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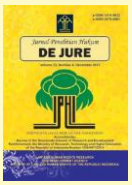
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Puji syukur ke hadirat Allah Subhanahu wa Ta'ala, Jurnal Penelitian Hukum De Jure yang diterbitkan oleh Badan Strategi Kebijakan Hukum Kementerian Hukum Republik Indonesia, bekerja sama dengan Perhimpunan Peneliti Hukum Indonesia, dapat terbit kembali Jilid 26 Nomor 1 Maret 2026.

Penerbitan Jurnal Penelitian Hukum De Jure Jilid 26 Nomor 1 Maret 2026 memuat 5 (lima) artikel dari berbagai lembaga penelitian di Indonesia maupun dari civitas akademika. Untuk meningkatkan perbaikan sistem hukum dan perundang-undangan, diperlukan upaya perbaikan yang signifikan terhadap kebijakan strategis pemerintah. Sehubungan dengan hal tersebut, redaktur Jurnal Riset De Jure Jilid 26 Nomor 1 Maret 2026 mengangkat isu-isu hukum antara lain manajemen perusahaan milik negara, penerapan teori psikopati pada sistem korporasi, keadilan restoratif dalam Kitab Undang-Undang Hukum Acara Pidana (KUHAP) yang baru, integrasi prinsip estoppel dalam penerapan hukum perdata di Indonesia, dan perilaku monopoli dalam e-commerce. Melalui tulisan-tulisan tersebut, mereka dapat menyumbangkan pemikiran yang menjadi bahan referensi dalam memenuhi rasa keadilan dan perlindungan hukum di masyarakat.

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Kata kunci yang tercantum di sini adalah kata-kata yang mewakili konsep yang diterapkan dalam artikel. Lembar abstrak ini dapat direproduksi tanpa izin atau biaya.

Retno Kus Setyowati

Pengelolaan Badan Usaha Milik Negara Sebelum Undang-Undang Nomor 1 Tahun 2025

Jurnal Penelitian Hukum De Jure Volume 26, Nomor 1, Maret 2026, Halaman 1-18

Badan Usaha Milik Negara (BUMN), selain diatur dalam Undang-Undang No. 40/2007 tentang Perseroan Terbatas, juga diatur oleh Undang-Undang No. 19/2003 tentang BUMN dan Undang-Undang No. 17/2003 tentang Keuangan Negara, yang membawa konsekuensi bahwa jika BUMN kehilangan jabatan, mereka akan dikenakan tanggung jawab pidana, yaitu korupsi. Penerbitan Undang-Undang No. 1/2025 tentang perubahan ketiga pada Undang-Undang No. 19 Tahun 2003 membawa perubahan dalam tanggung jawab direktur BUMN yang mengalami kerugian. Sebelum Undang-Undang No. 1/2025, Aturan Pertimbangan Bisnis tidak dipertimbangkan dalam keputusan Pengadilan, dan kerugian yang dialami oleh BUMN merupakan tindakan pidana korupsi. Dalam kasus Karen Agustiawan sebagai Direktur Utama PT Pertamina (Persero) dan Komisaris Utama PT Pertamina Hulu untuk tindakan BMG Block Participating Interest Australia, Putusan Kasasi menerapkan Aturan Pertimbangan Bisnis, tetapi dalam kasus kedua, Majelis Hakim Kasasi tidak menerapkannya, sehingga dijatuhkan hukuman. Berdasarkan UU No. 1/2025, kerugian BUMN diperlakukan sebagai risiko bisnis dan bukan sebagai kerugian negara yang dapat dikenai sanksi. Metode yang digunakan adalah penelitian hukum normatif dengan berbagai pendekatan, yaitu hukum positif dan perubahannya.

Kata Kunci: Manajemen; BUMN; Kerugian Korporasi; Undang-Undang No. 1/2025.

Ahmad Yusup

Konstruksi Kesalahan Korporasi sebagai Arsitektur Perdagangan Satwa Liar Jaringan Transnasional Melalui Teori Psikopati

Jurnal Penelitian Hukum De Jure Volume 26, Nomor 1, Maret 2026, Halaman 19-44

Perdagangan satwa liar ilegal bertransformasi menjadi bentuk kejahatan transnasional yang kompleks dan terorganisasi, tidak lagi didominasi oleh pelaku individual semata, tetapi semakin melibatkan korporasi sebagai aktor strategis. Artikel ini menganalisis bagaimana korporasi berperan sebagai arsitektur perdagangan satwa liar jaringan transnasional dan bagaimana teori psikopati mengonstruksi kesalahan korporasi dalam domain tersebut. Penelitian ini dirancang dengan tipe socio-legal research yang tidak hanya menggunakan basis pendekatan teori hukum semata, tetapi juga memadukannya dengan pendekatan disiplin ilmu lain, seperti kriminologi dan psikologi. Hasil penelitian menunjukkan bahwa keterlibatan korporasi dalam perdagangan satwa liar jaringan transnasional tidaklah bersifat insidental, tetapi bersifat sistematis dan terstruktur, dengan memanfaatkan mekanisme bisnis yang sah untuk menyamarkan aktivitas ilegalnya. Temuan penelitian juga menegaskan bahwa teori psikopati relevan dalam menjelaskan konstruksi kesalahan korporasi yang melakukan perdagangan satwa liar lintas negara, seperti ketiadaan empati, ketiadaan rasa bersalah, dan tidak adanya tanggung jawab moral serta sosial. Oleh karena itu, diperlukan pendekatan pertanggungjawaban pidana yang kompleks terhadap penanggulangan kejahatan korporasi dalam domain tersebut, yang diperkuat melalui mekanisme Mutual Legal Assistance (MLA) guna mengatasi hambatan yurisdiksi dan mendukung pengumpulan bukti lintas negara terhadap korporasi

Kata Kunci: Psikopati; Kesalahan Korporasi; Perdagangan Satwa Liar; dan Mutual Legal Assistance.

Kata kunci yang tercantum di sini adalah kata-kata yang mewakili konsep yang diterapkan dalam artikel. Lembar abstrak ini dapat direproduksi tanpa izin atau biaya.

Muh Hajoran Pulungan, Mosgan Situmorang

Restorative Justice dalam KUHAP Baru: Antara Kepastian Hukum dan Diskresi Aparat Penegak Hukum

Jurnal Penelitian Hukum De Jure Volume 26, Nomor 1, Maret 2026, Halaman 45-60

Pengaturan restorative justice dalam KUHAP baru menandai pergeseran paradigma sistem peradilan pidana Indonesia dari pendekatan retributif menuju pendekatan yang lebih humanis dan berorientasi pada pemulihan. Namun demikian, integrasi konsep tersebut menimbulkan persoalan normatif terkait keseimbangan antara kepastian hukum dan ruang diskresi aparat penegak hukum. Penelitian ini bertujuan untuk menganalisis konstruksi pengaturan restorative justice dalam KUHAP baru serta menilai implikasinya terhadap prinsip kepastian hukum dan batasan kewenangan aparat. Metode penelitian yang digunakan adalah penelitian hukum normatif dengan pendekatan perundang-undangan dan pendekatan konseptual, melalui kajian terhadap asas legalitas, asas kepastian hukum, dan teori diskresi dalam hukum pidana. Hasil penelitian menunjukkan bahwa meskipun restorative justice memberikan fleksibilitas dalam penyelesaian perkara dan berpotensi menghadirkan keadilan substantif, pengaturannya yang belum dirumuskan secara limitatif dan terukur berpotensi menimbulkan disparitas penerapan serta membuka ruang penyalahgunaan kewenangan. Ketegangan antara kebutuhan fleksibilitas dan tuntutan kepastian hukum menjadi isu sentral dalam implementasinya. Oleh karena itu, diperlukan perumusan norma yang lebih tegas mengenai batasan perkara, prosedur, dan mekanisme pengawasan guna memastikan bahwa penerapan restorative justice tetap berada dalam koridor asas legalitas dan prinsip equality before the law.

Kata Kunci: Restorative Justice, KUHAP Baru, Kepastian Hukum, Diskresi, Asas Legalitas.

Erwin Susilo, Bagus Sujatmiko, Suhaimi

Integrasi Prinsip Estoppel sebagai Pelengkap Regulasi Itikad Baik dalam Hukum Perdata Indonesia

Jurnal Penelitian Hukum De Jure Volume 26, Nomor 1, Maret 2026, Halaman 61-76

Studi ini bertujuan untuk menyelidiki konsep estoppel dan potensi penggabungannya ke dalam hukum perdata Indonesia. Penelitian ini penting bukan karena hukum perdata Indonesia kurang memberikan perlindungan, tetapi karena kerangka kerja yang ada mungkin tidak selalu memberikan artikulasi konseptual yang optimal dalam menangani kerugian yang timbul dari ketergantungan. KUHP mengakui prinsip-prinsip seperti pacta sunt servanda dan itikad baik; namun, perlindungan terhadap ketergantungan tidak terbatas pada prinsip-prinsip ini, karena juga ditangani melalui tindakan melawan hukum (Pasal 1365) dan doktrin culpa in contrahendo. Oleh karena itu, akan berlebihan untuk mengklaim adanya kekosongan hukum. Dalam banyak sistem hukum, khususnya dalam tradisi hukum umum, estoppel telah berkembang untuk menangani ketergantungan, kerugian, dan ketidakadilan. Dalam sistem hukum perdata, perlindungan terhadap ketergantungan tidak bergantung pada estoppel sebagai doktrin terpisah; melainkan, terintegrasi dalam prinsip-prinsip hukum yang telah ditetapkan. Studi ini menggunakan metode penelitian hukum normatif, termasuk pendekatan statutori, konseptual, dan komparatif, dengan memeriksa undang-undang, putusan pengadilan, dan doktrin hukum. Temuan menunjukkan bahwa estoppel telah berevolusi dari aturan pembuktian menjadi doktrin yang berkaitan dengan keadilan. Di Indonesia, nilai-nilai serupa tercermin dalam itikad baik, rechtsverwerking, dan tindakan melawan hukum, yang menunjukkan bagaimana konsep-konsep ini selaras dengan pemahaman estoppel yang berkembang dalam mempromosikan keadilan dalam sistem hukum. Dengan demikian, penelitian ini tidak mengemukakan estoppel sebagai respons terhadap kesenjangan hukum, tetapi sebagai kerangka konseptual yang komplementer dan adaptif, yang terdiri dari representasi, ketergantungan yang wajar, dan kerugian, yang dapat diintegrasikan melalui interpretasi, pengembangan yurisprudensi, dan penyempurnaan hukum secara bertahap.

Kata Kunci: Estoppel; Itikad Baik; Pacta Sunt Servanda; Perlindungan Hukum.

Kata kunci yang tercantum di sini adalah kata-kata yang mewakili konsep yang diterapkan dalam artikel. Lembar abstrak ini dapat direproduksi tanpa izin atau biaya.

Ayup Suran Ningsih, Harumsari Puspa Wardhani

Perilaku Monopoli dalam Perdagangan Elektronik: Analisis Hukum Persaingan Usaha terhadap TikTok

Jurnal Penelitian Hukum De Jure Volume 26, Nomor 1, Maret 2026, Halaman 77-92

Artikel ini menganalisis perilaku monopoli dalam perdagangan elektronik yang dilakukan melalui Sistem Elektronik (PMSE) di platform TikTok, khususnya melalui fitur TikTok Shop, dari perspektif hukum persaingan usaha Indonesia. Tujuan penelitian ini adalah untuk menguji kesesuaian model bisnis perdagangan sosial TikTok dengan Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Adil, serta peraturan yang mengatur PMSE. Metode penelitian yang digunakan adalah pendekatan hukum yuridis normatif, yang berfokus pada perspektif sosial-hukum, yang mengandalkan bahan hukum sekunder, termasuk peraturan perundang-undangan, doktrin hukum, literatur akademis, laporan resmi yang relevan, dan data empiris. Hasil penelitian ini menunjukkan bahwa integrasi fungsi media sosial dan perdagangan elektronik ke dalam satu ekosistem digital menciptakan potensi signifikan untuk praktik monopoli, termasuk kontrol atas algoritma distribusi konten, dominasi atas data pengguna, diskriminasi akses pasar, dan penetapan harga predator. Kondisi ini berpotensi merugikan persaingan usaha yang adil dan menekan keberlanjutan usaha mikro, kecil, dan menengah (UMKM). Studi ini menyimpulkan bahwa kerangka hukum yang ada untuk persaingan usaha belum sepenuhnya dapat beradaptasi dengan karakteristik bisnis digital berbasis platform. Oleh karena itu, perlu dilakukan pembaruan kerangka peraturan dan penguatan pengawasan oleh otoritas persaingan usaha agar ekosistem perdagangan digital beroperasi secara adil, merata, dan berkelanjutan.

Kata Kunci: Hukum persaingan bisnis; E-commerce; Monopoli; Bursa Efek Maharashtra (PMSE); TikTok.

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Management of State-Owned Enterprises Before Law No. 1 of 2025

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Abstract

SOEs, in addition to being regulated in Law No. 40/2007 concerning Limited Liability Companies, are also regulated by Law No. 19/2003 concerning SOEs and Law No. 17/2003 on State Finance, which carries consequences that if SOEs lose their jobs, they will be subject to criminal liability, namely corruption. The issuance of Law No. 1/2025 concerning the third amendment to Law No. 19 of 2003 brought about a change in the responsibility of directors of SOEs that suffered losses. Prior to Law No. 1/2025, the Business Judgement Rule was not considered in Court decisions, and losses by state-owned companies were a criminal act of corruption. In the case of Karen Agustiawan as President Director of PT Pertamina (Persero) and President Commissioner of PT Pertamina Hulu for the action of BMG Block Participating Interest Australia, the Cassation Decision applied the Business Judgement Rule, but in the second case, the Panel of Cassation Judges did not apply it, so it was sentenced. Under Law No. 1/2025, SOEs' losses are treated as business risks rather than as state losses that can be punished. The method used is normative law research with various approaches, namely positive law and its changes.

1. Introduction

State-Owned Enterprises (SOEs) play an important role in a country's economic development. The Board of Directors of SOEs is responsible not only for the company's sustainability and growth but also for the interests of shareholders, the government, and society in general. In this context, the Business Valuation Rules are a significant legal basis in guiding decision-making and civil liability in SOEs. Business Entities whose capital is wholly or mostly owned by the State through direct participation derived from separate state assets, SOEs in the form of limited liability companies whose capital is divided into shares wholly or at least 51% (fifty-one percent) owned by the State of the Republic of Indonesia, whose main purpose is to pursue profits.

Law of the Republic of Indonesia Number 19 of 2003 concerning State-Owned Enterprises, article 2 regulates the purpose and objectives (1) of contributing to the development of the national economy in general and state revenues in particular; (2) the pursuit of profit; (3) providing general benefits in the form of providing high-quality and adequate goods and services and/or for the fulfillment of people's livelihoods; (4) pioneering business activities that cannot be carried out by the private sector and cooperatives; (5) actively provide guidance and assistance to entrepreneurs in economic groups, cooperatives, and vulnerable communities.

Assistance to entrepreneurs from weak economic groups, cooperatives, and communities. When it is associated between the provisions in the Limited Liability Company Law and the Law on SOEs, the management of SOEs in the form of a limited liability company, is state property that has been separated in accordance with the doctrine of business valuation rules regulated in Law No. 40/2007 Article 97 paragraph (5) letter b which stipulates that members of the board of directors who manage and represent the company cannot be held liable for business losses if they are managed in good faith and prudence fully in accordance with the company's intentions and objectives, but because the Indonesian state adheres to a continental legal system or civil law that makes written rules the main source of law.

The management of SOEs that result in losses is not only regulated by Law No. 40/2007, but also regulated by Law No. 19/2003 on SOEs and Law No. 17 of 2003 on State Finance, the consequences of which can be examined and prosecuted as criminal cases, of course will be contrary to the doctrine of Business Judgment Rules, this concept stipulates that where the Company's Board of Directors cannot be legally responsible for the decisions it takes. Furthermore, with the issuance of Law No. 1 of 2025 concerning the three amendments to SOEs. This law changes several provisions in the old SOE Law, one of which is regarding the status of SOEs, which are no longer considered as losses or state profits, Because the profits and losses of SOEs are no longer owned by the state, it raises thoughts about how the responsibility or status of directors for losses within the scope of SOEs, especially related to corruption.

