

CHAPTER I

INTRODUCTION

1.1 Background

The state of law conception is always evolving with a state's advancement. Distinguished from other state laws, there are few concepts of how a state governs its nation. Starting from the conception of a liberal legal state (*nachwachterstaat*), to a formal legal state (*formele rechtsstaat*), transforming to material legal state (*materialele rechtsstaat*), to the idea of prosperity state (*welvarstaat*), or a state devoted to the public welfare (*sociale verzorgingsstaat*).¹ In the history, the implementation of the idea 'a state that is ruled by law' is firstly given by Plato. He viewed that a good state should have a good administration, which is also based on good regulations that is constructed in the law.² It was later forwarded by Aristoteles in *Politica*, his book that connected the term "Politics" along with the state of law terminology.³

¹ Padmo Wahjono, *Membudayakan UUD 1945*, (Jakarta: IND HILL-Co, 1991), pg.79

² Pietro Costa, Danilo Zolo, and Emilio Santoro, *The Rule of Law, History, Theory, and Criticism*, (Dordrecht: Springer, 2007), pg. 75

³ Zahermann Armandz Muabezi, *Negara Berdasarkan Hukum (Rechtsstaats) bukan kekuasaan (Machtsstaat)*, Jurnal Hukum dan Peradilan. Vol 6, No 3, (2017), pp. 423

State of law as a terminology has been implemented firstly in civil law countries as *rechtsstaat*, and widely known as rule of law in Anglo Saxon tradition in the common law countries.⁴ *Rechtsstaat* is an ideology based on the German principle, which is later adapted by modern countries.⁵ The *rechtsstaat*, in general is revolutionary as it moved against the absolutism concept, on the other hand, rule of law concept was introduced and developed with evolutionary approach.⁶ *Rechtsstaat* is a concept that would require a state to operate through institutions, procedures, and regulations.⁷

In line with the development of Indonesia's law, by means of the amendment of the 1945 Constitution of Republic Indonesia, Indonesia has clearly and explicitly mentioned Indonesia as a state of law. Through this declaration, it reinforces the commitment that Indonesia is lead by democratic governance and not by authoritarian governance. According to Jimly Asshiddiqie, the conception of state of law in Indonesia has 12 principles:⁸

