

# CHAPTER I

## INTRODUCTION

### 1.1 Background

Naturally, life is chaotic – with no law, social solidarity, and governance. It is human nature to be exclusively self-interested and to only seek something beneficial for their interest. However, albeit being self-interested, humans are still rationale being and will be willing to submit themselves to authority that can ease them in achieving their needs.<sup>1</sup>

Such reasoning is what drives the English philosopher Thomas Hobbes to conclude that it is necessary for the establishment of state to take care and to structure all aspects of a community affair in a particular region. Influenced by Hobbes, English philosopher John Locke also thinks that there is a need for the state in taking care of the life of the people living in that certain area.<sup>2</sup>

Different from Hobbes, Locke proposed that life itself is not chaotic, but a state of perfection and absolute freedom to partake one's life as desired, pure against others interference.<sup>3</sup> However, Locke is open to the possibility of chaos that might change the essentially peaceful life, so that there is an element of the state that is needed to restore such peace. No matter how many public affairs there are, a kind of regulation is needed so that these affairs will not overlap with each other,

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<sup>1</sup>Celeste friend, "Social Contract Theory", <<https://iep.utm.edu/soc-cont/#SH2a>>, Accessed September 19, 2020

<sup>2</sup>Bang Maul, "Kontrak Sosial", <<https://www.kompasiana.com/maulanasiddiksinaga3683/5d676177097f365290570c72/kontrk-sosial>>, Accessed September 19, 2020

<sup>3</sup>Celeste friend, *op.cit.*

this regulation is called a social contract.<sup>4</sup> The state then through the laws determines the moral values that used for that community life. What is fair in community life is determined by the state, so that justice is what is in accordance with the law of the state.

Similarly like the social contract theory in moral and political philosophy, there is also a legal theory referred to as rule of law theory that also focuses on how a state operates based on the state's law. Historically, the rule of law theory appears in various countries with its variation. One example of the rule of law theory that is established in Continental Europe is called *Rechtstaats*.<sup>5</sup>

As a result of the European socio-political situation which was dominated by the king's absolutism, *Rechtstaats* became popular in the 17th century. The European legal system was born from the struggle of the bourgeoisie to have a place in the law, as at that time, the law was exclusively controlled by the ruling groups – the people of the church. Besides, the Spanish also demand the guarantee of independence and legal certainty, this then results in the birth of the principles of equality before the law.<sup>6</sup> According to Julius Stahl, the concept of *Rechtsstaat* includes four important elements, namely: 1) Protection of human rights, 2) Sharing of power, 3) Government based on law, and 4) State administrative court.<sup>7</sup>

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<sup>4</sup>*Ibid.*

<sup>5</sup>Achmad Irwan Hamzani, “*Menggagas Indonesia Sebagai negara Hukum yang Membahagiakan Rakyatnya*”, Pancasakti University, Yustisia, Edition Number 90, September 2014, p. 138, <<https://jurnal.uns.ac.id/yustisia/article/view/29562>>, Accessed September 19, 2020

<sup>6</sup> *Ibid.*

<sup>7</sup>Sayuti, “*Konsep Rechtsstaat Dalam negara Hukum Indonesia*”, Nalar Fiqh, Jurnal Kajian Ekonomi Islam dan Kemasyarakatan, Vol 4, Number 2, December 2011, p.92, <<https://media.neliti.com/media/publications/220458-konsep-rechtsstaat-dalam-negara-hukum-in.pdf>>, Accessed September 19, 2020

In addition to *Rechtstaats*, the rule of law theory can be found from Anglo-Saxon country that implements the common law doctrine. This theory is also called the “Rule of Law” theory. The Rule of Law theory began in 1885 after Albert Venn Dicey wrote in his book “Introduction to Study of the Law of the Constitution”. The Rule of Law focuses on the Anglo Saxon legal system that contains elements such as: The supremacy of the law, namely the absence of arbitrary power, equality before the law as well as the protection of human rights.<sup>8</sup>

Similar to these countries who applied the rule of law theory, Indonesia also has a unique theory of its own regarding state based on law. This unique theory is based on the state ideology contained in its constitution. According to Article 1 (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter, 1945 Constitution), Indonesia is a state that is based on law.<sup>9</sup> Prior to the third 1945 Constitution amendment in 2001, the provision regarding Indonesia as a state based on law could only be found on the elucidation section and not contained in the articles.<sup>10</sup>

There are at least two fundamental meanings behind the transfer of the provision regarding Indonesia as a state based on law contained in the elucidation to Indonesia as a state based on law having its own article. The first fundamental meaning of such transfer is that there is an effort to affirm the concept of rule of

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<sup>8</sup>Achmad Irwan Hamzani, “*Menggagas Indonesia Sebagai negara Hukum yang Membahagiakan Rakyatnya*”, Pancasakti University, Yustisia, Edition Number 90, September 2014, p. 138, <<https://jurnal.uns.ac.id/yustisia/article/view/29562>>, Accessed September 19, 2020

<sup>9</sup>“Pengertian Negara Indonesia adalah Negara Hukum”, <<https://www.padamu.net/pengertian-negara-indonesia-adalah-negara-hukum>>, Accessed September 19, 2020

<sup>10</sup>Iswara N Raditya, “Amandemen UUD 1945: Sejarah & Isi Perubahan Ketiga Tahun 2001”, <<https://tirto.id/amandemen-uud-1945-sejarah-isi-perubahan-ketiga-tahun-2001-cjHB>>, Accessed September 19, 2020

law for Indonesia. Second, the transfer can also be interpreted as an effort to reaffirm that the Indonesian nation will earnestly base all activities of national life that depends on existing legal provisions.<sup>11</sup> The law will become the commander as well as the boundary markers for every action of the government and the people in managing the nation and state. Therefore, the jargon commonly used in English to describe the principle of the rule of law is: “the rule of law, not of man”.<sup>12</sup>