The legal system that applies in Indonesia like this, will cause legal problems for the board of directors, even though the board of directors has carried out their duties, management is always careful, always prioritizes the interests of the company and in good faith and the implementation of its duties in accordance with the company's intentions and objectives as stated in the company's articles of association, but it turns out that economic conditions are not conducive so that the company suffers losses. Based on the Business Valuation Rules, the Company's Board of Directors cannot be held legally liable for decisions that cause losses; In fact, this is not the case. In the practice of managing state-owned companies, SOE directors' losses are treated as a special crime, namely corruption.

This happened in the case of the President Director of Pertamina, Karen Agustiawan, in the decision. Decision Number 15/Pid.sus/TPK/2019/PN.Jkt.Pst which states that Karen Agustiawan has been legally and convincingly proven guilty of committing a crime of corruption committed jointly as in the additional indictment, imposes a prison sentence of 8 (eight) years and a fine of Rp 1,000,000,000 (one billion rupiah) with the provision that if the fine is not paid, it will be replaced with a prison sentence of 4 (four) months). In the appeal against Decision Number 34/Pid.Sus-Tpk/2019/PT DKI, which upheld the decision of the Central Jakarta District Court on behalf of Karen Agustiawan, while in the Cassation decision Number 121 K/Pid.sus/2020, it released Karen Agustiawan as a director for PT Pertamina's losses. Furthermore, in other cases, also at PT. Pertamina for the loss of LNG procurement which resulted in losses of up to IDR 2.1 trillion, was sentenced to 9 years in prison and a fine of IDR 500,000,000 (five hundred million rupiah), as stated in Decision No. 12/Pid Sus-TPK/2024/PN.JKT.PSt, which was strengthened by Decision No. 41/PID. SUS-TPK/2024/PT. DKI and cassation decision No. 1076/K/PID. Sus/2025 worsens the prison sentence to 13 (thirteen) years.

Issue Law No. 1 of 2025, amending Law No. 19 of 2003 concerning SOEs. This law brings a transformation of the responsibility of the board of directors for losses in the management of SOEs, which were originally responsible in addition to civil liability must also be criminally responsible, and SOE losses as a form of corruption, while in Law No. 1 of 2025 there is a paradigm shift in state finance, because this law expressly distinguishes between state wealth that is separate from the state budget which is no longer considered a state loss.

With this change in regulation, it raises a problem, how is the responsibility of the directors of SOEs for the losses of the companies they manage?

The purpose of this research is to provide answers and clarity about the legal status of SOE losses, namely losses that occur due to business activities, not state losses. For this reason, the author is interested in writing about the Contradictions in the Application of Business Valuation Rules on the Management of State-Owned Enterprises [LDN5.1] that Suffer Losses Before the Issuance of Law Number 1 of 2025 concerning State-Owned Enterprises.

2. Methods

The method used is normative law research with various approaches, namely positive law. With the primary legal material, namely Law (*legal approach*), it is an approach by analyzing all laws and regulations related to legal issues that are being studied while still being guided by laws and regulations and the principles of laws and

regulations [1] , and *the case* approach) is an approach by examining the judge's reasons in a decision (primary law), while secondary legal material is books, expert opinions, writings from various materials for the formation of law, and so on.

3. Discussion and Findings

There is no clear understanding of the Business Valuation Rules, but legal expert Japheth Yosafet Wilben Rissy translates them into business valuation rules.[2] However, it does not provide a definition *of Business Valuation Rules*, for it is based on the opinion of Henry Campbell, who gave a definition of business valuation rules based on the definition of a legal dictionary, which means the following:

"*A rule that immunizes the management of a company from liability for an act resulting in a corporate transaction either within the power of the corporation or the management authority where there is a reasonable basis to show that the transaction was conducted with care and good faith".*[3]

This means a rule that gives immunity from the management of a company from liability for actions resulting in a corporate transaction being carried out within the power of the corporation and the management authority, where reasonable grounds are obtained showing that the transaction was carried out with care and good faith.

Regarding good faith, there are 4 (four) conditions that must be met in business decisions). First, decisions should be based on research. Second, it must gather all the information that reinforces the belief that the business decision is reasonable. Third, the decision must be taken in good faith, if the directors know that the act violates the law, it will not be protected from the *business valuation rules.* Fourth, the director does not have personal interests, including financial interests.[4]The Board of Directors is the official organ of the company functioning as its governing body, representing the company both inside and outside the company in accordance with the articles of association.[5]

3.1. Duties and Functions of the Board of Directors

The Board of Directors is one of the organs of a limited liability company, with the Board of Commissioners and the GMS, which are interrelated. The Board of Directors has representative duties as stipulated in {original 1 number 5 of Law No. 40/2007. The Board of Directors is a legal entity that is fully authorized to manage and represent the company for its benefit, in accordance with the company's intentions and objectives. As a legal entity, a limited liability company has the rights and obligations to carry out these actions, represented by a person (director); therefore, they must be responsible for management and representative actions. For the action of the directors of managing the company, there are 2 (two) general actions and exclusion actions.[6]

Administrative actions *are* the day-to-day tasks of management. These daily tasks are part of the routine to achieve the company's goals and objectives.[7] Whereas beschking actions are specific actions related to third parties, which are basically other actions related to the company's business.[8] The obligation of representation is the obligation of the two directors for their actions to enter and exit for and on behalf of the limited liability company, with reference to Article 92 Jo. 97 paragraph (1) of Law No. 40/2007, because the first task is realized as a management task, which is ensured in the internal management of the company, the legal entity must take legal action against a third party to take action, namely, business actions to carry out the company's goals and objectives.

In carrying out representative duties, the directors can take legal action in the form of transfer or sale of limited company assets to third parties. It can be said that this action is a further implementation of the purpose and objectives of the establishment of a limited liability company as stipulated in the articles of association. One of the characteristics of a limited liability company that is relevant to the representation function is the investor's

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[1] Peter Mahmud Marzuki, *Legal Research, Jakarta*: Kencana Prenada Media Group, 2005, pp. 181-182.

[2] Yafet Yosafet Wilben Rissy, "*The Rules of Biusiness Judgment". Provisions and Enforcement by Courts* in *the UK, Canada and Indonesia*", Legal Pulpit, Vol.32, no.2 (June 2020). Hmn 276. http://Jurnal.Ugm.ac.id.jmh.view, accessed February 20, 2024

[3] Henry Black Campbell, *A Dictionary of Black Law* (St. Paul Min: West Publishing aco, 1990). p. 200

[4] Asep N Mulyana, *Business Valuation Rules on Irregularities in the Management of SOEs/BUMDs.* Jakarta. PT. Grasindo, 2018. pp. 3-32.

[5] Republic of Indonesia, Law No. 40/2007 concerning Limited Liability Companies. Article 1 number 5.

[6] Rudhi Prasetya, the *independent position of a limited liability company is accompanied by a review in accordance with Law Number 1 of 1995 concerning Limited Liability Companies.* Bandung: PT. Citra Aditya Bakti, 1996, p. 32

[7] Siti Hapsah Isfardiyana, Business Judgement Rule by the Company's Board of Directors, Jurnal Panorama Hukum, Vol.1 June 2017.

[8] Rudhi Prasetyo " *The Position of the Role and Responsibility of Limited Liability Companies*: (paper in the Commercial Law Seminar of the National Legal Development Agency-Ministry of Justice, July 29-30, 1987). p. 17.

ownership structure to obtain protection based on the contract. Investors (shareholders) establish a corporation to carry out activities in accordance with the company's goals or objects as one of the steps to ensure the accountability of the board of directors in the company's representatives.

The function of representation in the sense that when the directors represent the company both in and out of court, therefore the company is bound by transactions carried out by the directors for and on behalf of the company, and the possibility that the transactions carried out by the directors result in losses for the limited liability company, therefore the principle *of fiduciary duty* applies to the Company when performing its [9]representative functionsCompany. The obligation to perform must be accompanied by *good faith (te goeder trouw),*[10] this is because the Board of Directors is not personally responsible for the agreement made for and on behalf of the Company, which is of course a general principle to protect the Board of Directors, but this can only be applied if the Board of Directors carries out its duties in good faith.

The Board of Directors in carrying out its representation function, in accordance with Article 98 of Law No. 40/2007, requires the directors of a limited liability company to carry out their duties or defend their interests, both before a judge and outside the court, as stipulated in Article 1796 of the Civil Code, namely to conduct representation in front of and outside the court. The function of representing the company outside of court causes the company as a legal entity to be bound by contractual transactions carried out by the directors on behalf of and for the benefit of the company[11] . The principle of corporate representation outside of court, a transaction or contract made by the directors on behalf of and for the benefit of the company, then the company as a legal entity will automatically be bound.[12]The definition of an extrajudicial function means that the board of directors binds or enters into a contract with a third party to carry out the company's purposes and objectives. For purposes outside the law, the board of directors represents the company, both as a plaintiff and a defendant.

The duties of the representative of the board of directors cannot be carried out if the duties are related to the personal interests of the directors, as stipulated in Article 99 of Law No. 40/2007. This makes perfect sense, as it creates a conflict of interest: defending the rights of the Board of Directors as individuals and carrying out management and representative duties in the best interests of the limited liability company. The obligation to represent the company by referring to Article 84 of Law Number 1 of 1995 concerning Limited Liability Companies, which basically regulates members of the board of directors who are not authorized to represent the company in court related to cases between the company and the directors or directors concerned, who have interests that are contrary to the interests of the company.[13] The provisions of Article 84 of Law No. 1/1995 are now regulated in the same way in Article 99 paragraph (1 (Law No. 40/2007), and logically the board of directors cannot represent two different interests.

3.2. Responsibilities of the Board of Directors

The purpose and purpose of the company has 2 (two) aspects, namely on the one hand for the existence of a legal entity, and on the other hand as a restriction on the actions of a legal entity. [14]The goals and objectives of the company are actually the business field and how the directors benefit from the business field, the directors must not do business or act outside the business field. In the articles of association, the company's business field will be mentioned. Certainty regarding the company's business field and its efforts to run it can be ensured through the issuance of the company's approval. In Article 2 paragraph (1) letter a of Law No.19/2003 concerning SOEs, it is expressly stated that the establishment of a company is to pursue profits. Meanwhile, in Law No. 40/2007, it is not stated that the establishment of a company is to seek profit, but if it is understood that the board of directors can be held personally liable for the company's losses if in the management of the board of directors violates *fiduciary obligations, logically the purpose of a limited liability company is to make a profit as well. It can be understood that the author of Law No. 19/2003 expressly states that the establishment of a company is for profit, while in Law No. 40/2007,* the establishment of a limited liability company for profit is concluded by interpretation.

To understand the actions of the directors and the responsibilities of the directors in managing and

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[9] Munir Fuady, *Modern Doctrine in Company Law and Its Existence in Indonesian Law* (Bandung: Citra Aditya), pp. 185-186.

[10] M.Yahya Harahap, *Limited Liability Company*, Jakarta: PT. Sinar Grafika, 2009,. p.374.

[11] Munir Fuady, *Op.Cit*, p. 30.

[12] *Ibid*

[13] Misahardi Wilamarta, Shareholder Rights *in the Context of Good Corporate Governance*,. Depok: Postgraduate Program, Faculty of Law, University of Indonesia, 2005. p.2

[14] Fred B.G Tumbuan, "*Duties and Authorities of Limited Liability Company Organs According to the Limited Liability Company Law", paper presented at "Legal Socialization of Limited Liability Companies",* organized by the Indonesian Notary Association (INI) in Jakarta, August 22, 2022. pp. 7-8.

representing a limited liability company, it can be interpreted that the purpose and objectives of the company are 2 (two), namely the main action and the secondary action. The main action is to carry out the function of the activity as stated in the purpose and objectives as stated in the articles of association, while the secondary action of the board of directors can carry out the function of activities not only contained in the company's intentions and objectives, but also carry out activities that can facilitate its duties within the scope or boundaries[15] company. obligations. Thus, those who have an interest in the company may question this if it turns out that the company has suffered losses as a result of performing such secondary acts. The Board of Directors can carry out its duties outside the actions specified in the articles of association, as long as it does not violate laws and regulations, called *Ultra Vires.*

In carrying out their representation, the directors of a limited liability company may be involved in *Ultra Vires actions. The term Ultra Vires* is broadly defined to include acts prohibited by the Articles of Association, acts that go beyond the authority granted to it, and actions that are contrary to public order[16]. The definition of ultra vires is very broad because it can include any action that is contrary to the law, even concerning the public interest, which is actually the affair of the state. If the company performs an action outside or outside the scope of the articles of association, the company has taken *Ultra Vires action*. [17]If a company signs a contract in the field of insurance, even though its articles of association do not regulate the conduct of the insurance business, the company has acted ultra vires. [18]Action *Ultra Vires* is a Board of Directors that exceeds the provisions stipulated in the Company's Articles of Association and Bylaws. [19]Actions taken outside the scope of the company's intentions and objectives are essentially null and void, [20]which in judicial practice such actions are brought to court as unlawful actions to be annulled by seeking redress. Any act of a legal subject outside the limits of authority stipulated/regulated in the articles of association of the legal entity *(Ultra Vires)* is only binding on the members of the management who do it and must be responsible. The action is not binding on other members of the board of directors, unless they expressly consent to the *aforementioned Ultra Vires action* [21] . In this case, the division of authority and the limits of the authority of the Board of Directors are ensured. Regarding the binding of administrators, it is ultimately closely related to personal accountability for the actions *of Ultra Vires*.

The civil liability of a limited liability company director who manages and represents a limited liability company in connection with *the Business Valuation Rules*, was first practiced in the *American Common Law system*, in a shareholder *(shareholder*) lawsuit against the bank's managing director for civil liability.[22]The court acquitted the bank's directors on the grounds that they had met ordinary business standards.[23]

3.3. The Application of the Doctrine of Business Valuation Rules in the General Law System and the Civil Law System

In the United States which adheres to the Common Law system, the actions of the Board of Directors to administer and represent a Limited Liability Company are related to the doctrine of the Business Valuation Rules, which fall within business law or corporate law, and are therefore examined and tried as civil cases. Civil liability of the directors of a limited liability company that manages and represents a limited liability company in relation to: *The Doctrine of Business Valuation Rules* It is important to know, to ascertain how the regulation and/or elaboration of the doctrine on the responsibility of the directors who manage and represent a limited liability company in Indonesia is in accordance with the civil liability legal system as stipulated in Law Number 40 of 2007 concerning Limited Liability Companies.