1) Supremacy of law,

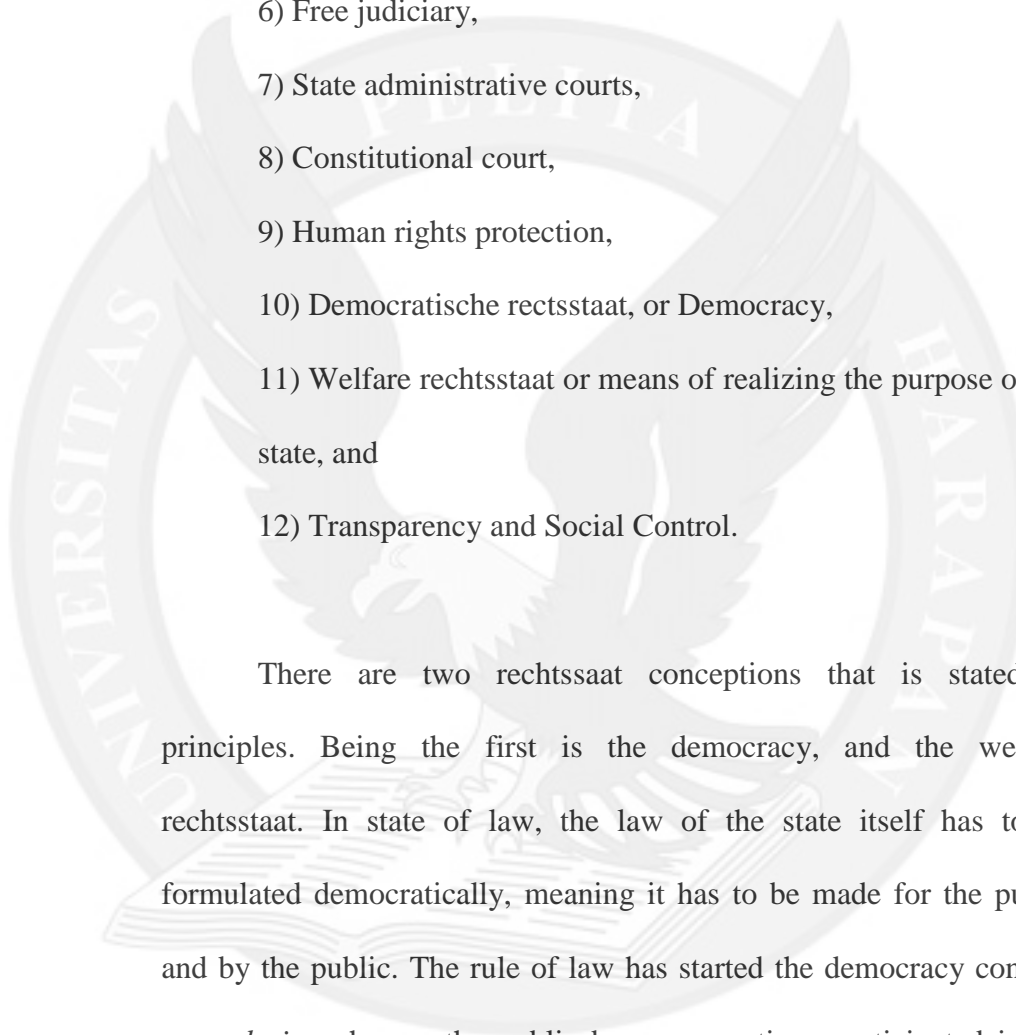
⁴ Imam Subechi, *Mewujudkan Negara Hukum Indonesia*, Jurnal Hukum dan Peradilan, Vol 1, No 3. (2012), pg. 340

⁵ Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory*, (Springer Science & Business Media, 2007), pg. 12

⁶ Dayanto, *Rekonstruksi Paradigma Pembangunan Negara Hukum Indonesia Berbasis Pancasila*, Jurnal Dinamika Hukum, Vol 13 No. 3 September 2013, pg. 500

⁷ Bertram Myron Gross, Vladimir Alekseevich Karthaskin, Elena Andreevna Luhacheva, Human Rights for the 21st Century, *Foundations for Responsible Hope: A U.S. Post Soviet Dialogue*, (ME Sharpe, 1993) pg 83

⁸ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Konstitusi Press, 2005), pg. 123-130

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- 2) Equality before the law,
 - 3) Due process of law,
 - 4) Limited authority,
 - 5) Executive independent bodies of the government,
 - 6) Free judiciary,
 - 7) State administrative courts,
 - 8) Constitutional court,
 - 9) Human rights protection,
 - 10) Democratische rechtsstaat, or Democracy,
 - 11) Welfare rechtsstaat or means of realizing the purpose of the state, and
 - 12) Transparency and Social Control.

There are two rechtssaar conceptions that is stated as principles. Being the first is the democracy, and the welfare rechtsstaat. In state of law, the law of the state itself has to be formulated democratically, meaning it has to be made for the public and by the public. The rule of law has started the democracy concept as *ecclesia*, whereas the public by no exceptions participated in the state administration.⁹ As a democratic state, Indonesia is run by the rules and authorities based on the constitution. There are some terms in democracy as a part of the implementation of the ‘democracy’ itself;

⁹ Aristotle, *Politics*, ed. C.D.C. Reeve, (Indianapolis: Hackett Publishing Company, 1998), pg 40

some of them are Pancasila democracy, public democracy, and national democracy. These terms go back to the perception of Greek methodology '*demos kratos*', with *demos* meaning public, and *kratos* meaning in power.¹⁰