It should be noted that state based on law is characterized by several principles including that all actions of the citizens or the government, whether individually or collectively, must be done in accordance with the prevailing legal provisions and statutory regulations. It is crucial for the state to have just and certain laws without discrimination as well as law with utility.<sup>13</sup> This concept that is proposed by Gustav Radbruch essentially means that a just law is a law that fulfills the aims and objectives of the law, which is justice. Meanwhile, certain law is the law that is made in certainty as it provided provision that is clear and logical. Lastly, the law that has utility is the law that aims to provide the greatest benefit or happiness to as many members of the community as possible.<sup>14</sup>

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<sup>11</sup>Janpatar Simamora, “*Tafsir Makna Negara Hukum Dalam Perspektif Undang-Undang Dasar negara Republik Indonesia Tahun 1945*”, Jurnal Dinamika Hukum Universitas HKBP Nommensen Medan Vol. 14, Number 3 September 2014, p. 556, <<http://www.dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/viewFile/318/334>>, Accessed September 19, 2020

<sup>12</sup>Jimly Asshiddiqie, “Konsep Negara Hukum”, [https://pn-gunungsitoli.go.id/assets/image/files/Konsep\\_Negara\\_Hukum\\_Indonesia.pdf](https://pn-gunungsitoli.go.id/assets/image/files/Konsep_Negara_Hukum_Indonesia.pdf), Accessed September 19, 2020

<sup>13</sup>Achmad Irwan Hamzani, “*Menggagas Indonesia Sebagai negara Hukum yang Membahagiakan Rakyatnya*”, Pancasakti University, Yustisia, Edition Number 90, September 2014, p. 141, <<https://jurnal.uns.ac.id/yustisia/article/view/29562>>, Accessed September 19, 2020

<sup>14</sup>“Memahami Teori Tiga Nilai hukum Gustav Radbruch”, <<http://www.pojokwacana.com/memahami-teori-tiga-nilai-hukum-gustav-radbruch/>>, Accessed September 19, 2020

In order to realize Article 1 (3) of the 1945 Constitution, the legal instrument is needed to regulate balance and justice in all areas of life and people's livelihoods through statutory regulations. Article 1 (3) of the 1945 Constitution demonstrates that laws and regulations have an important role in the constitutional state of Indonesia. Relating Indonesia as a state based on law to Pancasila as the basis of state ideology, Pancasila can guide Indonesia in establishing legal instrument that is applicable for Indonesia as a state with a unique characteristic which is multiethnic, multireligious, and multicultural.<sup>15</sup>

In order to match Indonesian unique characteristics and as a state that is based on law, Indonesia will be required to establish a legal system that reflects its ideological basis, the Pancasila legal system. The Pancasila legal system is a legal system that is in accordance with the interests, social values, and the concept of justice and unites it in one principle by taking the interest, social values, and concept of justice's virtuous element.<sup>16</sup>

Referring to an opinion by Fred W. Ringga that is quoted by Indonesian Coordinating Minister for Political, Legal, and Security Affairs of Indonesia Mahfud MD, Pancasila is a prismatic concept that contains the best elements of some of the different concepts and perspective rendered by Indonesia's unique characteristic.<sup>17</sup>

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<sup>15</sup>Achmad Irwan Hamzani, "Menggagas Indonesia Sebagai negara Hukum yang Membahagiakan Rakyatnya", Pancasakti University, Yustisia, Edition Number 90, September 2014, p. 140, <<https://jurnal.uns.ac.id/yustisia/article/view/29562>>, Accessed September 19, 2020

<sup>16</sup>*Ibid.*, 141.

<sup>17</sup>*Ibid.*, 140.

Pancasila as a state ideology can be found on the fourth paragraph of the Preamble of the 1945 Constitution – the source of law written by the Indonesian government constitution that was passed as the source of Law the first time on August 18, 1945.<sup>18</sup> This fourth paragraph also contains the wording:

“In order to form a Government of Indonesia that protects the entire Indonesian nation and Indonesian blood, and to promote public welfare, educate the nation's life, and participate in implementing world order based on independence, eternal peace, and social justice, the National Independence of Indonesia is compiled in a Law.”

This wording in the fourth paragraph from the preamble in the 1945 Constitution then demonstrate that Indonesia is a welfare state, which is a state that focuses on the betterment of the livelihood of its citizen and that the state must ensure that all of the Indonesian citizens are granted protection through public welfare.

Before discussing the concept of the welfare state through the lens of the 1945 Constitution, it is prudent to discuss it prior through the lens of a scholar, as it may provide a clearer narrative of such notion. According to Bessant, Watts, Dalton, and Smith, the basic idea of the welfare state goes back to the 18th century when Jeremy Bentham (1748-1832) proposed the idea that the government has the responsibility to guarantee the greatest happiness or welfare of the greatest number of its citizens.<sup>19</sup>

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<sup>18</sup>Tasya Awlia, “Undang-Undang Dasar 1945 RI: Sejarah hingga Periode Perubahan”, <<https://news.detik.com/berita/d-4851156/undang-undang-dasar-1945-ri-sejarah-hingga-periode-perubahan>>, Accessed September 21, 2020

<sup>19</sup>“Tafsir Ulang Konsep Negara Kesejahteraan”, <<https://bengkulukito.com/2018/09/23/tafsir-ulang-konsep-negara-kesejahteraan/>>, Accessed September 21, 2020

Bentham implores the term “utility” to describe the concept of happiness or well-being. Essentially, utilitarianism is a type of consequentialism normative ethics that emphasizes outcomes and prioritizes the consequences of an action. Utilitarianism focuses on outcomes that render the greatest happiness for the greatest number of people. It is:

"The moral theory that an action is morally right if and only if it produces at least as much good (utility) for all people affected by the action as any alternative action the person could do instead".<sup>20</sup>

According to Bentham the principle of utilitarianism is “The greatest happiness for the greatest number”. Therefore, Bentham thinks what is good thing that a government can do for its citizen is to provide the citizens with happiness or welfare for them.<sup>21</sup> As Bentham proposed that government actions ought to be directed to increase the happiness of as many people as possible, Bentham's ideas regarding legal reform, the role of the constitution, and social research for the development of social policies have resulted in him being known as the "father of welfare states".<sup>22</sup>

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<sup>20</sup>“Normative Theories: Utilitarianism”, <<https://courses.lumenlearning.com/atd-pima-philosophy/chapter/5-3-normative-theories-utilitarianism/>>, Accessed September 21, 2020