In Indonesia, the civil liability of directors based on the Business Valuation Rules is regulated by Law No. 40/2007 concerning Limited Liability Companies. The Board of Directors is an organ of a limited liability company.[24] As a subject of law, the human or individual who manages and represents a limited liability company is a subject of law, not an individual called a legal entity. The company's business form can be in the form of a

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[15] I.G.Ray Widjaya, *Company Law with the Special Meaning of Law Number 1 of 1995*. (East Bekasi: Kesain Blane), p. 1
[16] Munir Fuadi*, Doctrine...., Op.Cit.* pp. 102-103
[17] Johnny Ibrahim, "*The Doctrine of Ultra Vires and Its Consequences from Its Application to Private Legal Entities",* Journal of Legal Dynamics, Vol. 11, May 2, 2011, p. 250. https://dinamikahukum.fhoensoed.ac.id>Article>Funny, retrieved 24 February 2024
[18] *Ibid*
[19] Chatamarrasjid, *Corporate Veil Breaking and the Real Corporate Question*. Bandung: PT. Aditya Citra Bakti, 2004. p. 40.
[20] Gunawan Widjaja & Kartini Muljadi, Born Alliance, Covenant, Jakarta: Trisakti University Publishers. 2017. p. 250.
[21] *Ibid*
[22] Gerard V.Mantese &; Emily S. Proposes "*Business Valuation Rules*," Michigan Bar Journal, January 2020, p. 31. *https://www.manteselaw.com/The %20Business%20Judgment$Rule20M*. retrieved February 18, 2024.
[23] *Ibid*, p. 373
[24] Republic of Indonesia*, Law Number 40 of 2007*, *Article 1 number 5*

legal entity or a non-legal entity. The form of a legal entity or legal entity carries the consequences of the responsibility of the owner (shareholder) to third parties[25]and the company's obligations to *non-shareholder*

stakeholders[26]. Members who include *Non-shareholder stakeholders are creditors, employees, and the public. Unsound company management will create a temptation to abuse positions that can be detrimental to stakeholders.*[27] The Board of Directors is in charge of managing the company, based on the principles of company management. The Board of Directors in managing a company must pay attention to governance as defined by the OECD (Organization *for Economic Co-operation and Development).* [28] *There are 5 (five) principles of company management, namely:* Transparency*, Accountability, Responsiveness,* Independence*, and Fairness*.[29] These five principles, if applied, will bring healthy company management. Explanations of these principles will be given one at a time. Transparency is about openness, both in the decision-making process and in the provision of material and relevant information about the company. *Accountability* is related to two (2) things, namely the clarity of the function and the implementation of organizational accountability, so that the company is managed effectively. Responsibility (Responsive) related to conformity in the management of the company with laws and regulations as well as the application and application of sound company principles. Independence is professional company management without *conflicts of interest and* influence/pressure from any party. If the company's management is unprofessional and there is a conflict *of interest*, or healthy company principles. In accordance with the explanation of Article 4 of Law No. 40/2007, the principle *of good corporate governance is one of the principles that must be adhered to by a limited liability company*. 3 (three) other principles are obtained, namely the principle of good faith, the principle of propriety and the principle of compliance.[30]

The Company must have the purpose and objectives as well as business activities that do not conflict with laws and regulations, public order and morality as stipulated in the general provisions in Article 2 of Law No. 40/2007. In the explanation of Article 18 of Law No. 40/2007, it is emphasized that the company's intentions and objectives must be detailed in the articles of association, meaning that there are a number of activities carried out by the company in achieving the company's goals and objectives. The inclusion of the company's intentions and objectives in the articles of association is a function of principle, because the company's intentions and objectives are the legal basis for the management of the company's board of directors. In this case, the contract made with the parties must not deviate from the articles of association. [31]

The Board of Directors in carrying out *fiduciary duties,* includes the obligation *of care* and always prioritizes the interests of the company (*duty of loyalty*), as well as *good faith*. The Board of Directors in carrying out their duties must be in accordance with the purposes and objectives of the limited liability company (intra vires). If the board of directors does not carry out their duties in accordance with the purpose and objectives of the limited liability company, then *said Ultra Vires*. The doctrine *of Business Valuation Rules* applies to the Board of Directors of a Limited Liability Company after an investigation into alleged breaches*, fiduciary obligations,* and bad faith and actions of *Ultra Vires.* The early days of *the doctrine of Ultra Vires* were practiced in England which adhered to a *common law system*, in the case *of Ashbury Railway Company and Iron Co. Ltd v Hector Riche (1875*) which was attributed to the capacity of directors to [32]the capacity of contractors. In this action, it is ascertained whether the actions taken by the directors to represent the company are in accordance with the Company's business field (the company's object), so that the board of directors has the capacity to take legal action against third parties or business partners, because the capacity in question is focused on the Company's business field, so that the capacity has been associated with the Company that has a business field.

The Ultra Vires *Action Benchmark* is the arrangement of the company's business area (object) in the Articles of Association e.g. *Ashbury Railway Company and Iron Co Ltd, in accordance with the Companies Act 1862,* the Business Sector *of Ashbury Railway Company and Iron Co Ltd*, i.e. borrowing or leasing carriages or anything relating to the leasing, sale of railway carriages.[33] So the focus was on the rental of carriages, something that made sense, because at that time the railways were still simple, but in fact the directors *of the Asbury Railway*

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[25] Sentosa Sembiring*, Limited Liability Company Law*, Bandung: CV. Aulia, 2006. pp.12-13

[26] Shishwant Sutoyo & A. Jho Aldries, *Good Corporate Governance,* Jakarta: P.T. Damar Mulia, 2008, p.

[27] *Ibid*

[28] *https://www.oecd,org, OECD is an international organization, whose goal is to work with policies for a better life*, accessed February 18, 2024

[29] Joni Emirzon, *The Principles of Good Corporate Governance A New Paradigm in Indonesian Business Practices*. Yogyakarta: Genta Press 2007,. pp. 96-98.

[30] Siti nurhasanah, Principles of Good Corporate Governance (GCG), Journal of Fiat Justice, Journal of Law of the University of Lampung, vol.4, number 2, September 2010.

[31] M. Yahya Harahap, *Ltd. Low Responsibility Company*, Jakarta, Sinar Graphic, 2009. p. 61

[32] Johnny Ibrahim, *Loc.Cit*., p. 244.

[33] Johnny Ibrahim, *Loc. Cit*., p. 245.

Chareholder) ompany and Iron Co Ltd instead made a contract or agreement with *Hector Riche* for the construction of the railway in Belgium, which was not included in the articles of association, [34] because the Company's business

is to rent railway cars, which means that the construction of the railway line is not in accordance with the business of *the Asbury Railway Company and Iron Co Ltd*, so it can be included in the *Ultra Vires category*. The shareholders (*shareholders) of the Ashbury Railway Company and Iron Co Ltd* disagreed with the contract and raised objections through an independent association, and *the House of Lords* said that building a railway was different from renting a railway carriage, as it was not the Company's area of business. The company did not have the capacity to produce trains, so the contract with *Hector Riche* to build the railway in Belgium was cancelled.

Hector Riche Decides not to be entitled to damages for breach of contract.[35]This case is very important, and can be a serious problem for third parties who, in carrying out their business in good faith, ultimately have to bear losses due to inaccuracies or actions of the company's directors who are partners or business partners.

Corporations represented by the board of directors that commit acts that exceed their authority and violate laws and regulations and articles of association are called *Ultra Vires.* 2 (two) theories related to the Doctrine *of Ultra Vires* of the Board of Directors were obtained, namely *the reality of authority and abuse of authority* related to the possibility of losses suffered by third parties due to the actions of the Board of Directors.[36] *Real authority*, that is, although the articles of association expressly state that the Board of Directors has no authority, a third party considers the Board of Directors to have perfect authority. For this reason, the directors in carrying out their duties must be in good faith. Meanwhile, in *the abuse* of power, that is, the directors as agents of the company and as *holders of fiduciary obligations*, have authority, it turns out that they do not abuse power in contracts with third parties.[37]

Indonesia as one of the countries that adheres to the civil law system, *the Doctrine of Business Valuation Rules* contained in Article 1 number 5 of Law No. 40/2007, stipulates that the Board of Directors carries out management and representative duties in accordance with the Company's Articles of Association and the Company's Articles of Association as the basis for decision-making in the GMS.

3.4. The Court's Decision on the Responsibility of the Board of Directors for the Management of State-Owned Companies that Suffered Losses

There are 2 (two) decisions, regarding the application of the Business Valuation *Doctrine* to companies limited to SOEs, where there is a difference in the content of the same decision based on *the Doctrine of Business Valuation Rules*. In decision Number 121 K/Pid.sus/2020. Jo. Decree Number 15/Pdt.sus/TPK/2019/PN.Jkt.Pst Jo. Decree Number 34/Pid.sus-Tpk/2019/PT DKI on behalf of Karen Agustiawan, this decree exempts the directors of limited liability companies from civil liability that manages and represents limited liability companies, while decree number 217/K.sus/2014. Jo Decision No. 41 PK/pid.sus/2015. Decision Jo No. 36/Pid.TPK.2012/PN. JKT. PST. on behalf of Hotasi D,P. Nababan, who is responsible for the company's losses.

In Decision No. 121K/Pid.sus/2020 Jo Decision No. 34/Pid.Sus-TPK/2019/PT. DKI. Jo15/Pid.sus-TPK/2019/PN. JKT. PST, on behalf of Karen Agustiawan who is in charge of taking action in managing and representing PT. Pertamina (Persero) and the President Commissioner of Pertamina Upstream Energy caused losses to the company. In the judge's legal considerations, it was examined about the application *of the Piercing the Corporate Veil Doctrine* that applies to the board of directors. The Public Prosecutor indicted Karen

Agustiawan as the president director of PT. Pertamina (Persero) together with other directors have enriched Roc Oil Company Limited (ROC.Ltd) Australia in the amount of Rp. 568,066,000,000 (five hundred and sixty-six billion) in connection with the Company's decision to allocate *10% Participating Interest (PI)* in the BMG Australia block which generates state finances. *Roc Oil Company Limited (ROC.Ltd)* as a legal entity whose characteristic is limited liability.

Corruption together, meaning that Karen Agustiawan as a member of the Board of Directors and other members of the Board of Directors are held accountable by interested parties in the company based on Article 97 paragraph (3) and paragraph (4) of Law No. 40/2007. The Public Prosecutor is jointly responsible for his actions in managing and representing legal entities, in accordance with the theory of collective legal responsibility. In accordance with the indictment of the Public Prosecutor, the interested party is the state as a shareholder represented by the public prosecutor, who according to the law of the company filing the lawsuit is a shareholder

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[34] Johnny Ibrahim, *Ibid*.
[35] *Ibid*
[36] Freddy Haris & Teddy Anggoro, *Limited Liability Company: Notification Obligations by the Board of Directors* (Jakarta: Ghalia Indonesia, 2010). p. 68.
[37] *Ibid.*

against the directors who are suspected of committing unlawful acts. Law No. 19/2003 on SOEs does not regulate the norm that shareholders can file a lawsuit against the company's board of directors, this is in accordance with the principles of Law No. 40/2007.

Central Jakarta District Court Decision Number 15/Pid.Sus/TPK/2019/PN. JKT. PST stated that Karen Agustiawan was guilty of taking legal action in managing and representing the company. The verdict stated that Karen Agustiawan was guilty of committing a criminal act of corruption, along with other members of the board of directors that harmed the state's finances. Karen Agustiawan was sentenced to 8 (eight) years in prison, and a fine of Rp. 1,000,000,000.00 (one billion rupiah), with the provision that a maximum prison sentence of 4 (four) years must be served if the fine is not paid. Regarding the authority of the limited liability company's board of directors to take legal action, the panel of judges concluded that Karen Agustiawan abused her authority in her position as the president director of PT. Pertamina (Persero) and President Commissioner of PT. Upstream Energy. The legal considerations of the Central Jakarta Court Judge with reference to Law No. 40/2007 are appropriate, because the principles and provisions in Law No. 40/2007 are applied in Law No. 19/2003.

The essence of Article 92 paragraph (1) of Law No. 40/2007 is the basis for the board of directors to make business decisions, namely the actions of the company's directors for the benefit of the company and in accordance with the company's objectives. The essence of Article 97 paragraph (2) of Law No. 40/2007 regarding how actions are taken, namely the implementation of management for the benefit of the company and in accordance with the intentions and objectives in good faith and full of responsibility is very important to be considered by the company's board of directors. The jury stated that in his position as President Director of PT. Pertamina (Persero) and President Commissioner of PT. Pertamina Hulu Energi is responsible for control, monitoring acquisition actions, and company evaluation and analysis. In *the Participating Interest* action, it was concluded that abuse of authority was found[38]. Regarding the authority with the company's losses, the Central Jakarta District Court Judge concluded that the actions of Karen Agustiawan as the President Director of PT. Pertamina (Persero) has harmed the state's finances and benefited third parties, in this case *ROC Ltd*. The Central Jakarta District Court judge conducted legal considerations, that the acquisition made by PT. Pertamina (Persero) in Basker Manta and Gummy Block (BMG) Australia in 2009 worth Rp. 568,066,000,000,- (five hundred and sixty-six billion) resulted in state financial losses.

The legal considerations of the Central Jakarta District Court Judge are correct, using the legal norms of Law No. 40/2007, but it is a norm in civil law, but Karen Agustiawan was examined and tried in a criminal case. Law No. 40/2007 does not contain criminal sanctions for violations of norms in Law No. 40/2007, criminal sanctions can be found in other laws and regulations. On this decision, both parties, namely the Public Prosecutor and Karen Agustiawan, appealed to the Jakarta High Court. In the appeal decision Number 34/Pid-Sus-TPK/2019/PT. Jakarta upheld the Central Jakarta Court's decision, then the Public Prosecutor and Karen Agustiawan both filed an appeal. Based on Cassation Decision Number 121K/Pid-Sus/2020, the cancellation of the Decision of the DKI Jakarta High Court which in its lawsuit rejected the appeal from the Public Prosecutor, granted the appeal from Karen Agustiawan, stating that Karen Agustiawan was proven to have committed the act as charged by the Public Prosecutor, but the act did not constitute a criminal act, releasing the Defendant (Karen Agustiawan) from all lawsuits. In legal considerations, the Supreme Court stated that the losses suffered by PT. Pertamina Hulu Energi as a subsidiary of PT Pertamina (Persero) is not subject to Law Number 17 of 2003 concerning State Finance and Law Number 19 of 2003 concerning SOEs. Furthermore, other legal considerations state that the steps taken by the Defendant (Karen Agustiawan) as the President Director of PT. Pertamina (Persero) and President Commissioner of PT. Pertamina Upstream Energy does not go out of the realm of *Business Judgement Rule*.

From the legal considerations of the Supreme Court that examined and tried Karen Agustiawan for two positions in two legal entities, the doctrine of business valuation rules is actually focused on the legal actions of the directors. With these legal considerations, the steps taken by Karen Agustiawan as the president director of PT. Pertamina (Persero) and President Commissioner of PT. Pertamina Upstream Energy must be proven by opening everything or related to the action of determining *the Participating Interest (PI)* of BMG Blok Australia. As such, the principle of business valuation rules is essential to ensure Karen Augustiawan's action on the Participating Interest in ROC Ltd. BMG Block Australia.

In the second case, Karen Agustiawan is still serving as the president director of PT. Pertamina was sentenced to 9 years in prison and a fine of Rp 500,000,000 (five hundred million rupiah) for the loss of LNG procurement which resulted in losses of up to Rp 2.1 trillion in prison, as stated in Decision No. 12/Pid Sus-TPK/2024/PN.JKT.PSt, which was corroborated by Decision No. 41/PID. SUS-TPK/2024/PT. DKI and cassation decision No. 1076/K/PID. Sus/2025 worsens Karen Agustiawan's prison sentence to 13 (thirteen) years.

[38] Decree Number 15/Pid.Sus/TPK/2019/PN. JKT. PST

For comparison, in the application of the rules of Business Decisions, Decree Number 41PK/Pid.Sus/2015, Decision Jo Number 217K/Pid.sus/2014. Decision Jo No. 36/Pid.TPK/2012/PN. JKT. PST, on behalf of Hotasi D.P. Nababan. In the main indictment, the Public Prosecutor (JPU) charged Hotasi D.P Nababan as President Director of PT Merpati Nusantara Airlines (MNA) together with Tony Sudjiarto as General Manager for violating Article 2 paragraph (1) Jo. Article 18 paragraph (1) letter b of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes which has been amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption, Jo. Article 55 paragraphs (1) to 1 of the Criminal Code. In essence, D.P. Nababan's Hotasi action on the plan to lease Boeing 737-400 and Boeing 737-500 aircraft from *the Thirstne Aircraft Leasing Group (TALG)* can enrich themselves or other people or corporations so that they harm the state's finances.

In the additional indictment, the prosecutor charged Hotasi D.P. Nababan with Tony Sudjiato as General Manager for violating Article 3 Joarticle 18 paragraph (1) of Law No. 31/1999 concerning the Eradication of Corruption Crimes which has been amended by Law No. 20/2001 concerning Amendments to Law No. 31/1999 Jo. Article 56 paragraph (1) to -1 of the Criminal Code. The point is the action of Hotasi D.P. Nababan over the plan to lease Boeing 737-400 and Boeing 737-500 aircraft from *Thirstne Aircraft Leasing Group (TALG)* which can enrich themselves or other people or corporations by abusing their positions or authority to the detriment of the state's finances. From the indictment, it can be ascertained that regarding the management and representation of a limited liability company and civil liability regulated in Article 1 number 5, Article 92 paragraph (1) and paragraph (2), article 97 of Law No. 40/2007 is not only requested by the board of directors, including persons or legal subjects related to or involved in such legal actions.

