

CHAPTER I INTRODUCTION

1.1 Background

One of the most vital elements in the establishment of a state is human resources, both citizens and state officials. In regard to this matter, there is a theory defining that a person's moral and/or political obligations depend on the contract or agreement that is formed between them as a society.¹ This theory is known as a social contract.

An efficient state-building is not solely involving the construction and development of state institutions. But it is also about manufacturing a social contract between the state and its citizens, forming and implementing a set of political, social, and economic rules that govern both society and state.²

This relationship is a form of political settlement, representing the restrictions for government authority and the limits for individuals. Rule of law provides the anchor for this relationship. Rule of law, in essence, is the implementation framework for the social contract. Accordingly, it is fundamental to the success or failure of the state-building project.³

¹Celeste Friend, "Internet Encyclopedia of Philosophy", <<https://iep.utm.edu/soc-cont/>>, accessed 24 September 2020

²Roberto Valent, "Rule of Law and State-Building: Forging the Social Contract", <<https://www.ps.undp.org/content/papp/en/home/presscenter/articles/2017/02/01/rule-of-law-and-state-building-forging-the-social-contract-.html>> , accessed 24 September 2020

³Ibid.

Indonesia is a rule of law state. This statement is contained in the 1945 Constitution Article 1 paragraph (3) and also reflected under chapter X Article 27 paragraph (1), which proclaims that each citizen has an equal position before the law, and the government is obliged to uphold the law without exception. The affirmation of these constitutional provisions means that all aspects of life in society, state, and government must perpetually be based on law.

The term “rule of law”, appeared in the 19th century. This term is relatively new compared to some other well-known terms that existed in the constitution, such as democracy, sovereignty, etc.⁴ Rule of law means nothing above the law and the law is in control. Thus, the administration of governmental authority and all of the state actions must not be based on the order of the state head but must be based on law and can be justified legally.⁵

Practically, the rule of law concept appears in various types. Muhammad Tahir Azhary, the Professor of Islamic Law at the University of Indonesia stated that there are five kinds of rule of law concepts⁶, namely:

- 1) Islamic Nomocracy, a product of Qur'an and Al-Sunnah;
- 2) *Rechtsstaat*, a product of Continental European countries (Netherlands, Germany, and France);

⁴Achmad Irwan Hamzani, “Menggagas Indonesia Sebagai Negara Hukum yang Membahagiakan Rakyatnya”, *Pancasakti Journal of Law*, Vol 3, Number 3 December 2014, p. 137

⁵Ibid.

⁶Muhammad Tahir Azhary. *Negara Hukum: Suatu Studi Tentang Prinsip-Prinsipnya Dilihat Dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah dan Masa Kini*, (Jakarta: Prenada Media, 2003), p. 63

- 3) Rule of Law, a product of Anglo Saxon countries (England and the United States of America);
- 4) Socialist Legality, a product of Communist Countries (Russia); and
- 5) the Constitutional State of Pancasila, a product of Indonesia.

From all of the above concepts, the most popular among them are the concept of *rechtsstaat*, a product of Continental Europe and the *rule of law*, a product of Anglo Saxon⁷. In this regard, Indonesia formerly embraces the *rechtsstaat* concept as the legacy of the Dutch Colonization⁸, but, since the amendments of the 1945 Constitution, the term “*rechtsstaat*” was removed and replaced with the term “*negara hukum*”. This replacement aims to enable the usage of both terms, *rechtsstaat* and the *rule of law* due to these terms are not only concerned with semantic or grammatical issues but also substantive and paradigmatic issues.⁹

Friedrich Julius Stahl, a legal expert from Continental Europe describes the characteristics of *rechtsstaat* as follows¹⁰: 1) Protection of Human Rights; 2) Distribution of Power to Guarantee Human Rights; 3) Government Based on Regulations (*wetmatigheid van bestuur*); and 4) Administrative Court in Disputes. Meanwhile, the characteristics of the *Rule of Law* according to Albert Venn Dicey, a legal expert from Anglo Saxon, are as follows: 1) Supremacy of Law, in the sense that

⁷Jimly Asshiddiqie. *Hukum Tata Negara dan Pilar-Pilar Demokrasi: serpihan pemikiran hukum, media, dan HAM*, (Jakarta: Konstitusi Press, 2006), p. 152

⁸Achmad Irwan Hamzani, *Op.cit*, p 139.