<sup>21</sup>Matthew Malcom, “Normative Ethics: Utilitarianism”, Ethics Lecture session 17, Pelita Harapan University, February 25, 2019

<sup>22</sup>“Tafsir Ulang Konsep Negara Kesejahteraan”, <<https://bengkulukito.com/2018/09/23/tafsir-ulang-konsep-negara-kesejahteraan/>>, Accessed September 21, 2020

Another welfare state theory is proposed by R. Kranenburg. He stated that, in order to realize the welfare of its people, state must be based its action on the five pillars of the state, namely: Democracy, Rule of Law, Protection of Human Rights, Social Justice, and Anti-Discrimination. He stated that:

“The State must actively strive for welfare, act fairly that can be felt by the whole society equally and in a balanced manner, not for the welfare of certain groups but to all the people.”<sup>23</sup>

The theory of the Welfare State is more often interpreted differently by each individual and the State. However, this theory broadly includes the minimum elements such as well-being, social service, social benefits, and planned process or effort. The well-being element is where social welfare is a condition for the fulfillment of material and immaterial needs. Prosperous conditions occur when human life is safe and happy because basic needs for nutrition, health, education, shelter, and income can be met and when people are protected from the main risks that threaten their lives.<sup>24</sup>

The second element regarding social service usually contains five categories, namely social security, health services, education, housing, and personal social services. Where the third element, which social benefit is the social service that is given to the poor. Lastly, the fourth element is a process or planned effort. Social welfare is a process carried out by individuals, social institutions, communities, and

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<sup>23</sup>Bathara Kresno “Konsep “Welfare State theory” Maksimalkan Peran Pemerintah”, <<https://kumparan.com/bathara-kresno/konsep-welfare-state-theory-maksimalkan-peran-pemerintah/full>>, Accessed September 21, 2020

<sup>24</sup>*Ibid.*

government agencies to improve the quality of life through the provision of social services and social benefits.<sup>25</sup>

The 1945 Constitution provides several provisions for promoting the welfare of its citizen. First, in order to promote the citizen's welfare in the livelihood sector, Article 27 (2) stipulated that every Indonesian citizen has the right to work and to live with as standard that is decent for humanity and that everyone has the right to work and to receive fair and proper compensation and treatment in an employment relationship as in accordance with Article 28D (2). Proceeded in Article 28B (2), the State also ensures the welfare of every Indonesian child by stating that every child has the right to live, grow and develop and has the right to protection from violence and discrimination.

In addition, the 1945 Constitution also ensure the welfare of its citizen in the health sector by providing the right for every person to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment and the right to obtain health services in Article 28H.

Further, welfare does not only limited to livelihood and health but also education, Article 28C of the 1945 Constitution ensures the promotion of welfare through education by stating that everyone has the right to develop themselves through the fulfillment of their basic needs, the right to education and to benefit from science and technology, art and culture, in order to improve their quality of life and for the welfare of mankind.

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<sup>25</sup>*Ibid.*

It should also be noted that Article 31 reinforces welfare through education, stipulating that every Indonesian citizen has the right to education and obliged to attend basic education which the government is obliged to finance it. The government shall endeavor and implement a national education system, which increases faith and piety and noble character in the framework of the intellectual life of the nation, which is regulated by law.

Another example of a provision regarding Indonesia as a welfare state can be found in Article 33 of the 1945 Constitution regarding the national economy and social welfare. The economy is structured as a joint effort based on the principle of kinship. The land and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people and that national economy shall be implemented based on economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental insight, independence, and by maintaining a balance between progress and national economic unity.

The implication of Indonesia as a welfare state is that Indonesia has the obligation to realize national development. National development is an effort to improve all aspects of the life of the community, nation, and state while simultaneously developing the whole state administration system to achieve national goals. National development can be interpreted as a series of national sustainable development efforts to carry out the task of realizing national goals.<sup>26</sup>

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<sup>26</sup>“Makna, Hakikat dan Tujuan Pembangunan Nasional”, <<https://bulelengkab.go.id/detail/artikel/makna-hakikat-dan-tujuan-pembangunan-nasional-17>>, Accessed September 22, 2020

Theory regarding the development of a state can be found in a book entitled “*Teori Pembangunan Dunia Ketiga*” by Arif Budiman. Budiman wrote that in general, development is defined as an effort to improve the lives of the community and its citizens and generally, development is often interpreted as the progress achieved by society in the economic field.<sup>27</sup>

Budiman continued in his book, stating that there are 3 (three) kinds theories regarding state development, such as: Modernization theory, Dependency theory, as well as Post-dependency theory.<sup>28</sup> Modernization theory explains the process of transformation from traditional society to modern society. In other words, Modernization theory is a development theory that contains stages that developing countries must adopt or follow to achieve progress such as Developed countries. According to Teguh Imam Rahayu, there are two major theories that influence modernization theory, namely the theory of evolution and functional theory.<sup>29</sup>

According to the theory of evolution, social change is linear, progressive, and slow, which brings society to change from a primitive stage to a more advanced stage.<sup>30</sup> Whereas according to functional theory, then modernization theory assumes that modernization is a systematic, transformational, and continuous process.<sup>31</sup>

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<sup>27</sup> Muh. Firyal Akbar, “Analisis Teori Pembangunan Studi Mengenai Perkembangan Pembangunan Di Indonesia”, p. 1, <<https://osf.io/preprints/inarxiv/3rbpw/>>, Accessed September 22, 2020

<sup>28</sup> Dede Lukman Hakim, “Teori Pembangunan negara Berkembang”, <<https://suakaonline.com/teori-pembangunan-negara-berkembang/>>, Accessed September 22, 2020

<sup>29</sup> Musdalifa, “Modernization Theory (Teori Modernisasi)”, <<https://www.kompasiana.com/musdalifa16110/5bbb98b212ae94153f2ff1b2/modernization-theory-teori-pembangunan>>, Accessed September 22, 2020

<sup>30</sup> Teguh Imam Rahayu, “Teori Pembangunan Dunia Ke-3 dalam Teori Modernisasi Sub Teori Harrod-Domar (Tabungan dan Investasi)”, <<https://media.neliti.com/media/publications/218025-none.pdf>> p. 70

<sup>31</sup> *Ibid.*, 72.