In the conception of a democratic state, the public is always positioned in the strategic area of the constitutional system. The Constitution of Republic Indonesia is established in order for the government to have clear direction and purposes in carrying out their duties and authorities. Constitution as the highest law has positioned itself as the basis of every governmental authority and administration purposes held in Indonesia. In this matter, it is shown through the paragraphs that democracy and constitution are two inseparable elements for any state of law. These two elements have formed the foundation of Indonesia as a state of law.¹¹

While progressing the conception to the state of law, it was later found that each conception has its own advantages and disadvantages. In the first conception as a liberal legal state, it was seen as an individualistic conception that only focused on individuals

¹⁰ Miriam Budiarjo, *Dasar-Dasar Ilmu Politik*, (Jakarta: Gramedia, 1996), pg. 50

¹¹ A Salman Maggalatung. *Indonesia Negara Hukum Demokratis Bukan Negara Kekuasaan Otoriter*. Salam: Jurnal Sosial Dan Budaya Syar-I Vol 2, No 2 (2015)

as subjects.¹² This has brought us to the second *rechtstaat* principle stated above, the welfare *rechtsstaat*. Based on this problem, the state of law concept has established Welfare State as an ideology, as an effort to provide accountability for the public. To achieve the prosperity and welfare in all aspects of their people is the dream of the founders of nation of Indonesia. Welfare State is interpreted as a concept of governance where a state plays the important key to not only maintain, but also to promote the economical and social welfare of the governed state.¹³

In order to achieve the social and economical welfare of the people, regulations and constitutions are enacted for the public to reach the purpose of Indonesia as a state of law. The vision to reach welfare state has made law in Indonesia as a tool of social order, by means a tool to regulate its people to reach this certain goal.¹⁴ In the legal system of Indonesia, as a heritage of Dutch's colonialism, Indonesia was bounded to fill the national legal gap to regulate the Indonesia itself. In this light, regulations are made to provide guidance to its people, and also to empower Indonesians to a *bonnum publicum* goal,

¹² Didi Nazmi Yunas, *Konsepsi Negara Hukum*, (Padang: Angkasa Raya, 1992), pg. 21

¹³ "Welfare State", Encyclopedia Britannica, <https://www.britannica.com/topic/welfare-state> (Accessed: March 3 2018).

¹⁴ Dayanto, *Op.cit*, pg 507.

or the welfare of the people itself.¹⁵ There are some main features that describes a welfare state:¹⁶

- 1) Separation of power according to trias politica is considered as no longer principled, work efficiency is considered more important than political considerations, so the role of executive organs of the government is more important than the legislative;
- 2) The role of the state is not only limited to security and order of the society, but also for the interests of people in social, economic, and cultural aspects, so planning becomes an important tool in welfare state;
- 3) Welfare state is the state that emphasize on social justice rather than formal equality;
- 4) Property and ownership rights are no longer regarded as absolute right, but as a social function which means there is a limit for freedom of use;
- 5) There's a tendency that the role of public law is important and urges the role of civil law.

¹⁵ Yohanes Jehuru, "*Meneropong Krisis Negara Indonesia Dengan Teleskop Negara Ideal Plato*", Limen, Tahun 7 No. 2 April 2011, Sekolah Tinggi Filsafat Teologi Fajar Timur, pg. 78 (Accessed March 3rd 2018).