⁹Salman Maggalatung, “*Indonesia Negara Hukum Demokratis Bukan Negara Kekuasaan Otoriter*”, Syarif Hidayatullah Journal of Syaria and Law, p. 6

¹⁰Sayuti, “*Konsep Rechtsstaat Dalam Negara Hukum Indonesia*”, Journal of Islamic Economics and Social Studies, Vol 4, Number 2 December 2011, p.92-93

there should be no arbitrariness. The state can only punish a person if he/she is violating the law; 2) Equality Before the Law, both for ordinary people and officials; and 3) Due Process of law.¹¹

Thereby, based on both references, Prof. Dr. Jimly Asshiddiqie, SH reformulate the new characteristics of the rule of law conception. There are 12 principles established to be the main pillars of a modern state which can be referred to as both *Rule of Law* or *rechtsstaat*, namely¹²:

- 1) The Supremacy of Law: in essence, the real state supreme leader is not a human, but in the form of law and constitutions;
- 2) Equality before the Law: there is an equal position for everyone under the law and government that is recognized normatively and implemented empirically;
- 3) Due Process of Law: the enactment of the legality principle which requires every government actions to be based on legal and written statutory regulations;
- 4) Limitation of Power: to prevent the possibility of arbitrary power by one organ/one hand;
- 5) Independent Organs: to ensure democracy, because its function can be abused by the government to perpetuate power;
- 6) Free and Impartial Trial: to guarantee justice and truth, no intervention is permitted in the judges' decision-making process;

¹¹Jimly Asshiddiqie, “Gagasan Negara Hukum Indonesia”, <[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 23 September 2020

¹²Ibid.

- 7) State Administrative Court: to ensure the state administrative officials' decisions not persecuting citizens;
- 8) Constitutional Court: to strengthen the system of "checks and balances" between the branches of power that are deliberately separated to ensure democracy;
- 9) Human Rights Protection: to promote respect and protection of human rights as a significant feature of a democratic rule of law;
- 10) Democratic in Nature (*Demokratische Rechtsstaat*): to ensure public participation in the process of state decision-making;
- 11) Serves as a Means of Realizing the Goals of the State (*Welfare Rechtsstaat*): to improve general well-being; and
- 12) Transparency and Social Control: to fix the deficiencies existed in the formal institutional mechanisms through direct community participation.

The characteristic of the rule of law concept is very significant. Every concept should have a different characteristic in accordance with the values held by each country. Just like in the Continental European countries that have their own characters from the concept of "*rechstaat*", the Anglo Saxon countries which also have their own characters from the concept of "*Rule of Law*", and the combination of both concept for a modern state which was formulated by Jimly Asshiddiqie, Indonesia also has its own unique characteristics as contained in the preamble of the 1945 Constitution paragraph (4), which include:

- 1) Protection of the entire Indonesian nation and all Indonesian bloodshed;
- 2) Promotion of public welfare;

- 3) Intelligence of national life; and
- 4) Participation in maintaining the world order based on freedom, eternal peace and social justice.

In addition, the concepts of Indonesian rule of law are also affected by Pancasila as the main basic values of the nation. Such values are: 1) belief in The One and Only God; 2) a just and civilised humanity; 3) unity of Indonesia; 4) democracy led by Inner Wisdom in consultation/representation; and 5) social justice for the entire people of Indonesia.

From the characteristics of the Indonesian rule of law concept stated above, it can be seen that the concept of the rule of law as stated in the provisions of 1945 Constitution Article 1 paragraph (3) is closely related to the welfare state (*welvaarstaat*) according to the fourth paragraph. In this case, the understanding of the rule of law does not only cover state administration but also involves the life of the nation and society. Therefore, at the level of implementation, the more active the state is on performing the rule of law concept, the faster the realization of a welfare state.¹³

The notion of a welfare state is often referred to as a modern rule of law state in a material sense. Andersen states that a welfare state is a state in which the organized power is used (through politics and administration) to adjust the performance of the market forces in at least three directions:

¹³Zulkarnain Ridlwan, “*Negara Hukum Indonesia Kebalikan Nachtwachterstaat*”, *Fiat Justitia Journal of Law*, Vol 5, Number 2 August 2012, p. 149-150

- 1) by securing individuals and families with a minimum income irrespective of the market value of their work eligibility standard;
- 2) by narrowing the range of uncertainty through allowing individuals and families to meet particular “social emergencies” such as sickness, old age, unemployment, and individual or family crisis;
- 3) by ensuring that all citizens without distinction of status or class are offered the best standards available.¹⁴

In addition, Bagir Manan also gives his opinion regarding the welfare state. According to him, welfare states places the state or government not only as the security or public order guardian but also has the responsibility to realize social and general welfare for its people.¹⁵ In his other work, Bagir Manan further asserts that the concept of a modern legal state or a welfare state contains three aspects, namely: political, legal, and socio-economic aspects. The political aspect calls for limitations on state power in political life. The legal aspect requires the state to have the supremacy of law principles during the law enforcement process, the principle of legality, and the rule of law, while the social aspect entails the creation of social justice and general welfare.¹⁶

This understanding is in line with Mac Iver's concept, “*the state is no longer seen as a mere instrument of power, but more than that, it is seen as an agency of services.*”

¹⁴J.G. Andersen, *Welfare States and Welfare State Theory*, (Denmark: Aalborg Universitet, 2007), p.4