First, as a systematic process, the modernization process is a process involving all aspects of immediate life, including industrialization, urbanization, differentiation, secularization, and centralization, and this forms the face of modernization as an orderly form rather than an irregular process. Second, as a transformation process, which gives the meaning that modernization is a process that forms from a traditional condition to a modern one in all socio-cultural aspects. Third, as a continuous process means that the modernization process involves continuous social change, once a social change occurs, other social aspects will also be affected.<sup>32</sup>

It turns out that the world is faced with the fact that economic growth in developed industrial countries did not necessarily lead to growth in poor countries as stipulated in the modernization theory that played a dominant role in the 1940s. This then causes the emergence of a reactionary theory which is called the dependency theory. The dependency theory is one of the development theories that emerged in the late 1950s by Raul Presbisch, which emphasizes the economic concept that identifies financial dependence between developed countries and the developing countries.<sup>33</sup>

Dependency begins when the developing countries have no capacity to process their natural resources by themselves so that developed countries must intervene. The developing countries then supply raw materials to developed countries, which in the end will be processed by developed countries to be sold

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<sup>32</sup>*Ibid.*

<sup>33</sup>Ambar, "Teri Ketergantungan – Sejarah – Prinsip", <<https://pakarkomunikasi.com/teori-ketergantungan>>, Accessed September 22, 2020

again to the developing countries. The dependence of developing countries is how it needs the assistance of developed countries, even if the case is that developed countries might exploit from the developing countries. In a dependency theory, there must be a cause and effect relation to one country that influence the other – one country that dominates (the developed country) and a country that submits to the dominating country (the developing country).<sup>34</sup>

The third theory of development is the Post-dependency theory, which is a theory that reacts to the dependency theory. The emergence of this theory has given a new perspective on the development theories in general. One of the important perspectives given is that the external aspects of development become important. Previously this aspect was not considered to play a role in the dependency theory. Developed countries are only either considered as trading partners, which is often very helpful to the development process that occurs in a country or they are considered to be an obstacle, as the country has a very large economic power so that the developing country cannot compete with them.<sup>35</sup>

Another scholar's opinion on national development is by Tjokrowinoto. The term development itself may be very familiar to the people. However, oftentimes people interpreted development as something that is merely physical. For example, one would think the word “development” as the act of developing something tangible – like a school building. However, development is not only limited to

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<sup>34</sup>Nabila A. Fadhila, “Apa itu Teori ketergantungan?”, <<https://www.kompasiana.com/fadhilaafsyah6775/5bbaae3bbde5750a766f8254/apa-itu-teori-ketergantungan>>, Accessed September 22, 2020

<sup>35</sup>Land Sak, “Teori Pasca Pembangunan”, <[https://www.academia.edu/36248374/Teori\\_Pasca\\_Ketergantungan](https://www.academia.edu/36248374/Teori_Pasca_Ketergantungan)>, Accessed 22 September 2020

physical elements but can be done to intangible elements such as information and knowledge.<sup>36</sup> To reinforces such belief, Tjokrowinoto stipulated that development is:

"An increasing attainment of one's own cultural values".<sup>37</sup> Tjokrowinoto's opinion is also in accordance with Indonesian's Ideology. By relating his opinion to the Pancasila, indeed, development is also meta-physical and closely related to valued that are stipulated in Pancasila.<sup>38</sup>

The implementation of national development in Indonesia differed during the period. Prior the third amendment of the 1945 Constitution, the People's Consultative Assembly (Indonesian: *Majelis Permusyawaratan Rakyat*, abbreviated as MPR) who, at that time holds the highest position in the state institution has the authority to set the plan of the national development through "*Garis-garis Besar Haluan Negara*" (GBHN) which is the state's policy regarding state administration made in broad outlines as a comprehensive and integrated statement of the will of the people.<sup>39</sup>

However, after the third amendment of the 1945 Constitution, the MPR does not hold the highest authority in the state institution anymore. Thus, GBHN is removed.<sup>40</sup> Nowadays, planning for state development is done by the Presidents. For example, in the 2014 governance under President Jokowi, development is

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<sup>36</sup>Drajat Tri Kartono, Hanif Nurcholis, *Pembangunan Masyarakat Desa dan Kota*, (South Tangerang: Universitas Terbuka: 2016), <<https://www.pustaka.ut.ac.id/lib/wp-content/uploads/pdfmk/IPEM4542-M1.pdf>> p. 1.3

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, 1.4.

<sup>39</sup>Eko Prasteya "Sejarah GBHN yang Kini Ingin Dihidupkan Kembali", <<https://www.merdeka.com/peristiwa/sejarah-gbhn-yang-kini-ingin-dihidupkan-kembali.html>>, Accessed September 22, 2020

<sup>40</sup>Muhtar Said "Alasan Hukum menolak GBHN", <<https://news.detik.com/kolom/d-4671672/alasan-hukum-menolak-gbhn>>, Accessed September 22, 2020

implemented based on *Nawacita*.<sup>41</sup> The term is adapted from Sanskrit, *nawa* means nine and *cita* means ideals. In the context for state development, this term refers to the vision and mission used by the presidential and vice-presidential candidate, Joko Widodo and Jusuf Kalla to include their governance agenda. In this vision and mission, nine main agendas are presented to continue the former President Soekarno's ideals, known as *Trisakti*, namely politically sovereign, economically independent, and having a personality in culture.<sup>42</sup>

An example of national development in politics that can be found in *Nawacita*, is the plan to establish a government that is not absent by building governance that is clean, effective, democratic, and reliable. Then, national development in the economic sector that can be seen in *Nawacita* is the plan to establish food, energy, and monetary sovereignty. Whereas sociocultural development can be seen in *Nawacita*'s plan to increase public welfare through elevating the quality of life for its citizen by a minimum of 12 (twelve) years of education program, Indonesian healthcare program, as well as agrarian reform.<sup>43</sup>

All these sectors – political, economic, and sociocultural also could be developed through the law enforcement sector that is also included in *Nawacita*. The development through the law enforcement sector that is free of corruption, dignified, and reliable is done by establishing legal culture.<sup>44</sup>