¹⁶ Soerjono Soekamto, *Beberapa Permasalahan Hukum dalam Kerangka Pembangunan di Indonesia*, (Jakarta: Yayasan Perbit, 1975), pg 54

The rapid development of science and technology could increase the threat for creators that has successfully developed their own creations, if not protected by regulations. Therefore, Indonesia as a rule of law state has established a regulation that protects the intellectual property rights. Intellectual property rights, in Indonesia is defined as a right that comes up as a result of human thoughts to produce a creation or process that is useful for human beings, meaning the creations that emerges from any human's intellectual ability.¹⁷

International society has made a regulation to protect the intellectual properties of the law subjects in the international law community. Historically, the first intellectual property regulation was established in Venice, Italia in 1470 regarding patent. In England, the law about patent was adapted in 1623 as Statute of Monopolies, while the United States has only adapted the law regarding patent in 1791. Afterwards, some of international conventions were set, including Paris Convention, Berne Convention, and the intellectual property organization itself, namely World Intellectual Property Organization (WIPO). Through these conventions and bilateral also multilateral agreements, the international society of intellectual property has been a great influence for Indonesia. In this light, the development of Indonesia's intellectual property law is inseparable from these international conventions. As one

¹⁷ Syafrinaldi, *Sejarah dan Teori Perlindungan Hak Kekayaan Intelektual*, Jurnal Al- Mawarid Edisi IX 2003, pg. 2. (Accessed March 9 2018).

of the nation's effort to reach the welfare state of people, Indonesia has been an active member of international society of intellectual property. As a response to the awareness regarding this issue, Indonesia has been a ratifying country of some International Treaties. In 1994, Indonesia joined World Trade Organization (WTO), which also encourage every ratifying country to also ratify Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods (TRIPS). Alongside this ratification, Indonesia has ratified some of the international conventions of intellectual property. One of them is the 1883 Paris Convention for the Protection of Industrial Property (Paris Convention), in which covers trademarks, industrial designs, utility models, service marks, trade names, geographical indications, and repression of unfair competition. It is ratified with Presidential Decree No. 24 Year 1979. The other one is 1886 Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), which ratified in 1997 by Presidential Decree No. 18 Year 1997. The Berne Convention specified in copyrights.

After Indonesia's independence, the Dutch influence is still around with the rules that are still applied in Indonesia. In post independence era, Indonesia has some rules on intellectual property rights. Patent Law, was developed under several changes until it is finally established with the current No. 14 of 2001 regarding Patent. Trademark law was firstly published in Criminal Code of Dutch East Indies in 1848, and changed

after 16 years of Indonesia's independence. In 1961, Act No. 21 Year 1961 was made to regulate the Trademark Law. Some deficiency were found in the law, as the reason the Law No. 15 Year 2001 regarding Trademark was formed as the substitution of the former law.

The copyright law in Indonesia has evolved throughout the national history. It adapts with the technology and develops within the issues of the current situation in Indonesia and the world. The progress started from Act regarding Copyright Auteurswet 1912, for as long as 69 years. However, it was revoked by Act No. 6 Year 1982 regarding Copyright, considering the differentiation between the Auteurswet with the national interest of Indonesia.¹⁸ The change keeps going with Act No. 7 Year 1987, Act No. 12 Year 1997, and Act No. 19 Year 2002. The latter regulation regarding copyright lasted for 12 years, until it was changed recently with the newest law, Act No. 28 Year 2014 regarding Copyright (Copyright Law). On the other hand, the industrial design law in Indonesia has been covered with Law No. 31 Year 2000 regarding Industrial Design. Industrial design is a creation of shape, configuration, or composition of line and colors, or a combination thereof shaped three-dimensional or two dimensional that gives the aesthetic impression, and can be realized in a three or two dimensional pattern and used to produce a product, goods, or

¹⁸ Duwi Handoko, *Hukum Positif Mengenai Hak Kekayaan Intelektual di Indonesia*, (Indonesia: Hawa dan Ahwa, 2015), pg. 1

an industrial commodity and a handicraft.¹⁹ Covering inventions, literary and artistic works, designs and symbols, names and images used in commerce, intellectual property rights has been a significant right in this contemporary era. According to World Intellectual Property Organization (WIPO), its purpose is to give creators and inventors the benefit of financial and recognition through their creations.²⁰ Moreover, their goal is to connect the society with the creators themselves. As one of the exclusive rights, intellectual property stands together with another ownership rights.²¹