¹⁵Bagir Manan, *Politik Perundang-undangan dalam Rangka Mengantisipasi Liberalisme Perekonomian*, (Bandar Lampung: FH Unila,1996), p.9

¹⁶Elviandri, “*Quo Vadis Negara Kesejahteraan: Meneguhkan Ideologi Welfare State Negara Hukum Kesejahteraan Indonesia*”, *Muhammadiyah Journal of Law*, Vol 31, Number 2 June 2019, p. 259

This pragmatic thought then presents the conception of a welfare state or a modern material rule of law state, which according to him has the following characteristics:¹⁷

- 1) In a welfare state, the priority is the assurance of the people's socio-economic human rights;
- 2) Considerations of efficiency and management are prioritized over a politically oriented division of power. Thus, the role of the executive is larger than the legislature;
- 3) Property rights are not absolute;
- 4) The state does not only maintain order and security but also participates in social and economic endeavours;
- 5) The rules of administrative law increasingly regulate the socio-economy and impose certain obligations on citizens;
- 6) The role of public law tends to urge private law, as a consequence of the expanding role of the state;
- 7) It is more of a material rule of law state which prioritizes material social justice as well.

Thereby, from all of the concepts explained above, it can be concluded that the welfare state refers to an ideal development model that is focused on welfare increase through giving a more important role to the state government in providing comprehensive security, political, legal, social, and economical services to its citizens.

¹⁷MacIver, *The Modern State*, (London: Oxford University Press, 1966), p. 4.

It can be seen that the concept of a welfare state is often interpreted differently by different people and countries. The state drafters try hard to find state concepts which they consider to be more suitable with the basic values desired by the people. However, the concepts and models of the welfare state are very fluid in practice and very often experience transitions from one model to another. For instance, the Scandinavian countries that adhere to the Social Democracy model, the Anglo-Saxon countries which adopt the Liberal model, and the majority of Continental European countries which adopt the Conservative model.¹⁸ Concerning this matter, Indonesia has not specifically determined what kind of welfare state model is meant by Pancasila and the 1945 Constitution of the Republic of Indonesia.¹⁹

Nevertheless, when viewed from the provisions in the 1945 Constitution along with its implementation, Indonesia tends to adhere to the Conservative model of the Welfare State system. The focus of the study on the discussion of the welfare state in Indonesia is on the first pillar, namely the universal social security system based on humanity, benefits, and social justice as the determination of the welfare program. This social security provision is specified in the 1945 Constitution Article 28H paragraph (3) which states: "*Everyone has the right to social security which enables his/her complete development as a dignified human.*" Also, Article 34 paragraph (2) that pronounces:

¹⁸Oman Sukmana, "*Konsep dan Desain Negara Kesejahteraan*", Social Politc Journal, Vol 2 Number 1 December 2016, p.112

¹⁹Elviandri, Op.cit, p 263.

"The state develops a social security system for all people and empowers people who are weak and underprivileged according to human dignity."

Regarding the implementation, the social security program in Indonesia is not fully left to the market mechanism (private).²⁰ Hence, in accordance with the provision and the implementation in Indonesia regarding social security as described above, it can be asserted that the characteristic of social security in Indonesia is contrary to the Social Democracy model which provides universal social security with complete coverage and also contradicts with the Liberal model which provides social security in a very limited amount. Thereby, based on this perspective, it can be assumed that Indonesia adheres to a Conservative model which emphasizes the role of the family as the party responsible for the risk and provides social security depending on the type of work.²¹

In respect to that, the Constitutional Court evidently justified the interpretation of the welfare state ideology which tended to the Conservative model and not Social Democracy that provided comprehensive social security as expected by the petitioners. In the course of national life, the state also has no bigger role than civil society (family and society) in advancing the general welfare.²² Constitutionally, Indonesia adheres to the ideology of the welfare state but in reality it is getting far from welfare.²³ Therefore, it is necessary to discuss the national development plan as an effort to create changes

²⁰Ibid., 262.

²¹Asep Mulyana, "Studi Tentang Negara Kesejahteraan", <<https://referensi.elsam.or.id/2015/01/studi-tentang-negara-kesejahteraan/>>, accessed 25 September 2020

²²Elviandri, *Op.cit.*

²³Ibid.

in the desired direction. Because actually, the definition and the concepts of the welfare state is not the most essential thing, regardless of its concepts and its forms, the main feature that society expects is how the state performs its role in national development to realize their welfare.

National development is the most important fundamental step in realizing a welfare state. In doing so, it is necessary to form a plan in advance. Planning, according to Article 1 paragraph (1) of Law Number 25 of 2004 on the National Development Planning System, is a process to determine the appropriate future actions, through a sequence of choices, taking into account the available resources. This plan will become a guideline in the implementation of national development.