The indictment against Hotasi D.P. Nababan was filed because the lease of 2 (two) aircraft, namely Boeing 737-499 and Boeing 737-500, was not carried out from TALG, even though PT MNA had paid *a Security Deposit* of US$ 1000,000.00 to TALG in cash to *Hume & Associates* (a law firm). The indictment alleges that Hotasi D.P. Nababan's actions were unlawful because *the Security Deposit* was used for the upfront payment of TALG's purchase of Boeing B 737-500 aircraft to *East Dover Ltd*. This action is contrary to the principles of *Good Corporate Governance* as stipulated in Article 5 paragraph (3) of Law No. 19/2003 concerning SOEs. These principles are, transparency, efficiency. Professionalism, accountability, accountability and fairness. In addition, the actions of Hotasi D.P. Nababan are also contrary to the Decree of the Minister of Finance No. Kep.116/KMK.01/1991 and the Decree of the Minister of SOEs Number 101/MBU/2002 concerning the Preparation of Work Plans in Article 3 letter e Ko. Another appendix to section number 8.

In the decision of the Central Jakarta District Court Number 36/Pid.TPK.2012/PN. JKT. PST. It was stated that Hotasi D.P. Nababan was not legally and convincingly proven guilty of the crime of corruption and acquitted the Defendant Hotasi D.P. Nababan of all charges. In connection with legal considerations, Hotasi D.P. Nababan as the President Director of PT. MNA leased the Boeing 737-400 and Boeing 737-500 aircraft by making a *Security Deposit* payment of US$ 1,000,000.00 to TALG in good faith, carefully in accordance with the interests of PT MNA[39] De which is in charge of ascertaining whether or not the doctrine of business valuation rules applies to the business decisions of the board of directors. With these legal considerations, the board of directors has carried out management in good faith, carefully in accordance with the interests of PT. MNA, which is part of *the fiduciary duty* to ascertain whether *or not the doctrine of the Business Valuation Code is upheld* on the business decisions of the Board of Directors.

Regarding the action of Hotasi D.P. Nababan who made a bail payment of US$ 1,000,00.00 to TALD who was accused of benefiting himself or the corporation with a payment deposited to *Humes & Partners*, the judge of the Central Jakarta District Court made a legal consideration, payment *of the Security Deposit* as a continuation of the agreement between PT. MNA with TALD to lease Boeing 737-400 and Boeing 737-500 aircraft to PT. The Judge's legal considerations stated that the *payment of the Securities deposit* of US$ 1,000,000.00 by PT. MNA is deposited into *the Humes&M account; Partners*, law offices trusted by PT MNA and TALG *can be returned*.[40]

The refundable nature means that Hotasi D.P. Nababan who issues or pays a sum of money to another party in this case to *Humes & Associates*, for the planned lease of Boeing 737-400 and Boeing 737-500 aircraft, will get a refund at a later date if the performance in the agreement, in accordance with Article 1234 of the Civil Code is not carried out. Actually, with *its reversible nature*, this is an effort to prevent losses for the company as one of the reasons for exemption from legal liability. The panel of judges of the Central Jakarta District Court stated that Hotasi D.P. Nababan knew that the *Security Deposit would be used* by *TALD* as an advance to *East Dower*, but

[39] Decree Number 36/Pid.TPK.2012/PN. JKT. PST. p.114
[40] *Ibid*, p. 122

did not eliminate the *refundable nature*, even though TALD ultimately did not return the money.[41] The panel of judges of the Central Jakarta Court is of the opinion that D.P. Nababan as the president director of PT. MNA plans to lease the Boeing 737-400 and Boeing 737-500 aircraft and provide *a security deposit of US$ 1,000,000.00 to TALD* in good faith, with care in accordance with the company's interests. Payments are based on information available at the time of decision-making. Thus the elements that violate the law are related to the actions of Hotasi.D.P. The cause of the violation that is considered careless and violates *good corporate governance* is not legally proven.[42]

In the examination of the case, it was not found that the payment of the *Security Deposit of US$ 1,000,000.00 was related to the interests of Hotasi D.P. Nababan or did not have a* conflict of interest. A conflict of interest is the substance of a loyalty obligation that is part of *a fiduciary duty.* On the basis of these legal considerations, the Central Jakarta District Court Judge released Hotasi D.P. Nababan from legal responsibility for the management and representation of the Boeing 737-400 and Boeing 737-500 lease plans. Based on the decision, the Public Prosecutor (JPU) submitted a legal remedy to the Supreme Court of the Republic of Indonesia. The Supreme Court granted the Public Prosecutor's application and canceled the Central Jakarta District Court Decision Number 36/Pid.TPK.2012/PN. JKT. PST. With Cassation Decision number 217K/Pid.sus/2014 which states that the Defendant Hotasi D.P. Nababan is legally and convincingly proven to have committed the crime of Corruption together, imposing a sentence of 4 (four) years in prison and a fine of Rp. 200,000,000.00 (two hundred million rupiah).

Hotasi D.P. Nababan as President Director of PT. MNA has long planned the procurement of leases to strengthen its fleet in an effort to improve the financial performance of PT. MNA. The availability of aircraft is something important and decisive in the aviation business. The Boeing B 737-400 and Boeing B737-500 lease plans, are legal actions in accordance with the company's intentions and objectives or *intra vires actions.* The Board of Directors is obliged to make business decisions in the management of the company in accordance with the company's purposes and objectives as stipulated by the articles of association. From the legal considerations of the Central Jakarta District Court Judge, the action is to improve the financial performance of PT. The MNA with the strengthening of the fleet has long been planned with the intention (*Mens Rea*) of Hotasi D.P. Nababan.[43]However, the act of Hotasi D.P. Nababan that was carried out did not meet the requirements of formality or process, so it can be categorized as an unlawful act, this is in accordance with the legal considerations of the Supreme Court which states that:*The Defendant as the President Director of PT. The MNA does not report or propose changes or amendments to the GMS after the approval of the previous GMS....*[44]

The cassation judge considered, regarding the decision making of the leasing of Boeing B737-400 and Boeing B737-500 aircraft, to ensure the application of *the Business Valuation Rules*, by examining the decision-making process. Legal considerations state that Hotasi D.P. Nababan as the President Director of PT. MNA does not report or propose changes or resubmit changes to the General Meeting of Shareholders (GMS). The GMS is an organ of the Company that has the authority to decide on the implementation of the Company's intentions and objectives. These goals and objectives have been started since 2006. The aircraft was once approved for the planned lease of the Boeing B737-400 and Boeing B737-500 aircraft, as it had to be re-approved by GMS. Several things were obtained in the legal considerations of the cassation judge to ensure the enforceability of *the Business Decision Rules*:

1. Regarding the obligation of the board of directors to make business decisions in the management of the company based on the provisions of laws and regulations and articles of association or *intra vires actions*. The Board of Directors is obliged to make business decisions in the management of the company in accordance with the company's purposes and objectives as stipulated by the articles of association. Business decisions, i.e. aircraft leasing plans must be in accordance with the company's intent and objectives or *intra vires actions*.
2. The prudential measures of the directors in ensuring that the business decisions taken are safe for the company, do not violate *fiduciary obligations.* Both relate to *intra vires actions, the fiduciary duty* to ensure that the doctrine of *business valuation rules* applies or not to D.P. Nababan Hotasi. For the fulfillment of formalities or procedures in business decisions, the directors must be careful in ensuring a safe decision for the company in conducting transactions with third parties, in accordance with *fiduciary obligations.* In the case of a relationship, the director needs to obtain or obtain adequate information, in the broadest sense, of the rules or regulations relating to the business act or decision.

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[41] *Ibid*
[42] *Ibid*
[43] Decision No. 36/Pid.TPK.2012/PN. JKT. PST, p.114
[44] Verdict. 417 K/Pid.Sus/214. p. 58

The cassation judge ruled that Hotasi D.P. Nababan had committed an unlawful act by not following and/or not taking standard actions in making transactions or payments in the lease of Boeing B737-400 and Boeing B737-500 aircraft. The legal considerations are*: ".... pay a security deposit of US$. 1,000,000.00 not by Letter of Credit or Escrow Account, but in cash paid to PC Hume & PC account; Associates, even if there is no Purchase*

Agreement.....[45]. From the above legal considerations, when it comes to the doctrine of *penetrating the company's veil,* Hotasi D.P Nababan turns out to have made *a cash payment to the account of PC Hume & associates,* without a guarantee of refund if the purchase of Boeing B 737-400 and Boeing B 737-500 aircraft is not completed, even TALG has not purchased Boeing B737-400 and Boeing B737-500 aircraft from *East Dower* to be leased by PT. D.P. Nababan's failure to pay the *Security Deposit* of US$ 1,000,000.00 before signing the *Purchase Agreement* is a breach *of fiduciary duty*, namely carelessness and carelessness in guaranteeing the risk *of legitimate paymentThe Security Deposit of US$ 1,000,000.00* for the lease of Boeing B737-400 and Boeing B737-500 aircraft. Hotasi D.P. Nababan also committed an unlawful act as in the judge's legal consideration, because it violated Article 22 paragraphs (11) and (2) of Law No. 19/1003 concerning SOEs Jo. Article 35 paragraphs (1) and (2) of Government Regulation No. 45 of 2005 concerning the Establishment, Management and Dissolution of SOEs which is the implementing regulation of Law No. 19/2003.

In Article 22 paragraph (1) of Law No. 19/2003, it is stipulated that the Board of Directors is obliged to prepare a draft work plan and company budget which is an annual and long-term elaboration, which is then submitted to the GMS (Minister) for approval. In Article 35 paragraphs (1) and (2) of Government Regulation Number 45 of 2005, the Board of Commissioners/Board of Supervisors as an organ of the company signs the Work Plan and State Revenue and Expenditure Budget (RKAP) as a condition for obtaining approval from the GMS. The signing of the RKAP can be categorized as sufficient information, to perform the core business actions of *the maintenance tasks.* The submission of the RKAP is a requirement to obtain the approval of the GMS as one of the processes for implementing *the Business Decision Rules*. If the planned lease of Boeing B737-400 and Boeing B737-500 aircraft is included in the RKAP, then it is an intra-vires action, but it must still be ensured related to the *Security Deposit* of US$ 1,000,000.00.

Hotasi's action argument, D.P. Nababan, stated that his action qualifies as a civil legal action, because the plan to lease Boeing B737-400 and Boeing B737-500 aircraft to *TALG,* is for and on behalf of PT. MNA as a legal entity that carries out civil legal actions and *TALG* is a civil legal entity that already has a *Certificate of Establishment.* With this decision, it means that *the Doctrine of Business Valuation Rules* does not apply to Hotasi D.P. Nababan, but in fact his actions are actually not a criminal act, if it is based on the substance of civil law, namely regarding the relationship of persons or legal subjects of PT MNA who transact business with *TALG* as a legal entity. If the planned lease of the Boeing B737-400 and Boeing B737-500 aircraft is included in the RKAP and has been separated, but *the US$ 1,000,000.00 Security Deposit is not returned by TALG, even though the clause is refundable,* it is likely that the Panel of Judges of Cassation will likely make a different legal consideration, by applying *the rules of business valuation doctin,* i.e., if the company suffers a loss, and the Board of Directors breaches *fiduciary* In carrying out its duties, *the Doctrine of Business Valuation Rules will be applied.* For this reason, the board of directors must be responsible for it, and as an organ of the company, the responsibility of the board of directors to third parties becomes very relevant.

3.5. The Contradiction of the Application of Sanctions Against the Management Directors of State-Owned Companies that have Suffered Losses

There is a contradiction between regulations in private law and public law, especially in the management of SOEs in the form of limited liability companies. If the company suffers losses and results in state losses, then state losses bring consequences for alleged corruption crimes, as stipulated in Law Number 31 of 1999 which was updated with Law Number 20 of 2021. As a result, the board of directors will be held accountable for these losses as a criminal act of corruption.

Meanwhile, in the provisions of civil law, the management of a company does not distinguish between SOE and non-SOEs, the regulation is the same as that stipulated in Law Number 40 of 2007 concerning Limited Liability Companies, Article 97 paragraph (5) which stipulates that members of the board of directors cannot be held liable for losses if they can prove that the losses are not due to their fault, has conducted management in good faith and prudence for the interests and in accordance with the Company's intentions and objectives, has no direct or indirect conflict of interest in management actions that result in losses, and has taken steps to prevent the occurrence or continuation of losses.

[45] *Ibid*

Contradictions can be seen in the criminal case on behalf of Karen Agustiawan who serves as the director of Pertamina's SOEs as stated in Decree number 15/Pid, Sus/TPK/2019/PN.Jkt.Pst Jo. Decree number 34/Pid-sus/TPK/2919/PT. DKI Decree Jo. 121K/Pid.Sus/2020. In the decision of the First Agency: Declaring that the Defendant Ir. Karen Agustiawan is legally and convincingly proven to have committed the crime of "Joint Corruption Crime" as in the Additional Indictment; Similarly, in the appeal decision that upheld the first-instance decision, but in cassation annulled the High Court's decision, where Karen Aguswan's actions did not constitute a criminal offense, acquitting the Defendant from all lawsuits. The panel of cassation judges has applied the rules of Business Decision in this case, but it turns out that in the second case which was also carried out by Karen Agustiawan as the president director of PT. Pertamina is

Meanwhile, the same case regarding the management of SOEs that suffered losses but the content of the decision was different, namely the management of PT. Merpati Nusantara.As in decision number 36/Pid.TPK.2012/PN. JKT. PST on behalf of D.P. Hotasi Nababan, the board of directors who manages and represents PT. Merpati Nusantara Air Lines (PT. MNA) which is a state-owned enterprise. In the verdict, it is stated that the Defendant is Hotasi. D.P Nababan **was not legally and convincingly proven guilty of committing a criminal act of corruption**, but in the cassation decision, Decision number 217K/Pid.Sus/2014, **annulled the decision of the court of first instance and stated that the defendant Hotasi D.P. Nababan was legally and convincingly guilty of committing the crime of "joint corruption"**, then in the PK Decision No.41PK/Pid.Sus/2015 **rejecting the PK's application, so that D.P. Hotasi Nababan's actions remain a criminal offense.**

Of the two cases that have similarities, regarding the management of SOE companies that suffered losses, one of them is the state-owned company Pertamina which acquitted Karen Agustiawan in the Cassation decision, because it was stated by the panel of judges that Karen Agustiawan's actions were not criminal acts but civil actions that applied the doctrine of Business Decision Rules, while for the case of Hotasi Nababan, acts of harm to the state are criminal offenses. and there was no legal consideration from the judge in applying the doctrine *of Business Valuation Rules* to the case of D.P. Hotasi Nababan in the management of SOEs that suffered losses at PT. Merpati Nusantara Air Lines (PT MNA)

4. Conclusion

a. Indonesia as a country that adheres to the Civil Law system, written regulations are the main source of law, this has consequences for the management of limited liability companies, especially the Board of Directors that manages state-owned companies. The regulation of SOEs is not only with Law Number 40 of 2007 concerning Limited Liability Companies, but also Law Number 19 of 2003 concerning SOEs which has been perfected by Law Number 1 of 2025, Law Number 17 of 2003 concerning State Finance, Law Number 31 of 1999 concerning Corruption Crimes Jo. Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Corruption Crimes. Thus, the losses of state-owned companies become the examination and responsibility of the directors not only from a civil but also criminal side. If a state-owned company suffers losses, then the board of directors is considered to have committed a criminal act of corruption, whether the Doctrine of Business Valuation Rules is applied does not depend on the legal considerations of the panel of judges. With the issuance of Law No. 1/2025, there has been a paradigm shift from government valuation rules to business valuation rules so as to provide stricter legal protection for SOE managers, so that directors can act more actively as managers without worrying about being criminally investigated for losses that may arise if they have carried out their duties according to good professional standards, and still maintain a responsible relationship with the state.

b. There is a contradiction in the application of the Doctrine of Business Valuation Rules in Indonesia. This is based on Decision No.121K/Pid.Sus/2020, Decision Jo No.34/Pid.Sus-TPK/2019/PT. DKI, Decision Jo No. 15/Pid.Sus/TPK/2019/PN. JKT. PST, on behalf of Karen Agustiawan, what is important in this case is the action of the directors over business decisions that cause losses to PT. Pertamina (Persero) was settled in the context of a criminal act. After conducting a thorough examination, the cassation judge made a legal consideration that Karen Agustiawan's actions were not a criminal act. In its legal considerations, its directors and staff are not outside the realm *of the Business Valuation Rules* which are civil legal actions. However, in the second case, it is also about the losses of PT. Pertamina Karen Agustiawan is still being sentenced to a criminal act in accordance with Decision No. 12/Pid Sus-TPK/2024/PN.JKT.PSt, which was confirmed by Decision No. 41/PID. SUS-TPK/2024/PT. DKI and cassation decision No. 1076/K/PID. Sus/2025 worsens the prison sentence to 13 (thirteen) years. Meanwhile, Decision No. 217K/Pid.Sus/2014, Jo. Decision No.