Art itself, for some, is an exclusive thing to be obtained. For some others, it is a way to live life. Depends on the society, art could be illustrated as two. For some, it is an exclusive thing to obtain, a recreation, an escape. On the other hand, it could be the way to live life, to provide and to survive. This dissenting opinion comes along by its history and the present, where art comes in different approach. As part of intellectual property, the creation of art with its developments in form and style should be treasured and protected. The Copyright Law protects not only legal entity and the creators as subjects,²² but also the scope of objects, including books, pamphlets, speech, music, songs, plays, choreograph,

¹⁹Law No. 31 year 2000 Article 1

²⁰ World Intellectual Property Organization Official Website, < www.wipo.int/about-ip/en/>. (Accessed: March 10th 2018).

²¹Muhammad Abdul Kadir, *Kajian Hukum Ekonomi Hak Kekayaan Intelektual*, (Bandung: PT. Citra Aditya Bakti, 2001), pg 1

²² Law No. 8 Year 2014, Article 40

meme, collage, architectural design, maps, photography, videography, video games, and translations among many others. In Copyright Law, the exclusive rights of the creator that has automatically arise as a copyright itself. According to Article 4 of Indonesia's Copyright Law, the exclusive rights consist of two aspects, which are moral rights and economic rights. Additionally, the rights in Article 1 number 5 of Industrial Design Law covers the definition of exclusive rights that is given to the designer for his creation for a certain time to carry out his own or give their consent for other parties to exercise the right itself. Industrial design right is an ownership right that ensures the owner has the right to specifically reproduce its design for commercial purposes. The real step to implement this is to create a design, but to also make a document and design note to allow such design to be made by third parties.²³

The art era of today is called contemporary art. Relevant issues such as environmental problems including and human rights problems, and also political issues could be found in the artworks of this era, increasing the social impact formed by ununiformed art styles. However, the era has changed and has evolved until the art of the now, or the contemporary art. The contemporary art or postmodernist art is referred as an era following the modern art era. This era, according to art critics, are started from 1960s. While in other era the artists are more concerned about

²³ Paul Torremans, Jon Holyoak, *Intellectual Property Law*, (London: Butterworths, 1998), pg. 324

the artwork itself. In this contemporary art era, they are more focused in the process on how the artwork is made, how it is displayed, and how the visitor experiences it. Unlike any other era, like surrealism, pop art, and minimalism as examples, the paintings of 21st century has a more dynamic approach to reach its message to the society. For example, painters are not only specified as painters, they prefer to be described as ‘contemporary artist’, with mixed medias that are used. For example paintings could approach different kinds of applications. It could later be applied in different medias, such as mural art, digital art, sculpture, or converting the paintings to products. The possibilities could be endless, according to the creativity of the artist.

While former artist only gave their work through fine-art forms that are ornamental, the artists of the contemporary art era started a new movement that could raise the value of the artwork itself. The example is the transformation of a painting to merchandise that could be used as everyday objects. Such articles could be called as art merchandise. Art merchandise could be divided into two. The first one is the limited produced merchandise, and the second one is the mass produced merchandise. According to The MET,²⁴ reproductions and publications have been part of its history and educational mission to increase art awareness.

²⁴ Merchandise and Retail, <https://www.metmuseum.org/about-the-met/office-of-the-president/merchandise-and-retail>. (Accessed April 1 2018).