Furthermore, the definition of National Development, according to Article 1 paragraph (2) of the same law as stated above, is an effort carried out by all components of the nation in order to achieve the goals of the state. Based on this definition, it is said that the parties who are obliged to carry out national development are all components of the nation. Meaning, as a nation that binds itself in the form of the Unitary State of the Republic of Indonesia, the national goal needs to be realized by all layers of the nation without exception.²⁴ Although the government has the biggest role in the implementation of national development, the Indonesian people are also required to participate.

²⁴“Pokok-Pokok Penyelenggaraan Pembangunan Nasional”, <https://www.bappenas.go.id/files/3413/4986/1934/info_20091015133401_2370_0.pdf>, accessed on 28 September 2020

The government as the state administrator is the activator (facilitator and dynamist) of the realization of national goal. In implementing development, the government acts to represent the interests of all levels of the nation. Meanwhile, the development carried out by the community consists of: the individual micro level or the private person of the people; the aggregate-national level starts at the level of community groups, villages, sub-districts, regencies-cities, provinces to the national level; and the global-international level of development between nations.²⁵

Under the state administration system in Indonesia, there are seven principles concerning the state government order: 1) Indonesia is a rule of law state; 2) constitutional system; 3) the highest power exercised by the MPR; 4) the president is the highest state government administrator under the MPR; 5) the president is not accountable to the DPR; 6) the state minister is assistant to the president, and 7) the power of the state head is unlimited.²⁶ The Indonesian state administration system is based on these seven principles. Their main job is to carry out general government duties and organizing development tasks. In the context of organizing development tasks, the government is assigned to assist the development execution with the main role to:

- 1) help manage national and global potential as a source of national development;

²⁵Ibid.

²⁶Saputra, Abdul Maulana, Arif Hidayat, and Iin Fitriyani, "Konsep Nawacita Dalam Pembangunan Nasional Republik Indonesia 2015-2019", <<https://iinfitriyaniblog.wordpress.com/2016/05/07/konsep-nawacita-dalam-pembangunan-nasional-republik-indonesia-2015-2019/>>, accessed 28 September 2020

- 2) help formulate resource allocations for the implementation of national development; and
- 3) assist the people in implementing national development²⁷

In regards to national development implementation, several bases have been agreed since the beginning of 2000, which include the following²⁸:

- 1) 1945 Constitution as the legal bases for development;
- 2) Pancasila as the ideal foundation for development;
- 3) MPR Decree (the Stipulations on State Guidelines (GBHN) as the operational basis for development;
- 4) Five Year National Development Program (Propenas) as the basis of national development planning;
- 5) Annual Development Plan (Repeta) as the foundation of annual national development;
- 6) State Budget (APBN) as the basis for the annual national development financing;
- 7) Strategic Plan (Renstra) as the basis for sectoral national development planning;
- 8) Regional Development Basic Pattern (Poldas) as the basis for national development planning in the regions;
- 9) Five Year Regional National Development Program (Propeda) as the basis of national development planning in the regions;

²⁷ Ibid.

²⁸“Pokok-Pokok Penyelenggaraan Pembangunan Nasional”, <https://www.bappenas.go.id/files/3413/4986/1934/info_20091015133401_2370_0.pdf>, accessed on 28 September 2020

- 10) Regional Annual Development Plan (Repetada) as the basis for national development in the regions;
- 11) Regional Budget (APBD) as the basis for annual development financing in the regions;
- 12) Regional Strategic Plan (Renstrada) as the basis of national sectoral development planning in the regions;
- 13) National Development Coordination Meeting Forum (Rakorbangnas) as the basis for harmonization of development.

It should be acknowledged that it is the main task for future generations to continue the struggle of the fallen fighters by filling in gradual and sustainable development. A gradual and sustainable development will certainly not be achieved without a clear plan in determining policy steps.

A planned system is needed to regulate and oversee the course of government in realizing national development. However, through the 4th amendment of the 1945 Constitution or after the reformation, the State Guidelines (GBHN) which were previously used as a guide for the preparation of national development plans have been eliminated. Therefore, to maintain sustainable development, Law Number 23 of 2003 concerning Presidential Election mandates presidential candidates to convey their vision, mission, and programs. The government requires to plan and formulate a system that regulates an effective, efficient, and targeted development activities as well as maintaining the sustainability of the development process through the National Development Planning System.

The National Development Planning System, according to Law Number 25 of 2004, is a unitary development planning procedure that provides long-term, medium-term, and annual development plans which are implemented by components of the state administrators and society at the central and regional levels. The duration of the plans are as follows:

- 1) Long Term Plan (RPJP): covers a period of 10 years and above.
- 2) Medium Term Plan (RPJM): covers a period of between 3 to 8 years.
- 3) Short Term Planning: covers a period of a half to 2 years.