41PK/Pid.Sus/2015 Jo. Decision No. 36/Pid.TPK.2012/PN. JKT. PST, on behalf of Hotasi D.P. Nababan, the legal considerations of the Cassation Judge stated that Hotasi D.P. Nababan was not careful in carrying out his duties to manage and represent the Company, there were 2 (two) careless things, namely: First, not being careful in leasing Boeing B737-400 and Boeing B737-500 aircraft, because it is not in the Company's Work Plan and Budget in accordance with Article 22 paragraph (2) of Law No. 19/2003 Jo. Article 35 paragraph (1) and (2) of Government Regulation Number 45 of 2005 concerning the Establishment, Management, Supervision and Dissolution of SOEs as one of the business implementation processes Doctrinal assessment rules. Second, the security deposit of US$. 1,000,000.00 cannot be disbursed, despite the guarantee of Hume &; Partner. The Cassation Judge gave legal considerations that the Security Deposit is silent, only as a guarantee if in the future business transactions do not occur in accordance with the Decree of the Minister of Finance Kep. 116/KMK.01/1991.

Based on the criminal verdict on behalf of Karen Agustiawan and Hotasi D.P. Nababan, in the management of state-owned companies, the application *of business valuation rules* depends on proving whether there are aspects of prudence and goodwill of the directors in managing the company, for that it proves whether there is an error of the directors for the company's losses will be proven through criminal law, even though managing the company is an action regulated in business law or civil law.

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Konstruksi Kesalahan Korporasi sebagai Arsitektur Perdagangan Satwa Liar Jaringan Transnasional Melalui Teori Psikopati

Corporate Fault Construction As The Architecture Wildlife Trade In Transnational Networks From A Psychopathy Theory Perspective

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Abstract

The illegal wildlife trade is transforming into a complex and organized form of transnational crime, no longer dominated by individual perpetrators, but increasingly involving corporations as strategic actors. This article analyzes how corporations play a role as the architecture of the transnational network wildlife trade and how psychopathic theories construct corporate wrongdoing in the domain. This research is designed with a type of socio-legal research that not only uses the basis of legal theory approaches, but also combines it with the approaches of other disciplines, such as criminology and psychology. The results show that corporate involvement in transnational network wildlife trade is not incidental, but systematic and structured, utilizing legitimate business mechanisms to disguise its illegal activities. The findings of the study also confirm that psychopathic theory is relevant in explaining the construction of corporate wrongdoing that conducts the cross-border wildlife trade, such as the absence of empathy, the absence of guilt, and the absence of moral and social responsibility. Therefore, a complex criminal accountability approach is needed to address corporate crime in the domain, strengthened through the Mutual Legal Assistance (MLA) mechanism to overcome jurisdictional barriers and support cross-border evidence collection against corporations.

Abstrak

Perdagangan satwa liar ilegal bertransformasi menjadi bentuk kejahatan transnasional yang kompleks dan terorganisasi, tidak lagi didominasi oleh pelaku individual semata, tetapi semakin melibatkan korporasi sebagai aktor strategis. Artikel ini menganalisis bagaimana korporasi berperan sebagai arsitektur perdagangan satwa liar jaringan transnasional dan bagaimana teori psikopati mengonstruksi kesalahan korporasi dalam domain tersebut. Penelitian ini dirancang dengan tipe *socio-legal research* yang tidak hanya menggunakan basis pendekatan teori hukum semata, tetapi juga memadukannya dengan pendekatan disiplin ilmu lain, seperti kriminologi dan psikologi. Hasil penelitian menunjukkan bahwa keterlibatan korporasi dalam perdagangan satwa liar jaringan transnasional tidaklah bersifat insidental, tetapi bersifat sistematis dan terstruktur, dengan memanfaatkan mekanisme bisnis yang sah untuk menyamarkan aktivitas ilegalnya. Temuan penelitian juga menegaskan bahwa teori psikopati relevan dalam menjelaskan konstruksi kesalahan korporasi yang melakukan perdagangan satwa liar lintas negara, seperti ketiadaan empati, ketiadaan rasa bersalah, dan tidak adanya tanggung jawab moral serta

sosial. Oleh karena itu, diperlukan pendekatan pertanggungjawaban pidana yang kompleks terhadap penanggulangan kejahatan korporasi dalam domain tersebut, yang diperkuat melalui mekanisme *Mutual Legal Assistance* (MLA) guna mengatasi hambatan yurisdiksi dan mendukung pengumpulan bukti lintas negara terhadap korporasi

1. Pendahuluan

Perdagangan terhadap satwa liar yang terancam punah merupakan salah satu aspek pencurian sumber daya alam. Aktivitas perdagangan satwa liar dan bagian-bagiannya dipengaruhi oleh tingginya permintaan konsumen, jaringan lintas batas, dan penegakan hukum yang tidak merata. Permintaan produk satwa liar yang mencapai rekor tertinggi, ditambah dengan langkah-langkah pencegahan yang tidak memadai dan lembaga yang lemah, telah mengakibatkan berkembang pesatnya perdagangan gelap satwa liar dalam beberapa tahun terakhir.[1] Ribuan spesies satwa liar diperdagangkan, baik di pasar domestik maupun global karena berbagai alasan. Misalnya, bagian tubuh hewan banyak diperdagangkan secara masif untuk digunakan dalam pengobatan tradisional di Asia dan Afrika.[2] Di antara bagian tubuh tersebut seperti cakar beruang, sirip hiu, burung liar (khususnya burung penyanyi), diperdagangkan untuk dikonsumsi sebagai makanan lezat di Asia dan Eropa.[3] Kulit dan sisik hewan digunakan sebagai pakaian, sementara bagian tubuh hewan lainnya digunakan sebagai aksesoris. Terakhir, hewan liar sering dijual hidup-hidup kepada kolektor pribadi dan sirkus sebagai hewan peliharaan.[4] Perdagangan ilegal satwa liar ini, diperkirakan mencapai $20 miliar setiap tahunnya.[5]

Indonesia merupakan negara kepulauan dengan kisaran sekitar 17.000 pulau dan panjang garis pantai kurang lebih 95.181 kilometer.[6] Kondisi geografis tersebut menjadikan Indonesia memiliki tingkat keanekaragaman hayati yang sangat tinggi, sehingga diakui sebagai salah satu negara dengan biodiversitas terbesar di dunia.[7] Kekayaan hayati ini meliputi beragam jenis flora dan fauna, termasuk berbagai spesies satwa liar yang hidup di kawasan hutan, perairan, maupun wilayah udara.[8] Namun demikian, keberagaman tersebut menghadapi ancaman yang signifikan akibat aktivitas manusia, khususnya perburuan serta perdagangan ilegal satwa liar yang dilindungi.[9]

Pada tahun 2025, Kementerian Kehutanan (Kemenhut) berhasil mengungkap dan menggagalkan upaya perdagangan bagian tubuh satwa yang dilindungi, termasuk cula badak, yang melibatkan seorang warga negara asing asal Tiongkok di Bandara Internasional Sam Ratulangi, Manado, Sulawesi Utara.[10] Selain itu, perkembangan terbaru menunjukkan bahwa praktik penyelundupan satwa liar semakin meluas. Pemerhati Lingkungan dan Satwa Liar Aceh, Tezar Rahlevi, mengungkapkan bahwa perdagangan satwa liar tidak lagi hanya menyasar pasar domestik, khususnya di Pulau Jawa, tetapi juga telah menjangkau pasar internasional seperti

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Thailand, Vietnam, hingga kawasan Timur Tengah.[11]

Fenomena ini menunjukkan bahwa perdagangan satwa liar telah berkembang menjadi kejahatan lintas negara yang terorganisasi. Lebih jauh, pelaku kejahatan ini tidak terbatas pada individu, melainkan juga melibatkan entitas korporasi.[12] Dalam hal terjadi perdagangan satwa liar ilegal oleh korporasi, selama ini peraturan hukum yang digunakan untuk menindak korporasi tersebut adalah Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang (UU TPPU). Penggunaan undang-undang tersebut disebabkan oleh keterbatasan pengaturan dalam Undang-Undang Nomor 5 Tahun 1990 tentang Konservasi Sumber Daya Alam Hayati dan Ekosistemnya (UU Konservasi SDAHE), yang belum mengakui korporasi sebagai subjek hukum. Pengakuan korporasi sebagai subjek hukum dalam konteks perdagangan ilegal satwa liar, baru secara tegas diakomodasi melalui Undang-Undang Nomor 32 Tahun 2024 yang merupakan perubahan UU Konservasi SDAHE. Bahkan, undang-undang *a quo* secara eksplisit memberikan definisi mengenai korporasi, sehingga memperkuat dasar hukum pertanggungjawaban pidana korporasi dalam kejahatan perdagangan satwa liar.[13]

Pembaruan UU Konservasi SDAHE secara parsial tersebut, mensejajarkannya dengan berbagai undang-undang sektoral lainnya yang mengakomodir korporasi sebagai subjek hukum, seperti Undang-Undang Lingkungan Hidup, Undang-Undang Kehutanan, dan yang terbaru KUHP Nasional. Persoalannya saat ini, bagaimana implementasi ketentuan UU Konservasi SDHE oleh aparat penegak hukum dalam menjawab tantangan di lapangan. Dalam praktik, kasus perdagangan satwa liar yang melibatkan korporasi, sering berakhir tanpa proses hukum yang memadai terhadap korporasi, melainkan hanya terhadap individu bawahan atau pekerja lapangan.[14] Pola ini menunjukkan adanya kecenderungan reduksi kompleksitas kejahatan korporasi menjadi kesalahan personal semata, sehingga mengaburkan peran struktur, kebijakan internal, dan desain organisasi korporasi dalam memungkinkan terjadinya tindak pidana.[15]

Salah satu faktor krusial yang menjelaskan kondisi tersebut adalah problem penentuan kesalahan korporasi (*corporate fault*). Aparat penegak hukum masih menghadapi kesulitan dalam mengonstruksikan kesalahan korporasi sebagai kesalahan yang bersifat struktural dan sistemik.[16] Pemaknaan mengenai konsep kesalahan korporasi menyebabkan pembuktian unsur kesalahan sering kali dipersempit pada adanya perintah langsung dari pimpinan tertinggi korporasi.[17] Akibatnya, meskipun secara normatif korporasi telah diakui sebagai subjek hukum pidana, penegakan hukumnya masih terjebak pada paradigma konvensional yang berorientasi pada pelaku manusia (*natural person oriented*).[18] Tanpa pergeseran paradigma dalam mengonstruksi kesalahan korporasi, pembaruan UU Konservasi SDAHE berisiko menjadi sekadar harmonisasi formal yang tidak menyentuh akar persoalan kejahatan korporasi dalam perdagangan ilegal terhadap satwa liar. Situasi ini membuka ruang yang luas bagi korporasi untuk melakukan kejahatan perdagangan satwa liar dengan risiko hukum yang sangat rendah, khususnya dalam hal penegakannya.[19]

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[18] Alexander Sarch, "Collective Knowledge and the Limits of the Expanded Identification Doctrine," *Oxford Journal of Legal Studies* 44, no. 4 (November 2024): 939–940, https://doi.org/10.1093/ojls/gqae025.

[19] Ahmad Yusup dan Sigid Riyanto, *Limited Diversion Sanction (Sanksi Pengalihan Terbatas) dalam Tindak Pidana Korupsi untuk Korporasi*, (Cetakan Ke Dua) (Yogyakarta: Pustaka Pelajar, 2026), 142.

Dalam banyak kasus, korporasi memanfaatkan kelemahan sistem regulasi, baik secara nasional maupun internasional.[20] Dalam banyak penelitian, hingga saat ini regulasi dan penegakan hukum belum cukup untuk secara efektif mengendalikan perdagangan satwa liar ilegal global di tingkat nasional dan internasional.[21] Hal ini disebabkan, terdapat tiga hal penting yang menjadi faktor penghambat. *Pertama,* perbedaan regulasi antarnegara menyebabkan sulitnya harmonisasi penegakan hukum. *Kedua,* kejahatan lintas negara memerlukan mekanisme ekstradisi, *mutual legal assistance*, dan kerja sama internasional yang kompleks. *Ketiga,* pelaku korporasi sering memanfaatkan yurisdiksi tertentu yang memiliki regulasi lemah. Akibatnya, korporasi kerap luput dari jeratan hukum karena kompleksitas persoalan hukum yang ada, baik dalam rezim hukum nasional maupun internasional.[22]

Transformasi kejahatan satwa liar dari bentuk sederhana menjadi *corporate-enabled transnational crime* (kejahatan transnasional yang dimungkinkan dilakukan oleh korporasi) ini, menuntut penyusunan kebijakan hukum yang tidak hanya berfokus pada pelaku individu, tetapi juga pada struktur korporasi sebagai entitas hukum. Oleh sebab itu, korporasi dalam revisi UU Konservasi SDAHE, masuk sebagai subjek yang dapat dimintakan pertanggungjawaban pidana ketika melakukan perdagangan satwa liar secara *illegal*.[23] Dalam mengimplementasikan ketentuan tersebut, diperlukan sinergitas antar aparat penegak hukum, baik dalam maupun luar negeri. Hal ini disebabkan, korporasi memiliki kemampuan untuk mempengaruhi struktur pasar, menyediakan basis logistik, melaksanakan penyamaran legalitas, dan memfasilitasi transfer lintas negara dalam jumlah besar, di mana hal tersebut merupakan sesuatu yang tidak dapat dilakukan oleh individu secara terpisah.[24] Selain itu, korporasi memiliki kapasitas finansial yang dapat membuat proses peradilan panjang, mahal, dan kompleks jika negara tidak memiliki instrumen hukum yang kuat untuk menindaknya.[25] Penegakan hukum terhadap kejahatan korporasi masih menghadapi hambatan struktural yang serius, sehingga kerap tidak berjalan efektif. Kompleksitas struktur korporasi lintas yurisdiksi memungkinkan perusahaan mengalihkan aset, menyamarkan transaksi, dan menghindari pertanggungjawaban hukum dengan memanfaatkan celah perbedaan sistem hukum dan sulitnya merumuskan kesalahan korporasi.[26]

Penelitian terdahulu mengenai perdagangan satwa liar transnasional pada umumnya menempatkan pembahasan korporasi sebagai aktor pendukung (*facilitator*) dan tidak terlibat secara langsung dalam rantai pasokan kejahatan perdagangan satwa liar.[27] Penelitian lain menyoroti perdagangan satwa liar sebagai bagian dari *transnational organized crime* dengan fokus pada jaringan kriminal, yang memainkan peran penting di seluruh rantai perdagangan, dari sumber hingga pasar akhir.[28] Sementara itu, penelitian terdahulu dalam negeri, terkait dengan pertanggungjawaban pidana korporasi dalam kejahatan konservasi, masih mempersoalkan kekosongan hukum terkait dengan subjek hukum korporasi sebagai pelaku tindak pidana.[29] Selain itu, penelitian lainnya di Indonesia masih bergulat dengan persoalan pertanggungjawaban pidana perdagangan satwa liar yang dilakukan

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[20] Ashenafi Biru dan Pia Arenius, "Perpetuating Enforcement Weakness: Entrepreneurs' Destructive Actions in Normalizing Rule-breaking," *Small Business Economics* 65, no. 4 (2025): 878, https://doi.org/10.1007/s11187-025-01091-6.

[21] Meganne Natali, "Reinforcing the Global Fight against Illegal Wildlife Trade: Addressing CITES's Discretion and Fragmented Legal Framework," *Yearbook of International Environmental Law* 35, no. 1 (Agustus 2025): 2–3, https://doi.org/10.1093/yiel/yvaf005.