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<sup>41</sup>Harya Putra, “9 Nawacita Senjata Andalan Menuju Indonesia Hebat”, <<https://www.pkpberdikari.id/infografis/9-nawacita-senjata-andalan-menuju-indonesia-hebat/>>, Accessed September 22, 2020

<sup>42</sup>“Begini Makna Sebenarnya Trisakti menurut Soekarno”, <<https://news.detik.com/berita/d-2708500/begini-makna-sebenarnya-trisakti-menurut-soekarno>>, Accessed September 22, 2020

<sup>43</sup>Ang007, “Jadikan Indonesia Mandiri, Berkepribadian, dan Berdaulat”, <<https://kominfo.go.id/index.php/content/detail/5629/NAWACITA%3A+9+Program+Perubahan+Untuk+Indonesia/0/infografis>>, Accessed September 23, 2020

<sup>44</sup>*Ibid.*

Ostensibly, this is in accordance with the mandate that is provided in Article 1(3) of the 1945 Constitution, stating that Indonesia is a state that is based on law. By this Article then, it can be derived that, constitutionally, the president is bound to implement national development through establishing and developing a legal framework.

How does the development in each sector is done by developing a legal framework? For example, prior to the presidential reign of Joko Widodo and Jusuf Kalla, the previous President Susilo Bambang Yudhoyono endeavored to support the development of the sociocultural sector through creating a legal framework that supports the activity of that particular sociocultural sector. As stated above, development in the sociocultural sector includes the increase in public welfare. One of the critical factors in increasing public welfare is the development of the intellectual property.

Intellectual property covers sub-elements such as trademark, patent, industrial design, trade secret, and copyright. This is why then, former President Susilo Bambang Yudhoyono made a regulation regarding copyright that is considered as an intellectual property that is crucial in the development of public welfare. Even written at the consideration section of Law Number 28 of 2018 concerning Copyright (hereinafter, Indonesian Copyright Law):

“Copyright is an intellectual property in the fields of science, art, and literature that has a strategic role in supporting national development and advancing public welfare as mandated by the 1945 Constitution of the Republic of Indonesia.”

As the passage suggests, Copyright is a part of intellectual property. Intellectual property is defined by the World Intellectual Property Organization (WIPO) as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce.<sup>45</sup> Intellectual property can also be defined as rights that are legally protected that arises from intellectual activity in the industrial, scientific, literary, and artistic fields.<sup>46</sup>

In addition to WIPO's definition of Intellectual Property Rights (IPR), Eddy Damian also defined IPR as rights arising from the results of human thought that produce a product or process that has economic values. Objects regulated in the IPR are works that arise or are born due to human intellectual abilities.<sup>47</sup>

The World Intellectual Property Organization stated that there are two major reasons why countries protect intellectual property through laws and regulations. The first main reason being, to give statutory expression to the moral and economic rights of authors in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.<sup>48</sup>

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<sup>45</sup>World Intellectual Property Organization, "What is Intellectual property?", <<https://www.wipo.int/about-ip/en/>>, Accessed Sept 23, 2020

<sup>46</sup>World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law, and Use*, Volume 489 from WIPO Publication, (WIPO, 2004), p. 3, <[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_489.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf)>, Accessed September 23, 2020

<sup>47</sup>Eddy Damian, *Hukum Hak Cipta*, 5<sup>th</sup> edition, (Bandung: PT Alumni, 2019), p. 1

<sup>48</sup>World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law, and Use*, Volume 489 from WIPO Publication, (WIPO, 2004), p. 3, <[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_489.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf)>, Accessed September 23, 2020

Intellectual property is generally intended to protect authors and other producers of intellectual creations and services by giving them certain rights to control the use made of such creations, usually with time limitation. Those rights do not cover the physical object in which the creation may be embodied, but merely the intellectual creation. Intellectual property is traditionally divided into two branches, “industrial property” and “copyright.”<sup>49</sup>

The first branches of intellectual property are industrial property which includes patents for inventions, industrial designs which is an aesthetic creation that relates to the appearance of industrial products, trademarks, service marks, layout-designs of integrated circuits, commercial names and designations, geographical indications, and protection against unfair competition.<sup>50</sup>

Whereas the second branch of intellectual property is Copyright. Copyright relates to literary and artistic creations, such as books, music, paintings and sculptures, films and technology-based works.<sup>51</sup> In Article 1(1) of Indonesian Copyright Law, Copyright is defined as exclusive rights of the author that arise automatically based on the declarative principle after a work that is manifested in a tangible form without reducing restrictions in accordance with the provisions of laws and regulations. What it means by exclusive rights are rights that are reserved only for the author, so that no other party can take advantage of these rights without

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<sup>49</sup>*Ibid.*

<sup>50</sup>World Intellectual Property Organization, *Understanding Industrial Property*, 2<sup>nd</sup> Edition, (WIPO, 2016), p. 6, <[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_895\\_2016.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_895_2016.pdf)>, Accessed September 23, 2020

<sup>51</sup>*Ibid.*

the author's permission. According to Article 4 of the same Law, this exclusive right consists of moral rights and economic rights.

As mentioned above, Indonesia has the legal protection for the author, be it economic rights as well as moral rights. This makes sense, as creativity to produce intellectual works takes a lot of effort from the author and so to give motivation to these authors, the law surely wants to attempt to give protection to the author as a sign of appreciation.

The Indonesian Copyright Law mentioned several creations that are protected, namely, literature, cinematography, map, computer programming, and among them – song. The song is one of the most popular forms of art that we see today. Not only as a form of entertainment, lot of people also has been healed by the presence of song.<sup>52</sup> This research done by the University of South Florida suggests that one who suffers from depression would essentially feel better after they hear a sad song.

In addition to the song as a means of healing and entertainment, there is one distinct characteristic of a song, which is its omnipresence. A song is rather present anywhere and everywhere a person's go, especially the public places. The mall uses the song not only to entertain its visitors but also uses a playlist of songs to convey the branding of their store. In addition to the omnipresent characteristic of a song in terms of location, a song is also ever-present in the period of human life. From birth to death there is always be an accompanying song regarding life's journey.