The National RPJP contains only broad directions and is used as a guideline in preparing the National RPJM. The stages of the national development plan are compiled in each period of the National RPJM in accordance with the vision, mission, and programs of the President that are directly elected by the people. For instance, the NAWACITA program.

The concept of NAWACITA is contained in the Third National RPJM for the 2014-2019 period which was used for political purposes when Mr. Joko Widodo ran for President and Mr. Jusuf Kalla as the candidate for Vice President in the 2014 General Election. NAWACITA was used as their vision and mission if elected to become President and Vice President. These visions and missions contain nine priority principles agenda to continue Mr. Soekarno's spirit of struggle known as Trisakti,

namely politically sovereign, economically independent, and having a cultural personality.²⁹

After successfully winning the people's votes and starting to run the government, the concept of NAWACITA was then translated into the state planning document³⁰ and applied to their government programs.³¹ Not only in the economic field, but NAWACITA's vision also pays attention to the development priorities in other fields, such as culture, education, and defense, and security.³² Mr. President Joko Widodo even reiterated the importance of socio-cultural development through his speech at the 2017 MPR session. He said: "apart from ideological and political development, this nation must not forget about social and cultural development. The nation must educate the children to become a historical successor generation who loves their homeland, have ethics, manners, courtesy, strong national character and builds a nation-wide culture. Art expressions in various regions throughout the archipelago must continue to be built to enrich our Indonesia³³

Based on President Joko Widodo's speech, it can be affirmed that according to him, socio-cultural development is highly significant and should not be underestimated. The goal of socio-cultural development is the realization of people's welfare, which is

²⁹Fitri Halimah, "Studi Deskriptif Penerapan Program Nawacita Presiden Joko Widodo tentang Membangun Indonesia dari Pinggiran Terhadap Kesejahteraan Warga di Desa Kanoman Kecamatan Panjatan Kabupaten Kulon Progo". *Skripsi*, Yogyakarta: Prodi PPKn Universitas PGRI, 2017, p.1

³⁰Saputra, Abdul Maulana, Arif Hidayat, and Iin Fitriyani, *Op.cit.*

³¹Fitri Halimah, *Op.cit.*

³²Saputra, Abdul Maulana, Arif Hidayat, and Iin Fitriyani, *Op.cit.*

³³Kupas Merdeka, "Presiden: Kita Tidak Boleh Lupakan Pembangunan Sosial dan Budaya", <<https://www.kupasmerdeka.com/2017/08/presiden-kita-tidak-boleh-lupakan-pembangunan-sosial-dan-budaya/>>, accessed 28 September 2020

marked by the improvement of the quality of life that is decent, dignified, and provides main attention to the fulfilment of basic needs³⁴. The general targets to be achieved are:

- 1) improving life expectancy;
- 2) decreasing population growth rate;
- 3) reducing the total birth rate,
- 4) lowering the crude mortality rate;
- 5) increasing social and cultural resilience, enhancing the position and role of women;
- 6) developing youth active participation; and
- 7) strengthening culture and sports achievement.³⁵

In order to accomplish those targets, it is necessary to establish and perform various policies for social and cultural development that covers the fields of health, population and family planning, social welfare, the role of women, youth and sports as well as culture.³⁶ For instance, in the health sector, the government needs to form/implement policies related to 1) the improvement of the quality of human resources and a healthy environment; 2) giving priority to efforts to improve health, prevention, cure, recovery, and rehabilitation; 3) improvement and maintenance of the quality of health and nutrition institutions and services; 4) sustainable empowerment of human resources in the health sector and medical infrastructure, and 5) prioritizing the fulfilment of health service needs for poor families and vulnerable groups, refugees and disaster victims.

³⁴“Pembangunan Sosial Budaya”, <<https://www.bappenas.go.id/files/8713/5228/3295/narasi-bab-viii-pembangunan-sosial-budaya.pdf>>, accessed 28 September 2020

³⁵Ibid.

³⁶Ibid.

In the population and family planning sector, the government needs to form/implement policies related to 1) administration of population to encourage accommodation of population rights; 2) increasing the quality of the population through birth control, reducing the mortality rate, 3) increasing the quality of family planning services; and 4) family empowerment through improving family welfare and resilience; 5) awareness-raising for state officials and the public regarding child protection.

In the social welfare sector, the government needs to establish policies relating to 1) increasing the reach of social welfare services for the population, especially the poor, neglected children, the elderly, people with disabilities, social disabilities, and victims of natural disasters and social disasters; 2) increasing the competence of human resources involved in providing social welfare services; and 3) realization of a more efficient refugee problem management system.

In the culture sector, the government needs to form/implement policies related to (1) the development and socialization of national cultural values to strengthen national identity; (2) consolidating and developing various forms of national ties; (3) improvement of multicultural management; (4) providing facilities for the creation of national cultural copyright; (5) efforts increasement for the preservation and development of cultural assets.