[22] Vini Novilia dan Hudi Yusuf, *Efektivitas Sanksi Hukum Dalam Penanggulangan Tindak Pidana Ekonomi Khusus: Perspektif Hukuman Ekonomi Terhadap Pelaku Kejahatan Korporasi*, 1, no. 9 (2024): 5365, https://jicnusantara.com/index.php/jiic.

[23] Lihat Pasal 40A ayat (4) jo Pasal 21 ayat (2) Undang-Undang Nomor 32 Tahun 2024 Tentang Perubahan Atas Undang-Undang Nomor 5 Tahun I990 Tentang Konservasi Sumber Daya Alam Hayati Dan Ekosistemnya (Perubahan UU Konservasi SDAHE).

[24] International Consortium on Combating Wildlife Crime, *Kejahatan Satwa Liar Dan Kehutanan Perangkat Analitis*, Kedua (United Nations Office on Drugs and Crime, 2022), 231.

[25] Ahmad Yusup dan Sigid Riyanto, *Limited Diversion Sanction (Sanksi Pengalihan Terbatas) Dalam Tindak Pidana Korupsi untuk Korporasi* (Yogyakarta: Pustaka Pelajar, 2024), 151-152.

[26] Vini Novilia dan Hudi Yusuf, *Loc.Cit*.

[27] Sina Duensing, Martin C. Schleper, dan Christian Busse, "Wildlife Trafficking as a Societal Supply Chain Risk: Removing the Parasite without Damaging the Host?," *Journal of Supply Chain Management* 59, no. 2 (April 2023): 24, https://doi.org/10.1111/jscm.12297.

[28] United Nations Office on Drugs and Crime, *World Wildlife Crime Report 2024: Trafficking in Protected Species* (Erscheinungsort nicht ermittelbar: United Nations, 2024), 4.

[29] Fajar Winarni, *Loc. Cit*.

oleh subjek hukum individu dengan basis penyelesaiannya menggunakan UU Konservasi SDAHE sebelum perubahan.[30]

Berbeda dari penelitian-penelitian tersebut, penelitian ini memosisikan korporasi bukan sekadar sebagai aktor pendukung atau fasilitator dalam perdagangan satwa liar jaringan transnasional, melainkan sebagai arsitektur utama kejahatan yang secara sadar merancang struktur korporasi melalui pembentukan anak perusahaan, penggunaan perusahaan cangkang (*shell companies*), pemecahan fungsi bisnis lintas yurisdiksi, memanfaatkan lemahnya sistem hukum di negara berkembang, memanfaatkan masyarakat berpenghasilan rendah di negara berkembang di sekitar wilayah penangkapan, serta pemanfaatan perbedaan rezim hukum nasional untuk mengaburkan konteks kesalahan pidana dengan membingkainya dalam suatu aktivitas bisnis legal korporasi. Selain itu, penelitian ini menempatkan teori psikopati sebagai kerangka analisis untuk mengonstruksi kesalahan korporasi dalam mendesain perdagangan satwa liar lintas negara. Penelitian ini juga menempatkan mekanisme *Mutual Legal Assistance* (MLA) sebagai instrumen utama dan sebagai sarana strategis dalam membantu proses penegakan hukum perdagangan satwa liar lintas negara dengan mengaitkannya pada teori psikopati dalam bidang ilmu psikologi guna menemukan kesalahan atau *mens rea* dari korporasi. *Novelty* penelitian ini terletak pada pendekatan integratif yang menghubungkan teori kejahatan korporasi transnasional dalam bingkai rantai pasokan perdagangan satwa liar lintas batas dengan rezim MLA. Selain itu, *novelty* lain dari penelitian ini adalah membongkar atau menemukan *mens rea* atau kesalahan dari korporasi dengan menggunakan basis pendekatan teori psikopati dalam bidang ilmu psikologi. Fokus penelitian ini menekankan bagaimana teori psikopati mengonstruksi kesalahan korporasi dalam mengaksitekturi kejahatan perdagangan satwa liar jaringan transnasional, di mana dari konstruksi kesalahan tersebut, dapat diterapkan mekanisme pertanggungjawaban pidana korporasi melalui instrumen MLA.

Penelitian mengenai kejahatan perdagangan satwa liar oleh korporasi dalam dimensi *transnational crime* menjadi sangat penting dalam konteks ini. Urgensinya tidak hanya terletak pada meningkatnya ancaman perdagangan satwa liar terhadap ekosistem yang dilakukan oleh korporasi, tetapi juga pada kebutuhan untuk mengisi kekurangan peraturan perundang-undangan, baik nasional maupun internasional dalam mengonstruksi kesalahan korporasi yang melakukan kejahatan perdagangan satwa liar illegal jaringan transnasional.[31] Dengan latar belakang tersebut, kajian ini tidak hanya relevan bagi akademisi hukum pidana, tetapi juga bagi pembuat kebijakan, organisasi konservasi, aparat penegak hukum, serta komunitas internasional yang memiliki kepentingan terhadap keberlanjutan lingkungan dan pemberantasan kejahatan lintas negara yang melibatkan satwa liar. Berdasarkan uraian latar belakang tersebut, dalam penelitian ini akan menjawab dua permasalahan utama. *Pertama,* bagaimana korporasi berperan sebagai aktor dalam mendesain perdagangan satwa liar jaringan transnasional? *Kedua,* bagaimana teori psikopati mengonstruksi kesalahan korporasi yang melakukan kejahatan perdagangan satwa liar jaringan transnasional?

2. Metode

Dalam mendesain artikel ini sampai dengan kesimpulan, penulis menggunakan basis pendekatan *socio-legal research* (penelitian sosio-legal),[32] di mana dalam penelitian ini, fokus kajian tidak hanya berdimensi seputar konsep hukum semata, melainkan menggunakan pendekatan konsep-konsep kriminologi, dan psikologi dalam merumuskan analisis kritis konstruksi kesalahan korporasi dalam mendesain perdagangan satwa liar lintas negara. Dengan adanya basis pendekatan berbagai disiplin ilmu tersebut, menunjukkan bahwa penelitian ini merupakan penelitian interdisipliner sebagaimana ciri dari *socio-legal research*.[33] Dalam memperkuat ketajaman analisis,

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[30] Ridho Afrizal Abd Rohim, Ifahda Pratama Hapsari, dan Dodi Jaya Wardana, "Pertanggungjawaban Pidana Bagi Pelaku Penyelundupan Satwa Liar Yang Dilindungi," *Pemuliaan Keadilan* 2, no. 1 (Januari 2025): 129–43, https://doi.org/10.62383/pk.v2i1.466.

[31] Dalam Undang-Undang Nomor 5 Tahun 1990 tentang Konservasi Sumber Daya Alam Hayati dan Ekosistemnya (1990) sama sekali korporasi belum menjadi subjek hukum, sehingga sulit menghukum korporasi menggunakan undang-undang ini. Oleh sebab itu, pembaruan hukum dengan memasukkan korporasi sebagai subjek yang dapat dihukum dalam UU Konservasi SDA menjadi sebuah keniscayaan. Hal ini didasarkan pada satu adagium yakni *het recht hinkt achter de feiten aan* (hukum selalu tertinggal dari peristiwanya.

[32] Herlambang P. Wiratraman dan Widodo D. Putro, "Tantangan Metode Penelitian Interdisipliner Dalam Pendidikan Hukum Indonesia," *Mimbar Hukum* 31, no. 3 (2019): 408–9.

[33] Nicole Graham, Lee C. Godden, dan Margaret Davies, "Broadening Law's Context: Materiality in Socio-Legal Research," *Griffith Law Review* 26, no. 4 (2018): 482, https://doi.org/10.1080/10383441.2017.1548001.

penelitian ini menggunakan beberapa pendekatan seperti pendekatan perundang-undangan (*statute approach*), pendekatan konsep (*conceptual approach*), dan pendekatan kasus (*case approach*).[34] Salah satu *novelty* dalam peneltian ini adalah selain menggunakan pendekatan konsep hukum dan kriminologi, penelitian ini juga menggunakan pendekatan konsep psikologi yakni teori psikopati dalam melakukan konstruksi kesalahan korporasi. Analisis preskriptif menjadi acuan dalam penelitian ini. Analisis preskriptif dimaksudkan untuk mengemukakan pendapat atas hasil penelitian yang telah dilakukan dengan maksud agar memberikan pandangan mengenai benar atau salah bahkan dapat saja memberikan argumentasi perihal apa yang seharusnya dilakukan menurut hukum atas suatu peristiwa hukum.[35]

3. Pembahasan

3.1. Korporasi Berperan sebagai Aktor dalam Mendesain Perdagangan Satwa Liar Jaringan Transnasional

Dalam literatur kriminologi, kejahatan korporasi dipahami sebagai tindakan ilegal yang dilakukan oleh organisasi formal atau individu yang bertindak atas nama organisasi tersebut untuk kepentingan korporasi.[36] Dalam studi kriminologi, kejahatan korporasi dibagi dalam tiga kategori.[37] *Pertama, crimes for corporation* atau kejahatan yang dilakukan secara melawan hukum dengan tujuan memperoleh keuntungan bagi korporasi. *Crimes for corporation* inilah yang sering disebut sebagai kejahatan korporasi (*corporate crime*).[38] *Kedua, criminal corporation* atau biasa disebut korporasi sebagai topeng dalam melakukan kejahatan. *Criminal corporation* ini merupakan korporasi yang sengaja dibentuk dan dikendalikan untuk melakukan kejahatan.[39] *Ketiga, crimes against corporation* atau korporasi sebagai korban dari kejahatan yang dilakukan oleh karyawannya sendiri.[40] Dari 3 tipologi kejahatan korporasi dalam studi kejahatan, paling tidak hanya ada dua tipologi yang berperan dalam konteks perdagangan satwa liar ilegal, yakni *crimes for corporation* dan *criminal corporation.*

Dalam dimensi *transnational crime,* kejahatan perdagangan satwa liar oleh korporasi diklasifikasi dalam tiga tipologi.[41] *Pertama,* kelompok kejahatan terorganisasi (*organized crime groups* atau *organized criminal group*). Pasal 2 huruf a *United Nations Convention against Transnational Organized Crime* (UNTOC), kelompok kejahatan terorganisasi didefinisikan sebagai "sekelompok individu yang terstruktur, terdiri dari tiga orang atau lebih, terbentuk dalam suatu periode waktu tertentu, dan bertindak secara terpadu dengan tujuan melakukan satu atau lebih kejahatan serius sebagaimana ditetapkan dalam konvensi ini, demi memperoleh keuntungan atau materi lainnya, baik secara langsung maupun tidak langsung". Singkatnya, dalam domain perdagangan satwa liar, kelompok kriminal terstruktur seperti sindikat penyelundupan, mafia lingkungan, yang secara aktif memburu, menyelundupkan, dan menjual satwa liar dengan tingkat organisasi dan kontinuitas yang tinggi.

Kedua, kelompok kejahatan korporasi (*corporate crime groups* atau *corporate criminal group*). Seperti halnya kelompok kejahatan terorganisasi, membentuk jaringan yang memungkinkan dilakukannya kejahatan. Kelompok kejahatan korporasi kemudian akan terdiri dari satu atau lebih korporasi yang menggunakan organisasi formal yang sah dan bertindak bersama-sama dengan individu lain atau kelompok luar untuk melakukan kegiatan ilegal demi menguntungkan korporasi.[42] Hubungan yang saling terkait antara aktivitas dunia atas dan dunia bawah

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[34] Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*, Revisi (Yogyakarta: Mirra Buana Media, 2022).

[35] Elisabeth Nurhaini Butarbutar, *Metode Penelitian Hukum: Langkah-Langkah untuk Menemukan Kebenaran dalam Ilmu Hukum* (Bandung: Refika Aditama, 2018), 148.

[36] Judith van Erp, "The Organization of Corporate Crime: Introduction to Special Issue of Administrative Sciences," *Administrative Sciences* 8, no. 36 (t.t.): 3, https://doi.org/10.3390/admsci8030036.

[37] Kristian, *Sistem Pertanggungjawaban Pidana Korporasi: Tinjauan Teoritis dan Perbandingan Hukum di Berbagai Negara* (Bandung: Refika Aditama, 2016), 57.

[38] Eddy O. S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Revisi*, Edisi revisi (Yogyakarta: Cahaya Atma Pustaka, 2016), 196.

[39] *Ibid.*, 197.

[40] *Ibid.*

[41] Tanya Wyatt, Daan Van Uhm, dan Angus Nurse, "Differentiating criminal networks in the illegal wildlife trade: organized, corporate and disorganized crime," *Trends in Organized Crime* 23, no. 4 (Desember 2020): 351–58, https://doi.org/10.1007/s12117-020-09385-9.

[42] Judith van Erp, *Loc.Cit*.

menjadi ciri banyak perdagangan satwa liar dalam domain ini.[43] *Ketiga,* jaringan kejahatan tidak terorganisasi (*disorganized criminal networks*). Dalam konseptualisasinya tentang disorganisasi, kelompok kriminal kurang terstruktur, tidak menggunakan kekerasan sebagai alat, dan seringkali tidak teritorial, sangat terorganisasi, atau monopolistik.[44] Istilah jaringan disorganisasi ini muncul karena dalam banyak kasus perdagangan satwa liar, struktur kejahatan tidak terorganisasi yang mencakup beberapa negara dan terjadi secara transnasional. Dengan demikian, jaringan-jaringan ini lebih cepat berubah dan kurang stabil daripada sebuah kelompok. Jaringan-jaringan individu oportunis ini, seperti sopir truk, petugas perbatasan yang korup, perantara, kurir ekspres, dan sebagainya, membangun hubungan sementara dan dinamis satu sama lain dan terkadang dengan kelompok kejahatan terorganisasi dan/atau korporasi yang sudah mapan untuk menyelundupkan satwa liar melintasi perbatasan.[45]

Adanya temuan lebih dari 100 perusahaan (korporasi) dalam perdagangan satwa liar ilegal adalah bukti bahwa korporasi ikut andil dalam proses tersebut.[46] Keterlibatan korporasi dalam perdagangan satwa liar dapat terjadi melalui dua mekanisme:[47] *Pertama,* melalui aktivitas ilegal langsung, seperti korporasi yang secara sadar memfasilitasi perdagangan satwa lewat perusahaan logistik, ekspor/impor, atau sertifikasi palsu. *Kedua,* melalui kolusi dengan aktor kriminal lain, misalnya melalui perbankan, penyedia jasa pendaftaran entitas, dan jaringan distribusi global yang memanfaatkan infrastruktur legal korporasi. Selain dua mekanisme tersebut, korporasi dalam domain perdagangan satwa liar juga dapat terjadi atau berjalan beriringan dengan aktivitas legal dari korporasi tersebut. Hal ini sulit terdeteksi disebabkan keterlibatan korporasi dalam kejahatan perdagangan satwa liar sering kali tersembunyi di balik struktur perusahaan yang kompleks.

Perlu diingat, bahwa dalam hal perdagangan satwa liar di Indonesia, ada yang bersifat legal atau diizinkan oleh negara,[48] ada pula yang bersifat ilegal yang tidak mendapat izin atau tidak diperbolehkan untuk dilakukan, baik individu maupun korporasi.[49] Dalam Pasal 1 angka 24 UU Konservasi SDAHE disebutkan bahwa "korporasi didefinisikan sebagai sekumpulan orang dan/atau aset yang tersusun secara terorganisasi, baik berbentuk badan hukum maupun bukan badan hukum." Definisi ini menegaskan bahwa dalam konteks perdagangan ilegal satwa liar, pengertian korporasi bersifat luas, mencakup tidak hanya perusahaan berbadan hukum, tetapi juga entitas atau perusahaan yang tidak berbadan hukum.

Dalam keterlibatan korporasi pada aktivitas perdagangan satwa liar, korporasi dapat terlibat secara langsung maupun tidak langsung.[50] Keterlibatan langsung dapat berupa perusahaan yang secara spesifik memperdagangkan satwa tanpa izin, memfasilitasi ekspor ilegal, atau memanipulasi dokumen untuk melegalkan satwa yang diperoleh secara ilegal. Sementara itu, keterlibatan tidak langsung dapat berupa perusahaan logistik yang secara sadar mengangkut satwa ilegal, perusahaan peternakan atau *breeding farm* yang mengaburkan asal-usul satwa hasil tangkapan liar dengan dalih "penangkaran legal", atau perusahaan yang menyediakan sarana transportasi dan finansial bagi jaringan perdagangan ilegal.[51] Dengan demikian, korporasi memiliki posisi strategis dalam rantai kejahatan ini, memungkinkan transaksi besar, penyelundupan lintas negara, serta pencucian asal-usul satwa liar agar tampak legal.