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<sup>52</sup>Angela Chen, "People with depression feel better after listening to sad music, research suggests", <<https://www.theverge.com/2019/5/4/18528349/depression-music-sad-emotion-psychology-health>>, Accessed September 20, 2020

For example, some of the Russians use death lullaby to lull their babies to sleep believing that such endeavour will scare the death away. As they believed that death will only come for those who are afraid and steer away from those who calls them.<sup>53</sup>

Moreover, a song is an art that is blind to social class and hierarchy. Though the latter elements might influence one taste in the kind of music they would rather listen to, everyone has at least been exposed to a song. A song might be able to transcend culture. Like the above example, the song can be used as entertainment value which consists of dance accompaniment even expressing one's emotions or feelings. According to Harvard University's study, songs that consist of vocal that includes such many functions will tend to sound similar even though the song came from differing cultures. This then leads to the capacity of people with different culture to make accurate inference regarding the song.<sup>54</sup>

A song that transcends culture can also be seen in the rise of the Hallyu Wave, which is the increase of popularity to Korean culture that includes their fashion, makeup, drama, and songs that started in the 2010s in Indonesia. The language barrier does not stop Indonesian fans from enjoying Korean songs. This can be seen by many sold-out concerts of Korean singer in Indonesia. For example, in the 2014 Korean girl group, Girls' Generation concert, their most expensive ticket section

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<sup>53</sup>Tatiana Novikova, "death lullabies in Russian Culture", <<https://hekint.org/2017/01/30/death-lullabies-in-russian-culture/>>, Accessed September 20, 2020

<sup>54</sup>Rick Nauret, "Psychological effect of Music May Transcend Culture", <<https://psychcentral.com/news/2018/01/29/psychological-effect-of-music-transcend-cultures/131859.html>>, Accessed September 20, 2020

retailed around 2.5 million rupiah sold out in the span of merely under 5 (five) minutes.<sup>55</sup>

Such rise of the Hallyu wave is crucial in establishing Korean soft power which is the ability of a country to persuade others to do what it wants without force or coercion.<sup>56</sup> This soft power of Korea can be seen by how one of its boyband, BTS that was invited to the UN headquarters in New York for Generation Unlimited, a global partnership by the United Nations Children's Fund (UNICEF) to speak at the launching ceremony.<sup>57</sup> In addition, this soft power of Korea that is gained by the raise of popularity of Hallyu wave has made gain in economic advantage in Korea, as in In 2014, the export of the music industry increased 21.0% in comparison to the previous year and the average annual increase rate of K-POP was 41.7%.<sup>58</sup>

From the example stipulated above, it can be derived that the development of one's nation is contingent on its creative industry, particularly the music industry. As writing a song also brings a potential of economic benefit to the songwriter, it then becomes one of the motivations for the songwriter to make an intricate piece of a song. However, sometimes when the drive to make songs is purely for the

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<sup>55</sup>“Tak Sampai 5 Menit, Tiket Termahal Konser SNSD di Jakarta Langsung Ludes”, <<https://hot.detik.com/kpop/d-2333161/tak-sampai-5-menit-tiket-termahal-konser-snsd-di-jakarta-langsung-ludes>>, Accessed September 20, 2020

<sup>56</sup>Joseph S. Nye Jr. “Soft Power: The Means to Success in a World Politics”, <<https://www.foreignaffairs.com/reviews/capsule-review/2004-05-01/soft-power-means-success-world-politics>>, Accessed September 20, 2020

<sup>57</sup>Wantanee Suntikul “BTS and the Global Spread of Korean Soft Power”, <<https://thediplomat.com/2019/03/bts-and-the-global-spread-of-korean-soft-power/>>, Accessed September 20, 2020

<sup>58</sup>Chae, J. Y. (2014), The need and composition of establishing Korean wave theme infrastructure, *Korea Culture & Tourism Institute*.

economic advantage without some artistic aspiration, it is very easy for the songwriter to get carried away in the fast track of plagiarism. There could be new songs that are very similar to other songs created prior by different musicians.

For example, in Indonesia, there are many alleged song plagiarisms. During the mid-2020 for example, Indonesian singer Rini Wulandari along with composer Novi Umar, alleged Indonesian influencer Kekeyi to plagiarize their song "*Aku Bukan Boneka*" through "*Keke's Bukan Boneka*". Wulandari and Umar claimed that the hook part of both songs as very similar.<sup>59</sup>

Similarity of songs does not only stop in case stipulated above. There is even the case that foreign song is being copied by Indonesian musician such as the song that was sang by Puteri Bahar, entitled "*Pusing Pala Barbie*" was said to be rather similar to the song "All About That Bass" from the American singer-songwriter, Megan Trainor.

Alleged song copying also takes place to a song that is created by Indonesian artists that is copied by foreign artists. Take the song by Malaysian Rapper Joe Farizal for example, that has been allegedly copied one of Indonesian Rapper Saykoji's song entitled "*Tahukah Kau*". In here, the entire song was copied, Faizal merely change the part of the song from the original lyric of "*Indonesia kita kaya*" (Indonesia we are wealthy) to "*Malaysia kita kaya*" (Malaysia we are wealthy).<sup>60</sup>

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<sup>59</sup>Melvina Tionardus, "Lagunya Diduga Plagiat, Kekeyi Memangis Takut Masuk Penjara", <<https://www.kompas.com/hype/read/2020/06/01/160151866/lagunya-diduga-plagiat-kekeyi-menangis-takut-masuk-penjara>>, Accessed September 20, 2020

<sup>60</sup>Citra Narada Putri, "Igor Saykoji, Pernah Diplagiat", <<https://www.femina.co.id/celebrity/igor-saykoji-pernah-diplagiat>>, Accessed September 20, 2020

It is very unfortunate that the examples above have shown that plagiarism has become a common practice in Indonesia. It can be argued that the problem occurs due to the lack of understanding by the masses of what constitutes an infringement of copyright as the notion of song plagiarism is yet to be clearly defined in Indonesian national law. Even the term “plagiarism” itself is nowhere to be found from Indonesian Copyright Law.