Every socio-cultural development related to the above sectors is indeed very important, however, in this discussion, the importance of the government's role in

forming policies related to facilities for the creation of national cultural copyright as mentioned in point number 4 on the culture sector paragraph needs to be highlighted.

It is significant to discuss the above legal issues due to the lack of adequate regulations under the Indonesian Copyright Law. With regard to Indonesia as a rule of law state, it is highly necessary for the government to complement the law with a more complete and clear regulations. However, before discussing further about the lack of adequate regulations, we firstly need to understand about the Intellectual Property Rights (IPR). IPR are rights that arise from the ability to think and produces a product or process that is useful for humans.³⁷ IPR are broadly divided into 2 (two) parts, namely³⁸:

- 1) Copyright;
- 2) Industrial Property Rights, consisting of:
 - a) Patent;
 - b) Trademark;
 - c) Industrial Design;
 - d) Integrated Circuit Layout Design;
 - e) Geographical Indication; and
 - f) Trade Secret.

³⁷“Kenali Beragam Hak Kekayaan Intelektual”, <<https://prolegal.id/2018/04/23/kenali-beragam-hak-kekayaan-intelektual/>>, accessed on 29 September 2020

³⁸Ibid.

One of the differences between the aforementioned two rights lies in whether or not the right is required to be listed. IPR that must be registered is the Industrial Property Rights, the Copyright is not obliged to be registered.³⁹ Furthermore, of the two types of IPR, copyright has the most comprehensive scope of protected objects, because it includes science, art, literature, and computer programs.

By definition, Copyright is described as an exclusive right of an author that arises automatically based on the declarative principle after work is manifested in a tangible form without reducing restrictions under the provisions of laws and regulations. As mentioned above, one of the creations included in the scope of copyright protection is art and one of the examples of art is songs. Songs have several elements such as lyrics, arrangements, and music. Each of which is created, recorded, and performed by different subjects,⁴⁰ namely songwriters, producers, record label owners, and singers. Those subjects can be classified as the author(s) or copyright holder(s) and/or related rightsholder(s).

Based on Law number 28 of 2014 on Copyright (Copyright Act), author(s) is a person or persons who individually or collectively produce a unique and personal creation. In this context, the person can be the author(s) of the lyric, arrangement as well as the music. Copyright holder(s) is the author(s) as the owner of a copyright or a party who legally accepts the right from the author(s). Related rightsholder(s) are the

³⁹Surahno, “Pengertin dan Sejarah Hak Kekayaan Intelektual”, <<http://repository.ut.ac.id/4087/1/HKUM4302-M1.pdf>>, accessed 29 September 2020

⁴⁰Antonio Rajoli Ginting, “Peran Lembaga Manajemen Kolektif Nasional Dalam Perkembangan Aplikasi Musik Streaming”, Vol 13, Number 3 December 2019, p. 380

performers, phonogram producers, or broadcasting institutions who obtain such right. The copyright as intended above is consisting of economic rights and moral rights. The economic rights in general is in the form of royalties. Thus, if a song is used commercially, the royalty's receiver is not only the author(s), but also the singer(s), producer(s) and record label owner(s).⁴¹ Each has its portions according to the amount that was determined by the National Collective Management Institution (LMKN).

Structurally, LMKN under the Minister of Law and Human Rights Decree (PERMENKUMHAM) number 29 of 2014, has several tasks, one of which is to determine the procedure for distributing royalties and the amount of royalties for author(s), copyright holder(s) and related rightsholder(s). The amount of royalty is divided into several sectors which are regulated through the LMKN Decree. However, until this day, the LMKN has not yet issued a nationally applicable royalty rate for music streaming services. Thus, the legal certainty regarding this matter is still in question.

The importance of legal certainty concerning music streaming is closely related to the rapid development of technology. Starting with the introduction of the digital world which gives the opportunity for the songs to be heard easily every time. In the past, one could only listen to songs through cassettes, radio, CDs, and computers. Daniel Nordgard said that before the digitalization era, the issue of music royalty had surfaced, for example the piracy of music CDs or the re-recording of music cassettes by other

⁴¹Ibid.

individuals which were then traded.⁴² However, piracy that occurred during the era of physical products was still limited due to technical problems such as poor sound quality or image resolution that was not as good as the original version. Thus, during that time, consumers still tend to choose the original versions because they consider the product quality. Nevertheless, since the digital era, piracy has become commonplace and is practiced by almost everyone. For instance, the free downloader service for YouTube.⁴³

Fortunately, the born of music streaming become the solution for this piracy issue. Although at the beginning of its appearance, the streaming music platform was greeted by protests from some world musicians because of the assumption that streaming music was damaging the artistic value of a musical work due to profits that were considered smaller than sales of CDs and downloads, yet over time it has been proven that music streaming is the savior of the music industry.⁴⁴

The existence of music streaming is considered advantageous for many music consumers. Take the very popular streaming music platform, Spotify, for example. In this platform, the system that is used is "song renting". This system allows users to adjust their budgets according to their needs. Users can even listen to songs for free and legally through this platform. However, certainly, some provisions bind these free users. Firstly, free users are unable to choose songs that they like (limited songs).