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43 Tanya Wyatt, et al., *Op.Cit.*, 356.

44 *Ibid.,* 357.

45 *Ibid*.

46 Raden Ariyo Wicaksono, *Loc.Cit*.

47 Tanya Wyatt, et al., *Loc.Cit.*

48 Lihat Pasal 26 Perubahan UU Konservasi SDAHE jo. Peraturan Pemerintah Nomor 8 Tahun 1999 Tentang Pemanfaatan Jenis Tumbuhan Dan Satwa Liar jo. Pasal 39 Peraturan Pemerintah Nomor 5 Tahun 2021 Tentang Penyelenggaraan Perizinan Berusaha Berbasis Risiko, jo. Peraturan Menteri Lingkungan Hidup Dan Kehutanan Nomor P.106/MENLHK/SETJEN/KUM.1/12/2018 Tentang Perubahan Kedua Atas Peraturan Menteri Lingkungan Hidup Dan Kehutanan Nomor P.20/MENLHK/SETJEN/KUM.1/6/2018 Tentang Jenis Tumbuhan Dan Satwa Yang Dilindungi, jo. Peraturan Menteri Lingkungan Hidup Dan Kehutanan Nomor 15 Tahun 2023 Tentang Perizinan Berusaha Pemanfaatan Jenis Tumbuhan Dan Satwa Liar.

49 Lihat Pasal 21 ayat (2) Perubahan UU Konservasi SDAHE.

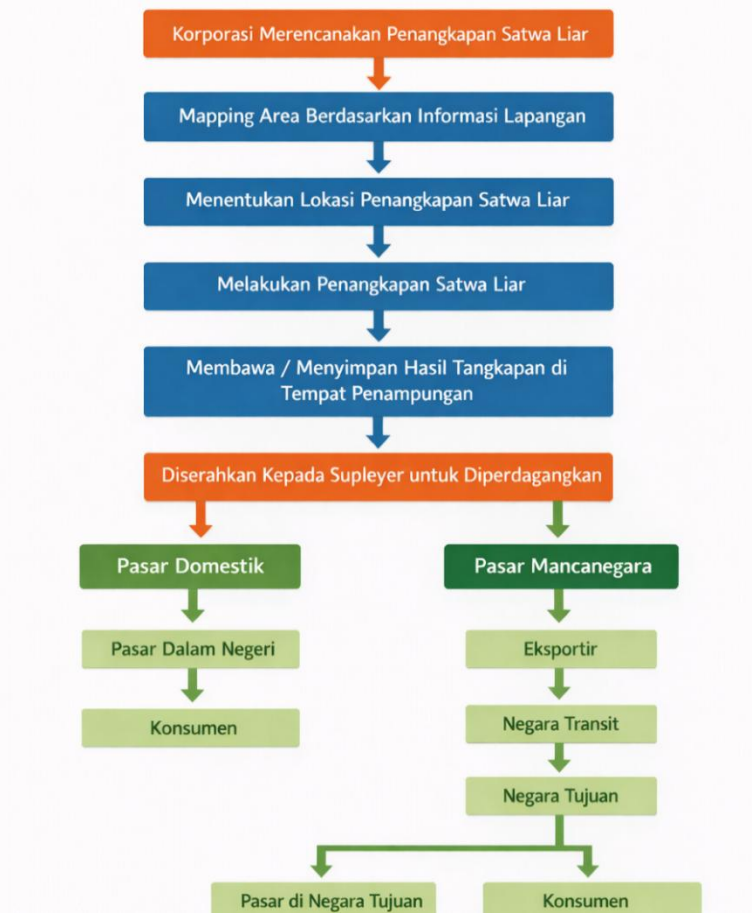
50 International Consortium on Combating Wildlife Crime, 2022, *Kejahatan Satwa Liar Dan Kehutanan Perangkat Analitis Edisi Kedua*, United Nations Office on Drugs and Crime, 82.

51 *Ibid*.

Selain itu, persoalan menjadi semakin rumit ketika kejahatan perdagangan satwa liar tersebut dikategorikan sebagai *transnational crime*.[52] Oleh sebab itu, hal ini menjadi tantangan tersendiri dalam penindakannya. Jaringan perdagangan satwa liar sering kali memanfaatkan kerja sama lintas negara yang melibatkan negara sumber, negara transit, dan negara tujuan. Jaringan kriminal ini merupakan inti dari perdagangan satwa liar ilegal di seluruh wilayah di dunia.[53] Bagaimana korporasi mendesain keterlibatannya dalam dimensi perdagangan satwa liar lintas negara ini?

Untuk menjawab pertanyaan tersebut, penulis akan menunjukkan kerangka desain korporasi dalam perdagangan satwa liar seperti gambar berikut ini.

Gambar 1 Korporasi dalam Rantai Pasok Perdagangan Satwa Liar Lintas Negara



Sumber: diolah oleh Penulis

Dengan kerangka ini, penulis mencoba menjelaskan dan menguraikan bagaimana keterlibatan korporasi dalam mengarsiteki perdagangan satwa liar ilegal dengan basis *transnational crime*. Gambar 1 di atas merupakan alur pemanfaatan satwa liar. Bagan tersebut merepresentasikan perdagangan satwa liar sebagai suatu rangkaian proses yang terstruktur, berlapis, dan berbasis perencanaan, sehingga menegaskan bahwa kejahatan ini tidak dapat dipahami sebagai perbuatan insidental atau semata-mata hasil inisiatif individu di lapangan. Paling tidak penulis mengelompokkan dalam tiga tahapan alur dalam gambar 1 di atas. *PERTAMA,* dimulai dengan penangkapan. Sebelum sampai pada tahap ini, tentu telah dimulai dengan adanya *tracking area* (pelacakan area) yang akan dijadikan objek penangkapan. Setelah korporasi menemukan area yang akan menjadi objek penangkapan, korporasi dengan jaringannya melakukan pemetaan area (*mapping area*) untuk selanjutnya dilakukan

[52] Muhamad Devasso Azzura Adam dkk., "Analisis Kejahatan Transnasional melalui Aktivitas Money Laundering dalam Illegal Wildlife Trade di India," *Transformasi Global* 9, no. 2 (Desember 2022): 85, https://doi.org/10.21776/ub.jtg.009.02.1.

[53] OECD, *The Illegal Wildlife Trade in Southeast Asia: Institutional Capacities in Indonesia, Singapore, Thailand and Viet Nam*, Illicit Trade (OECD Publishing, 2019), 16, https://doi.org/10.1787/14fe3297-en.

penangkapan. Penangkapan yang dilakukan baik dengan cara perburuan ataukah dengan cara lain yang dapat memudahkan proses penangkapan. Dalam tahap ini, korporasi biasanya tidak terlibat secara langsung, melainkan mengutus orang-orangnya secara langsung atau bekerja sama dengan jaringan yang tidak berafiliasi langsung dalam struktur kepengurusan korporasi, seperti orang-orang atau individu dalam suatu komunitas dekat dengan lokasi penangkapan.[54] Tahap awal yang dimulai dari perencanaan korporasi, pemetaan area berdasarkan informasi lapangan, hingga penentuan lokasi penangkapan menunjukkan adanya proses pengambilan keputusan yang sistematis dan rasional. Karakter ini merupakan ciri khas kejahatan korporasi dan kejahatan terorganisasi, di mana tindakan ilegal merupakan bagian dari desain operasional, bukan penyimpangan individual.

KEDUA, tahap penampungan, dalam tahap ini korporasi dapat saja bertindak secara langsung melalui struktur perusahaan, tetapi dapat juga tidak terlibat secara langsung. Keterlibatan korporasi dalam tahap penampungan ini, penulis klasifikasi menjadi dua kelompok. *Pertama,* keterlibatan langsung dalam dimensi legal melalui penyamaran asal usul satwa liar yang akan diperdagangkan. Dalam konteks ini, biasanya sebuah sektor terorganisasi dan ilegal beroperasi secara berdampingan dengan kegiatan ekonomi legal suatu korporasi.[55] *Kedua,* keterlibatan langsung dalam dimensi ilegal, di mana dalam hal ini, korporasi sejak awal tidak memiliki izin untuk melakukan perdagangan satwa liar. Dua domain keterlibatan langsung korporasi ini dapat dilakukan dengan dua cara, yakni melalui perusahaan tunggal (*sole proprietorship*), atau dengan melalui mekanisme perusahaan grup (*corporate group*). Khusus perusahaan grup, modus operandi dalam melakukan kejahatan ilegal seperti perdagangan satwa liar, dikenal dengan istilah *tunneling*.[56] *Tunneling* dalam dunia bisnis ini sulit terdeteksi oleh pihak berwenang. Hal ini disebabkan oleh lemahnya penegakan hukum, buruknya penerapan *corporate governance*, serta tingginya tingkat korupsi di Indonesia, sehingga banyak kasus *tunneling* luput dari deteksi.[57]

KETIGA, tahap pemasok (*supplier*). Dalam tahap ini, besar kemungkinan korporasi terlibat secara langsung, baik memasok dalam negeri maupun melalui ekspor ke luar negeri. Ketika korporasi melakukan ekspor satwa liar ke luar negeri, di sinilah letak dimensi *transnational crime* dari perdagangan satwa liar. Merujuk ketentuan Pasal 3 UNTOC, suatu perbuatan dikategorikan sebagai kejahatan lintas negara (*transnational crime*) apabila memenuhi salah satu kondisi berikut: (a) dilakukan di lebih dari satu negara, (b) dilakukan di satu negara tetapi sebagian penting dari kegiatan persiapan, perencanaan, pengarahan, atau pengendalian terjadi di negara lain, (c) dilakukan di satu negara namun melibatkan kelompok kriminal terorganisasi yang beroperasi di lebih dari satu negara, atau (d) dilakukan di satu negara namun menimbulkan dampak utama di negara lain.[58] Berdasarkan ketentuan Pasal 3 UNTOC, perbuatan memperdagangkan satwa liar ke luar negeri dengan jalan ekspor merupakan salah satu dimensi dari *transnational crime* dan dari empat parameter yang ditentukan dalam pasal *a quo* dapat saja dipenuhi oleh korporasi, khususnya bagi korporasi yang sengaja dibentuk sebagai sarana untuk mengendalikan kejahatan (*criminal corporations*).[59]

Jalur mancanegara memperlihatkan pola kejahatan lintas negara yang melibatkan eksportir, negara transit, dan negara tujuan, yang memanfaatkan perbedaan yurisdiksi serta lemahnya koordinasi penegakan hukum antarnegara. Kondisi ini menjadikan pembuktian dan penelusuran pertanggungjawaban korporasi semakin sulit, terutama ketika instrumen kerja sama internasional hanya dipahami sebagai prosedur administratif semata. Jika menelusuri jalur perdagangan satwa liar jaringan transnasional yang didesain oleh korporasi, Indonesia menjadi sasaran empuk untuk dijadikan sebagai negara sumber atau negara pemasok komoditas ekspor korporasi ke beberapa negara, khususnya di kawasan ASEAN.[60] Gambar 2 berikut ini sedikitnya menunjukkan jalur sebarannya.

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54 Tanya Wyatt, et al., *Loc.Cit.*

55 Mari Mulyani, "Securitisation, Sovereignty, and Regional Cooperation: ASEAN Insights for IORA on Addressing IUU Fishing as a Transnational Environmental Crime," *Geopolitics*, 6 November 2025, 1–27, https://doi.org/10.1080/14650045.2025.2583281.

56 Ratna Candra Sari Sugiharto, *Tunneling dan Corporate Governance* (Yogyakarta: Gadjah Mada University Press, 2014), 3.

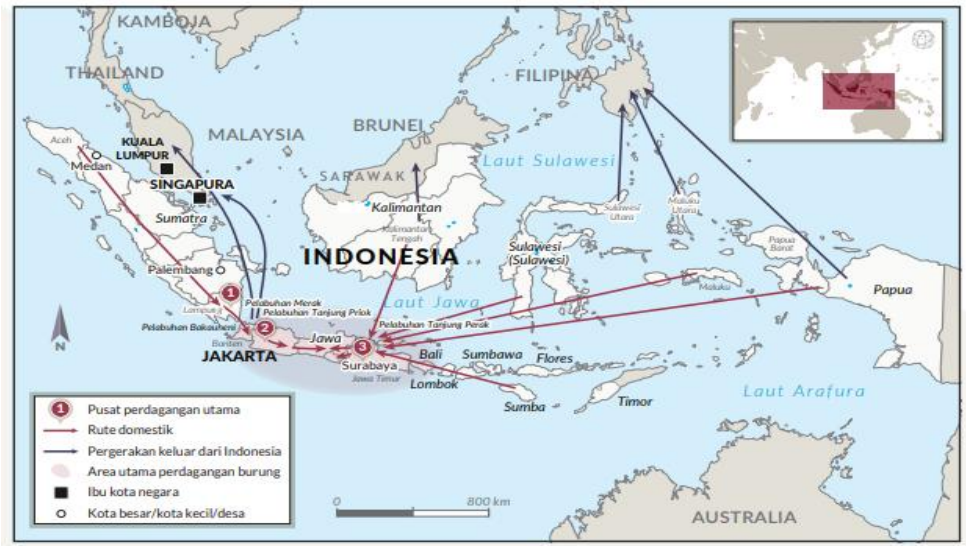
57 *Ibid.*, 1.

58 Lihat Pasal 3 United Nations Convention Against Transnational Organized Crime (UNCTOC), sebagaimana telah diratifikasi oleh Indonesia melalui Undang-Undang Nomor 5 Tahun 2009 Tentang Pengesahan United Nations Convention Against Transnational Organized Crime (Konvensi Perserikatan Bangsa-Bangsa Menentang Tindak Pidana Transnasional Yang Terorganisasi).

59 Eddy O.S. Hiariej, *Loc.Cit*.

60 OECD, *The Illegal Wildlife Trade in Southeast Asia*, 24.

Gambar 2 Contoh Peta Jalur Perdagangan Satwa Liar Lintas Negara



Sumber: Wahyu Nurbandi (2022)[61]

Gambar 2 tersebut secara visual memperlihatkan bagaimana Indonesia diposisikan sebagai negara sumber (*source country*) dalam jaringan perdagangan satwa liar yang bersifat terorganisasi dan lintas negara, dengan pola pergerakan yang menunjukkan adanya desain alur distribusi yang sistematis dan terencana. Jalur-jalur yang ditarik dari berbagai wilayah di Indonesia menuju titik-titik tertentu yang tidak merepresentasikan pergerakan acak, melainkan menggambarkan rantai pasok kejahatan yang menyerupai mekanisme logistik korporasi legal.[62] Menurut penulis, sedikitnya terdapat 4 poin analisis dari peta gambar 2 di atas. *Pertama,* penandaan wilayah-wilayah tertentu di Indonesia sebagai area utama perdagangan atau titik pengumpulan menunjukkan bahwa sumber satwa liar berasal dari kawasan dengan kekayaan biodiversitas tinggi, seperti Sumatera, Kalimantan, Sulawesi, dan Papua.[63] Wilayah-wilayah ini berfungsi sebagai basis pasokan, tempat satwa ditangkap atau dikumpulkan sebelum memasuki jalur distribusi berikutnya.

Kedua, peta tersebut menunjukkan adanya konsentrasi rute domestik yang mengarah ke kota-kota pelabuhan dan pusat logistik utama, seperti Jakarta dan beberapa pelabuhan strategis lainnya. Kota-kota ini tampak seperti pusat penyimpanan atau penyortiran, di mana satwa liar disamarkan dalam pengiriman legal, atau dipersiapkan untuk keluar dari wilayah Indonesia. Pola ini memperlihatkan bagaimana infrastruktur perdagangan dan transportasi yang sah dimanfaatkan untuk menopang aktivitas ilegal, suatu ciri khas keterlibatan korporasi yang mampu mengakses dan mengendalikan jalur logistik formal. *Ketiga,* terdapat jalur lintas perdagangan Indonesia dengan negara-negara tujuan atau transit di kawasan Asia Tenggara dan sekitarnya, seperti Singapura dan negara-negara lain, menegaskan karakter transnasional dari jaringan ini.