If only the threshold of song plagiarism in Indonesia is clear, such issues of copyright infringement that happens from the insufficient law would be able to be mitigated so that the author’s right to gain economic benefit as well as their moral right would be guaranteed. Therefore, it is needed for Indonesia to follow the example of a country that has made a further attempt at protecting the author’s right by having a clear threshold of song plagiarism.

The country that has made a further attempt at protecting the author’s rights compared to Indonesia is the United States. First, the United States is a country that places great importance in the music industry itself, so that the congress is much more motivated to protect such industry by establishing a clear legal framework. Even the former president, John F. Kennedy stated that:

“The life of the arts, far from being an interruption, a distraction, in the life of a nation, is very close to the center of a nation’s purpose—and is a test of the quality of a nation’s civilization.”<sup>61</sup>

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<sup>61</sup>“How Countries Around the World Fund Music-and Why It Matters”, <<https://pitchfork.com/features/article/how-countries-around-the-world-fund-musicand-why-it-matters/>>, Accessed September 21, 2020

Such importance that is placed by the United States towards the music industry can be seen by how the United States Government offering to fund musicians and the music industry a sum of \$2 trillion USD aid packages in the Coronavirus pandemic of 2020.<sup>62</sup> Contained in the \$2 trillion USD bill was a \$75 million USD in emergency funding for the National Endowment of the Arts to grants to arts organizations as well as \$75 million USD for the National Endowment for the Humanities.<sup>63</sup>

The United States' Government is also aware that the economic benefit of a song is particularly high. 2018 International Federation of the Phonographic Industry (IFPI) data suggest that the United States has total revenue of \$19.1 Billion USD from the music industry, an amount that is 10% higher than the previous year.<sup>64</sup> This is one of the reasons why the regulation regarding song plagiarism has developed during the last century in the United States more than in any other country. Due to this reason, this research paper will examine song plagiarism with a focus on Indonesian Copyright Law as well as American law that uses a point reference The United States Copyright Act of 1976 as well as American case law. Based on the Background, this paper intended to discuss the notion of song plagiarism in Indonesia compared to the United States with the title of the paper as follows: "COMPARATIVE STUDY ON SONG PLAGIARISM STANDARD IN

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<sup>62</sup>Bruce Houghton, "US Government Offers Help For Musicians, Music, Industry", <<https://www.hypebot.com/hypebot/2020/03/senate-passes-aid-package-offers-help-for-musicians-indie-music-industry.html>>, Accessed September 21, 2020

<sup>63</sup> *Ibid.*

<sup>64</sup>"IFPI Global Music Report 2019 // State of the Industry", <<https://www.cudisco.org/pdf/GLOBAL-MUSIC%20REPORT-2019.pdf>>, Accessed September 21, 2020

## INDONESIAN COPYRIGHT LAW AND THE UNITED STATES COPYRIGHT ACT”.

### **1.2 Formulation of Issues**

Based on the background, the focus of this research paper is aimed at tackling the song plagiarism law through Law Number 28 of 2014 concerning Copyright with the formulation of issues as follows:

1. How does Law Number 28 of 2014 concerning Copyright regulate the notion of song plagiarism in Indonesia compared to the United States Copyright Act of 1976?
2. How does the regulation regarding song plagiarism under Law Number 28 of 2014 concerning Copyright is implemented in Indonesia compared to the United States Copyright Act of 1976?

### **1.3 Research Purpose**

The purposes of the research paper conducted are:

- 1) To explain how Law Number 28 of 2014 concerning Copyright regulates song plagiarism in Indonesia.
- 2) To explain how the regulation regarding song plagiarism under Law Number 28 of 2014 concerning Copyright is implemented in Indonesia.

## 1.4 Benefit of Research

1.4.1 The theoretical benefits of this research paper can be used as further research material as well as a basis for learning media or further application of learning media and to add value to scientific knowledge in the field of education in Indonesia by Universitas Pelita Harapan regarding intellectual property law, especially on song copyright.

1.4.2 The practical benefits of this research paper are:

1) For students, the results of the study are expected to provide as reading material and discussion that can add insight to the development of the song plagiarism case and its threshold in Indonesia.

2) For lecturers, the results of the study are expected to render the lecturers a comprehensive guide of the comparison between Indonesian Law as well as the United States' Law regarding copyright on songs for further is discussed with the students in the class.

3) For schools, the results of the research to be able to add references and discourse by Universitas Pelita Harapan to develop knowledge related to intellectual property rights law, especially copyright on song plagiarism.

4) For researchers, the results of the research paper will be able to contribute thoughts on solving the problem of low threshold regarding the act of song plagiarism.

### **1.5 Structure of Writing**

In the writing of this research paper entitled “COMPARATIVE STUDY ON SONG PLAGIARISM STANDARD IN INDONESIAN COPYRIGHT LAW AND THE UNITED STATES COPYRIGHT ACT” the structure of writing is as follows:

#### **1) Chapter I: Introduction**

The first chapter contains the introduction of the background of the issue that is being investigated that consists of five blocks. The first block being the Rule of Law theory, proceeded with the second block which is Indonesia as a welfare state then the third block, Indonesia being a welfare state with the responsibility to give incentive to its development. After that, the fourth block will proceed, which is Indonesia in imploring its development particularly for its social and cultural sector by establishing laws and regulations. A brief framework of intellectual property law in Indonesia as well as its branch is rendered in the background section. Last but not least, the background will narrow down to the topic that is discussed, regarding song plagiarism in Indonesia, its implementation, and how it compared to a more developed country, the United States. After the background, the first chapter will proceed with the formulation of the issue, the purpose of the research paper, the benefits of the research for the students, lecturers, schools, as well as researchers

and. The last subsection of chapter one that is rendered will be the structure of writing.

## 2) Chapter II: Literature Review

The second chapter contains the Literature review, which is divided into two subsections, namely the theoretical framework as well as the conceptual framework. The subsection of the theoretical framework consists of the history as well as the legal basis of the notion of Copyright which consists of a theory of Copyright from the book "*Hukum Hak Cipta*" by Prof. Em. Dr. Eddy Damian, S.H., regarding some principles adhered by countries that use the civil law system and common law system in copyright law.