⁴²Ibid.,38.

⁴³Ibid.

⁴⁴Reza Wahyudi, "Layanan "Music Streaming" Sumbang 43 Persen Pendapatan Industri Musik", <<https://tekno.kompas.com/read/2018/04/25/12005617/layanan-music-streaming-sumbang-43-persen-pendapatan-industri-musik?page=all>>, accessed 20 August 2020

Secondly, free users are unable to download any songs (can't listen offline), and Lastly, free users will be interrupted by several advertisements that appear almost all the time. Furthermore, users who have more budget can register themselves as a premium user. This feature is equipped with some qualified facilities such as; the ability to choose songs that they like (from millions of song choices), the ability to download various songs (can listen offline) until the subscription period ends (when the subscription period runs out, the download song playlist will disappear automatically), and the ability to not be interrupted by any advertisements.

Through the "song renting" system provided by music streaming providers, users will certainly save a lot of costs. According to the price listed on the Spotify website page in August 2020, only by paying IDR 54,990 per 3 months, Spotify users can be registered as a premium user and can enjoy all of the facilities provided. This price is considered very cheap when compared to the price of physical CDs, in which per CD ranges from IDR 80,000 - IDR 200,000.

The good news is that the very affordable prices provided by the music streaming platform have led to the reduction in the purchase of pirated music or illegal free downloads via the internet. "Several music streaming services provide free subscription access. This will make people no longer access illegal music download sites," said Ventha when interviewed by detik.com.⁴⁵ Aside from the prices, government actions

⁴⁵Adi Fida Rahman, "Streaming Musik Gratis Tekan Pembajakan di Indonesia", <<https://inet.detik.com/cyberlife/d-3359133/streaming-musik-gratis-tekan-pembajakan-di-indonesia>>, accessed 25 August 2020

to block illegal websites also play a huge role in reducing illegal music downloads. Even though there may still be some illegal downloading sites that missed, at least this action makes the process of downloading illegal music more difficult. Based on research conducted by YouGov in the UK, 35% of British citizens feel that downloading pirated songs is now much more complicated.⁴⁶ Also, YouGov reports that currently, music piracy in the UK has decreased drastically in the last five years and partly because of the existence of Spotify.⁴⁷

The streaming music platform will not solely benefit users but will also provide huge profits for the rightsholders. Nevertheless, without a clear and complete regulation, this also can be a disadvantage. The lack of adequate guideline(s) and regulation(s) will allow the occurrence of inequality of royalty income. Some even did not receive royalties at all, because of the wrong direction of the payment. Anji, a musician from Indonesia, shows a number of screenshots containing the complaints of some of his fellow musicians who have experienced this bad fate.⁴⁸ There is Denny Caknan who admits that his song "Kartonyono Medot Janji" is often claimed by various parties. There are also other regional musicians who claim that almost all of their songs have been licensed by other people.⁴⁹ The appearance of payment error made by the music streaming application is due to the lack of guidelines and regulations.

⁴⁶Harith Jobs, "Berkat Spotify, Pembajakan Musik Pun Mulai Berkurang", <<https://www.feedme.id/gaya/45509/berkat-spotify-pembajakan-musik-pun-mulai-berkurang>>, accessed 25 August 2020

⁴⁷Ibid.

⁴⁸"Anji Ungkap Banyak Kasus Pencurian Musik di Media Digital, Siap Bantu Cari Solusi", <<https://www.wowkeren.com/berita/tampil/00306769.html>>, accessed 18 August 2020

⁴⁹Ibid.

According to Yasonna, the Minister of Law and Human Rights (MENKUMHAM), in almost all countries, music royalties through social media and applications are clearly regulated, meanwhile, Indonesia does not have any related regulations.⁵⁰ For this reason, the government will make rules for withdrawing royalties from social media and applications.⁵¹ In regard to the establishment of such rule, the United States' regulation can be used as a reference.

On October 11, 2018, the United States passed the Music Modernization Act (MMA) through the US House and Senate with unanimous support. The MMA brings the most significant reform of music licensing in decades. It updates music copyright laws and streamlines music licensing for the digital era.⁵² This law is organized into three key titles: Title I – Musical Works Modernization Act which renew the music-licensing process; Title II – Classics Protection and Access Act which establishes Copyright Protection for pre-1972 recordings; and Title III – Allocation for Music Producers Act which improves royalties pay-outs for producers.