For limited produced merchandise, products could be made personally by the artist, or could also be made in limited quantity by third party. In 2013, Louis Vuitton, as one of the biggest luxury brands in the world, collaborated with Eko Nugroho, an Indonesian painter to make a scarf. This scarf is priced at Rp 9.3 million (\$905), and is showcased in prestigious art exhibitions around the world. The scarf was made limited, producing 1 in quantity. As another example in Indonesia is when Eko Nugroho made his own independent merchandise store consisting of his work, which then extended in the form of useful objects in a limited manner. Moreover, artists across the globe could also make their own artworks in the form of merchandise. For example in mass produced merchandise, Uniqlo, one of the biggest casual wear retailers in the world, went for a partnership with Museum of Modern Art in 2014, reaching the clothing industry. This collaboration contains many works of the century's living and deceased artists. Among them is Jean- Michel Basquiat, the New York Icon in late 1980s, with his own style through street art and iconography that is connected to the history. He also approaches different cultures of the society, such as jazz, baseball, or political events. This collection also includes Andy Warhol, Keith Haring, Jackson Pollack, and Yayoi Kusama. Through limited merchandises and merchandise collaborations, artists are given the appreciation for their fruit of mind. While some works such as books and paintings are protected under the

copyright law, the transformation to 2D or 3D shape as an useful everyday objects often raises confusion to the question on how the art merchandise are regulated, and how the rights of the makers are protected under which law.

Among the limited produced merchandise and the mass produced merchandise across the world, the following reason has allured the writer of this thesis to research on the matter of this kind of work of art, in accordance to Indonesian Intellectual Property Law, specifically under Indonesian Copyright Law and Indonesian Industrial Design Law.

1.2 Problems

1. How do Copyright Law No. 28 Year 2014 and Industrial Design Law No. 31 Year 2000 regulate the protection of art merchandise?
2. How is the implementation of Law No. 28 Year 2014 and Law No. 31 Year 2000 if an infringement of art merchandise arises?

1.3 Purpose

The writer's purpose of this thesis is firstly, to analyze the legal protection under the Copyright Law and Industrial Design Law in regard to the art merchandise in Indonesia. Second, it is also the writer's purpose to determine whether the Copyright and Industrial Design Law is already fulfilling the legal protection needed of this

matter, and which law should be applied in which situations. Finally, the writer hopes that this thesis could bring significant and rewarding information that could help the development of intellectual property law in Indonesia to the fullest extent.

1.4 Research Benefit(s)

1.1.1 Theoretical Benefit

Theoretically, by writing this thesis, the writer intended to give a significant contribution to Indonesia's legal system, specifically in field of intellectual property law field, and also in the art industry in hope to increase awareness in these particular fields, and to escalate the production visual art merchandising across Indonesia. Moreover, this research is also intended to help students who have developed an interest in this topic later in the future, to be a source of information and reference.

1.1.2 Practical Benefit

Practical benefit that is expected from this thesis is to provide information and knowledge regarding how the artist and their artworks are protected under the Indonesian law, and to fill the hole in intellectual property law covering the matter researched.

1.5 Research Structure

CHAPTER I : INTRODUCTION

The chapter will start with the introduction of the topic, then followed by problems, then purposes of this thesis, followed by the benefits of it, and the systematics of writing of this thesis.

CHAPTER II : LITERATURE REVIEW

This chapter will consist of theories and concepts that are relevant to discussed topic, which will firstly be preceded by the theory framework. The theories concepts within this section will help the writer as the basics in analyzing the issue. Then it will be followed with conceptual framework, that would cover the contemporary art and current applicable law regulating the matters of this thesis.

CHAPTER III : RESEARCH METHOD

This chapter will explain the method that will be used in the research and in analyzing the topics. This chapter will include the approach that is used in acquiring the data, including techniques and explanation about the time frame that is set in correlation to the topic. This data will then be analyzed in Chapter IV.

CHAPTER IV : ANALYSIS

The chapter will consist of the result of the data that have been collected in the previous section, together with analysis of the data

using the methods that has been set beforehand, with deeper explanation. This chapter would mostly discuss issues in the real life situation, reviewed with Law No. 28 Year 2014 regarding Copyright Law and No. 31 Year 2000 regarding Industrial Design.

CHAPTER V : CONCLUSION AND RECOMMENDATIONS

This chapter will work as the final closure of this thesis. It will consist of the conclusion of the research regarding the analysis that has been conducted, and the suggestions that will be made for the related parties.