Then, the theoretical framework will proceed to the copyright in Indonesia section, which consist of how the Directorate General of Intellectual Property defined the notion of copyright and how it is regulated under Indonesian Copyright Law which is Law Number 28 of 2014 Concerning Copyright Law, the history of Indonesian Copyright Law before the enactment of Law Number 28 of 2014 concerning Copyright as well as the rationale of the law.

The third theoretical framework will talk about copyright in the United States that is regulated under the United States Copyright Act of 1976, the scope of the copyright, as well as relevant provision that supplement the provision from the United States Copyright Act of 1976.

The fourth theoretical framework will discuss the notion of the song under Law Number 28 of 2014 as well as the United States Copyright Act of 1976.

Then the fifth theoretical framework will discuss the notion of plagiarism under Law Number 28 of 2014 concerning Copyright and how it relates to the notion of copyright infringement under the Indonesian Copyright Law. Further, the notion of plagiarism in the United States Copyright Act of 1976 will also be rendered.

Whereas the subsection of conceptual framework consists of the definition of juridical review, song, plagiarism, standard, Law Number 28 of 2014 concerning Copyright Law, Copyright, The United States Copyright Act of 1976, and case law.

### 3) Chapter III: Research Methodology

The third chapter is a research methodology that discusses the writing method of this research paper. This chapter consists of five subsections namely, types of research, types of data, data analysis technique, research approach, and data analysis. What kind of data, be it primary or secondary data will be discussed in this chapter. Data such as documentation of several related parties such as court decisions on cases related to copyright infringement especially plagiarism, legal expert opinion, musicians, and music experts will be listed in this chapter.

In the types of research sections, the kinds of research that is conducted for the paper and the explanation of such type of research will be discussed. The aim of that particular kind of research will also be discussed. Then, there will be a

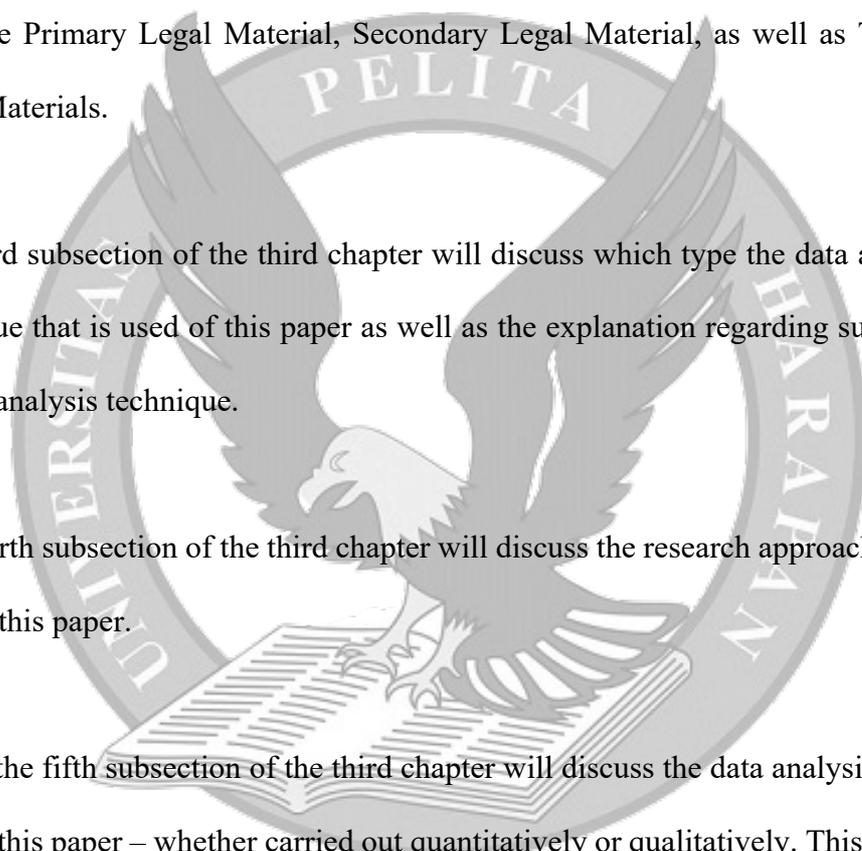
discussion on the type of legal research of this paper as well as the explanation regarding the type of legal research that is used in this paper.

The second subsection of the third chapter will discuss the types of data that are being used. Explanation regarding the data that is being used will also be rendered. Then there will be the lay out the levels of secondary data in this legal research from the Primary Legal Material, Secondary Legal Material, as well as Tertiary Legal Materials.

The third subsection of the third chapter will discuss which type the data analysis technique that is used of this paper as well as the explanation regarding such type of data analysis technique.

The fourth subsection of the third chapter will discuss the research approach that is used in this paper.

Lastly, the fifth subsection of the third chapter will discuss the data analysis that is used in this paper – whether carried out quantitatively or qualitatively. This section will also explain the meaning of the data analysis that is being used as well as what are the legal material that is used in this research paper. The method of processing legal materials will also be discussed.



#### 4) Chapter IV: Discussion and Analysis

The fourth chapter consists of a discussion for the formulation of the issue. The explanation on the first formulation issue regarding the regulation of song plagiarism in Indonesia contained in Law Number 28 of 2014 concerning Copyright will be rendered. Also, contained in the subchapter, the comparison of how the United States regulates song plagiarism under the United States Copyright Act of 1976 will be rendered. Then, in the second formulation of the issue, the provision regarding song plagiarism on Law Number 28 of 2014 concerning Copyright is implemented and compare it on how the provision regarding song plagiarism contained the United States Copyright Act 1976 and relevant case law is implemented will be explained.

#### 5) Chapter V: Conclusion and Recommendation

The fifth chapter contains the results of research and conclusions and recommendations related to how Indonesia can adopt the rules from Copyright act 1976 as a standard regulation for song plagiarism. The conclusion section is a summary of the important points in the research content that have been discussed in detail. The conclusions that are rendered will contain the essence of the topic that is clear and easily understood, especially for the readers. Whereas the recommendations section there will be various suggestions for readers who will examine the discussion in this paper as an incentive for the development of the topic that is being researched.