In terms of music licensing renewal, the Musical Works Modernization Act regulates several main pieces. First, it changes how digital music providers like Spotify, Pandora, Apple Music, YouTube, Google Play, and others in obtaining licenses for the broadcast of music compositions. Second, it overhaul the way

⁵⁰Fitri Novia Heriani, “Aplikasi Penyedia Musik Seperti JOOX, iTunes Siap-siap Kena Royalti”, <<https://www.hukumonline.com/berita/baca/lt5c5abae4ca28f/aplikasi-penyedia-musik-sejenis-joox--itunes-siap-siap-kena-royalti/>>, accessed 20 August 2020

⁵¹Ibid.

⁵²Rory PQ, “What is the Music Modernization Act and Why It Matters?”, <<https://iconcollective.edu/music-modernization-act/>>, accessed 20 August 2020

rightsholders can get royalties payment from streaming providers. Third, it establishes a governing body called Mechanical Licensing Collective (MLC), which will be responsible for the collection and distribution of royalties owed to songwriters and publishers.⁵³ The MLC will establish and maintain a public database that identifies musical works and their owners, therein reducing the number of unidentified owners of musical works copyright and ensuring the correct rightsholders to receive the royalty payments. The MLC also empowered to grant blanket licenses to digital music services for the distribution and streaming of musical works. Fourth, it align the rate-setting standards under which sound recording (performance license) and musical works (mechanical licence) royalties are determined. In terms of performance license, the MMA helps to streamline the process for performance rights organization (PRO) to argue for higher royalty rates. If a prospective licensee and PRO are unable to agree on a royalty rate, either party may apply for the determination of a reasonable rate by one of two federal district judges in the Southern District of New York.⁵⁴ The MMA require the Copyright Royalty Board to move to a willing buyer/willing seller standard in the determination of both performance and mechanical royalty contexts.⁵⁵ Thus, in term of mechanical license, If the MMA is passed and mechanical licenses are no longer bound by the previous policy-oriented rate-setting standard, certain market participants

⁵³Mac Hibler, “Copyright Changes for the Modern Music World”, <<https://www.stout.com/en/insights/article/music-modernization-act-copyright-changes-modern-music-world>>, accessed 20 August 2020

⁵⁴United States Copyright Office, “Copyright and Music Marketplace”, February 2015, p. 35

⁵⁵H.R. 5447-115th Congress: Music Modernization Act. Section 103, p. 26.

believe that royalty rates will increase for mechanical license copyright owners.⁵⁶ Therefore, it can be assert that the MMA allows rightsholders to receive more money through the new standard rate for sound recording (performance) royalty and musical works (mechanical) royalty.

From the brief description above, it can be seen that many advantages can be obtained by musicians in the United States after the issuance of the MMA. Likewise, Indonesia must also give a responsive steps towards the digital era development to guarantee the rights of the rightsholders. The urgency of such step is relatable to the fact that music streaming providers will provide a huge economic benefit to the music industry and Indonesian state if it is managed and regulated by clear and complete laws.

1.2 Formulation of the Issue

From the background stated above, the formulation of the issue is as follows:

- 1) How are the regulations of Copyright Law on royalty for music streaming activities in Indonesia?
- 2) How is the implementation of Copyright Law on royalty collection for music streaming activities in Indonesia?

1.3 Research Purpose

- 1) To find out the copyright protection on royalty fees for music streaming activities in Indonesia

⁵⁶United States Copyright Office, “*Copyright and the Music Marketplace*”, February 2015, p. 81-832

- 2) To find out the implementation of copyright protection on royalty withdrawal for music streaming activities in Indonesia

1.4 Research Benefit

In research, certainly, it is desirable to have benefits that can be taken in the study.

The benefits of this study are:

1.4.1 Theoretical Benefits

- a) To add the reader knowledge about music streaming royalties.
- b) As a reference for the government in establishing music streaming royalty's regulation.

1.4.2 Practical Benefits

- a) For the government, it is expected to be used as an input for drafting the music streaming regulation.
- b) For the rightsholders to obtain fair music streaming royalty income.

1.5 Structure of Writing

Systematics of writing aims to facilitate the comprehension and study of research.

In this research report, systematic writing consists of five chapters, each of which in outline can be explained as follows:

Chapter I: Introduction

This chapter is an introduction in which material is mostly to refine research proposals that contain of background, formulation of the issue, research purpose, research benefit, and structure of writing.

Chapter II: Literature Review

This chapter describes the theories of discussion in detail which include the notion of the procedure, royalties, music streaming royalties, Indonesian Act, Music Modernization Act, United States as well as the understanding of it all.

Chapter III: Research Methodology

This chapter contains the development of a methodology that consists of framework, data sources, types of data and data analysis methods.

Chapter IV: Analysis and Discussion

This chapter contains analysis data to assess the regulation concerning music streaming royalties in Indonesia compare to the United States.

Chapter V: Conclusion and Recommendation

Contains the conclusions of a series of thesis discussions based on the analysis that has been done as well as suggestions to be submitted to the object of research or for further research and the recommendation towards the issues.