Keempat, struktur jalur yang relatif konsisten dan berulang dari Indonesia menuju titik-titik tertentu di luar negeri, mengindikasikan bahwa perdagangan satwa liar tidak bersifat sporadis, melainkan berjalan secara berkelanjutan. Keberlanjutan ini merupakan indikator kuat bahwa aktor di balik jaringan tersebut memiliki kapasitas organisasi, sumber daya, dan stabilitas operasional, yang lazim ditemukan dalam entitas korporasi atau jaringan yang beroperasi dengan logika korporasi. Dengan demikian, Indonesia tidak hanya diposisikan sebagai lokasi asal satwa liar yang akan diperdagangkan, tetapi sebagai bagian integral dari desain rantai pasok global yang dikendalikan dari tahap awal hingga tahap akhir. Bahkan terdapat penelitian lain yang menunjukkan bahwa

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[61] Wahyu Nurbandi, "Perdagangan Ilegal Online Pada Burung Beo Yang Sangat Terancam Punah Di Indonesia: Celah Dalam Penegakan Hukum Sektor Swasta," *Laporan Tren Global Initiative Against Transnational Organized Crime*, 2022, 2.

[62] Richard Gatot N. Triantoro, Agus Purwoko, dan Freddy Jontara Hutapea, "Tracking Illegal Wildlife Trade in Papua, Indonesia: An Initial Investigation," *Global Ecology and Conservation* 62 (Oktober 2025): 2, https://doi.org/10.1016/j.gecco.2025.e03792.

[63] Paul A. Garber dkk., "Global Wildlife Trade and Trafficking Contribute to the World's Nonhuman Primate Conservation Crisis," *Frontiers in Conservation Science* 5 (Juni 2024): 7–8, https://doi.org/10.3389/fcosc.2024.1400613.

di negara asia juga memiliki kecenderungan sebagai negara tujuan perdagangan satwa liar.[64]

Dengan pesatnya perkembangan teknologi informasi, alur pada gambar 1 tersebut oleh korporasi ditransformasi mekanisme pemasarannya dengan menggunakan sarana teknologi. Hal ini biasa dikenal dengan sistem aplikasi *e-commerce* (*e-commerce applications system*).[65] Selama kurun waktu 2022, perdagangan satwa liar ilegal online di Indonesia, berdasarkan jumlah akun perdagangan yang ditemukan di *platform e-commerce,* terdapat 81–161 akun di temukan.[66] Selain itu, data periode 2018–2019 sebelumnya juga menunjukkan adanya 4.463 konten perdagangan satwa liar ilegal yang terdeteksi di platform *e-commerce* di 32 provinsi di seluruh Indonesia, dengan total 8.423 satwa liar yang diperdagangkan secara ilegal.[67] *E-commerce* dan situs media sosial digunakan untuk memfasilitasi perdagangan satwa liar ilegal, tidak hanya dengan menyediakan *platform* untuk mengiklankan satwa liar dan produk satwa liar ilegal, tetapi juga bagi penjual dan pembeli untuk berkomunikasi dan berkoordinasi dengan jaringan kriminal global yang terlibat dalam perdagangan tersebut.[68]

Korporasi dalam dimensi keterlibatan perdagangan satwa liar melalui *platform digital*, sedikit banyaknya akan bekerja sama dengan korporasi digital yang sudah ada, atau bahkan membentuk korporasi digital sendiri dalam basis perusahaan *group*. Korporasi digital dalam ranah ini dengan demikian bukan sekadar pasif menampung iklan, tetapi secara struktural mempengaruhi bagaimana perdagangan satwa liar dilakukan secara daring. Algoritma pencarian dan rekomendasi konten yang dirancang oleh perusahaan teknologi berpotensi mengarahkan konsumen ke iklan satwa liar yang secara teknis melanggar hukum, sehingga turut membentuk pola perdagangan.[69] Adapun modus operandi dan taktik transaksi perdagangan satwa liar, biasanya menggunakan kode huruf dan angka sebagai identitas satwa.[70] Pola ini dalam dimensi hukum pidana erat kaitannya dengan penyertaan (*deelneming*). Penyertaan tindak pidana (*deelneming*) merupakan perbuatan pidana yang dilakukan oleh lebih dari satu subjek tindak pidana.[71]

Terdapatnya korporasi yang berperan dalam penyediaan sarana berupa mendesain pola algoritma *platform digital* melalui aplikasi *e-commerce* perdagangan satwa liar, dan bekerja sama dengan korporasi penyedia satwa liar yang siap untuk diperdagangkan, kian membuat kompleksnya persoalan ini, khususnya dalam dimensi pertanggungjawaban pidananya. Sebab, dalam penyertaan tindak pidana (*deelneming*), pelakunya tidak hanya satu korporasi saja, melainkan lebih dari satu. Penentuan peran masing-masing korporasi apakah sebagai *pleger*, *medepleger*, *uitlokker*, atau *medeplichtige* menjadi tantangan tersendiri dalam konstruksi pertanggungjawaban pidana ke depan.[72] Korporasi penyedia *platform digital* melalui aplikasi *e-commerce* dapat bertindak aktif (*delicta commissionis*) maupun bertindak pasif (*delicta omissionis*). Perbuatan korporasi penyedia *platform digital* dianggap sebagai perbuatan akif (*delicta commissionis*), manakala secara aktif merancang dan mengoperasikan sistem (termasuk algoritma dan fitur promosi) yang memfasilitasi perdagangan satwa liar. Artinya, ada tindakan aktif korporasi yang berkontribusi langsung terhadap terjadinya tindak pidana perdagangan satwa liar. Sebaliknya, dalam dimensi perbuatan pasif (*delicta omissionis*), pertanggungjawaban pidana terhadap korporasi penyedia *platform digital* timbul ketika korporasi memiliki kewajiban dan kemampuan untuk mencegah atau menghentikan perdagangan ilegal, tetapi secara sengaja atau lalai tidak melakukannya.

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64 Hannah Murray, Meredith L. Gore, dan Bistra Dilkina, "Encoding and Decoding Illegal Wildlife Trade Networks Reveals Key Airport Characteristics and Undetected Hotspots," *Communications Earth & Environment* 6, no. 1 (Mei 2025): 3, https://doi.org/10.1038/s43247-025-02371-5.

65 Krismanko Padang dkk., "Online Illegal Wildlife Trade in Indonesia: Strengthening the Regulatory Framework and Law Enforcement," *Oryx* 59, no. 2 (Maret 2025): 210, https://doi.org/10.1017/S0030605323001667.

66 *Ibid*., 213.

67 United Nations Office on Drugs and Crime (UNODC), "Tracking in Protected Species," World Wildlife Crime Report, New York: United Nations Publication, 2020.

68 Stephen Guertin, *Online Wildlife Trafficking Marketplace*, U.S. Department of the Interior, released 2021, https://www.doi.gov/ocl/online-wildlife-trafficking-marketplace?utm, diakses pada Sabtu, 20 Desember 2025.

69 Sardjana Orba Manullang, "The Legality of Devious Cyber Practices: Readiness of Indonesia's Cyber Laws," *Society* 10, no. 2 (Desember 2022): 482, https://doi.org/10.33019/society.v10i2.482.

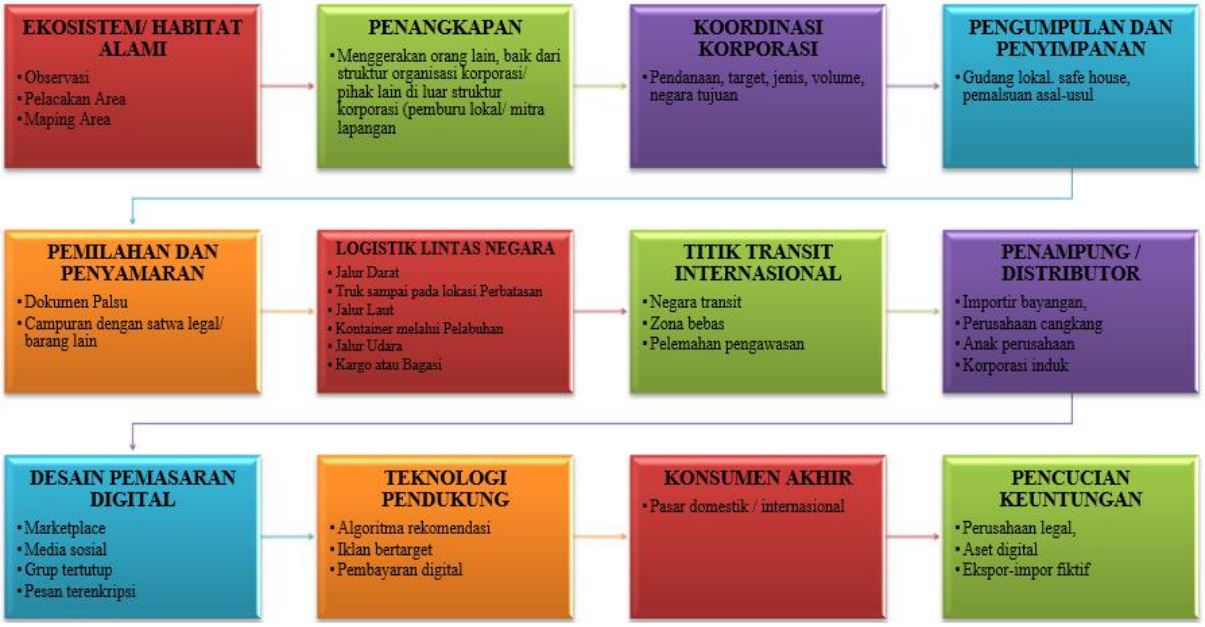
70 Raden Ariyo Wicaksono, *Subur Perdagangan Satwa Ilegal di Marketplace*, Betahita, released 2023, https://betahita.id/news/detail/8392/subur-perdagangan-satwa-ilegal-di-marketplace.html?v=1675860428&utm, Diakses pada Sabtu, 20 Dsember 2025.

71 Handar Subhandi Bakhtiar, Ahmad Yusup, dan Handina Sulastrina Bakhtiar, *Hukum Pidana: Asas, Teori dan Pembaruan Berdasarkan KUHP Nasional dan UU Penyesuaian Pidana* (Jakarta: Kencana, 2026), 222.

72 *Ibid.*

Untuk memudahkan pembaca dalam memahami alur mekanisme perdagangan satwa liar lintas negara yang dirancang oleh korporasi, berikut penulis ilustrasikan dalam bagan berikut dengan mengintegrasikan pada dimensi perkembangan teknologi informasi.

Gambar 3 Desain Perdagangan Satwa Liar Lintas Negara oleh Korporasi



Sumber: Diolah oleh penulis berdasarkan Laporan Kementerian Lingkungan Hidup dan Kehutanan Tahun 2024

Menurut analisis penulis, gambar 3 di atas merupakan rentetan atau desain korporasi sebagai aktor dalam keterlibatannya pada aktivitas perdagangan satwa liar. Bagan tersebut menunjukkan bahwa perdagangan satwa liar lintas negara dirancang secara terstruktur dan sistematis.[73] Desain tersebut tentunya sudah dilakukan dengan penuh perhitungan dan juga menyulitkan bagi aparat penegak hukum dalam mendeteksinya. Hal ini disebabkan prosesnya selalu tertutup atau berjalan beriringan dengan aktivitas korporasi secara sah. Dari gambar 3 tersebut tampak proses dimulai dari penangkapan satwa di habitat alami oleh pemburu lokal secara diam-diam yang bekerja atas permintaan korporasi.[74] Analisa konsep *anomie global* dan *asimetri kriminogenik* oleh Uhm menjelaskan bahwa perdagangan satwa liar ilegal muncul akibat adanya kesenjangan struktural antara negara asal dan negara tujuan.[75] Dalam konteks tersebut, pelaku usaha atau korporasi, baik yang bergerak di sektor legal maupun ilegal, memanfaatkan kondisi kemiskinan untuk merekrut individu agar terlibat dalam kegiatan kriminal.[76] Selanjutnya, korporasi atau jaringan terorganisasi kemudian mengkoordinasikan pendanaan, jenis satwa, dan tujuan pasar, sehingga aktivitas perburuan tidak berdiri sendiri, melainkan menjadi bagian dari rantai pasok yang direncanakan.[77] Satwa yang ditangkap selanjutnya dikumpulkan, disimpan, dan disamarkan, baik melalui pemalsuan dokumen maupun pencampuran dengan komoditas legal.[78] Untuk pengiriman lintas negara,

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[73] Annika Mozer, dan Stefan Prost, "An Introduction to Illegal Wildlife Trade and Its Effects on Biodiversity and Society", *Forensic Science International: Animals and Environments*, Volume 3, 2023, hlm. 1.

[74] Duensing, Schleper, dan Busse, "Wildlife Trafficking as a Societal Supply Chain Risk," 3.

[75] Sri Reski Amalia, "Perdagangan Satwa Liar Asia Tenggara Dalam Rantai Nilai Industri Obat Tradisional Tiongkok," *Indonesian Journal of International Relations* 8, no. 2 (Agustus 2024): 519, https://doi.org/10.32787/ijir.v8i2.572.

[76] *Ibid.*

[77] Michelle Anagnostou, "Synthesizing Knowledge on Crime Convergence and the Illegal Wildlife Trade," *Environmental Challenges* 5 (Desember 2021): 2, https://doi.org/10.1016/j.envc.2021.100222.

[78] Jia-Ying Liu dkk., "Exploring Illegal Trade and Management Strategies in Protected Aquatic Wildlife in Xiamen, China," *Water* 17, no. 3 (Januari 2025): 9, https://doi.org/10.3390/w17030305.

digunakan jalur darat, laut, dan udara[79] secara fleksibel, dengan memanfaatkan titik transit internasional yang tidak memiliki pengawasan hukum yang memadai guna mengaburkan asal-usul.[80]

Pada tahap akhir, korporasi memanfaatkan teknologi digital dalam pemasaran,[81] seperti *marketplace*, media sosial, dan sistem pesan tertutup.[82] Algoritma pencarian, iklan bertarget, dan pembayaran digital memperluas jangkauan konsumen lintas negara serta membentuk pola perdagangan online.[83] Keuntungan yang diperoleh kemudian dicuci melalui mekanisme bisnis legal, sehingga menyulitkan pelacakan dan pertanggungjawaban hukum.[84] Secara keseluruhan, gambar 3 menegaskan bahwa perdagangan satwa liar lintas batas negara bukan sekadar tindakan individual, melainkan kejahatan terorganisasi yang dirancang secara sistematis oleh korporasi, baik korporasi dalam tipologi *crime for corporation,* maupun korporasi dalam tipologi *criminal corporation,* dan didukung oleh logistik global serta teknologi digital. Di mana hal ini mengaburkan dimensi penegakan hukum dalam hal pertanggungjawaban pidana terhadap korporasi.

Dalam menjelaskan perbuatan korporasi sebagai arsitektur perdagangan satwa liar jaringan transnasional, tidak dapat dilepaskan dari para pengurus atau organ korporasi itu sendiri yang merupakan entitas perorangan atau individu (*natural person*). Dalam domain psikologi, perbuatan korporasi yang mendesain perdagangan satwa liar jaringan transnasional, tampak seperti tindakan atau perbuatan yang tidak memiliki rasa empati sama sekali, baik terhadap satwa liar yang terancam punah maupun terhadap lingkungan tempat satwa itu tinggal (habitat satwa liar). Ciri ini identik dengan salah satu jenis gangguan mental dalam ilmu psikologi yakni psikopati. Gangguan psikopati hanya dapat dialami oleh subjek hukum manusia dan bukan pada korporasi. Gangguan psikopati ditunjukkan dengan adanya beberapa ciri berikut, seperti kebohongan patologis, tipu daya, tanpa penyesalan, amoralitas, dan tanpa emosi.[85]

Organ korporasi atau pengurus korporasi yang dalam hal ini adalah subjek hukum manusia (*natural person*) yang melakukan desain perdagangan satwa liar jaringan transnasional, tentunya dalam keputusan yang diambil bertindak untuk dan atas nama korporasi, sehingga tindakannya dipandang sebagai tindakan korporasi jika mendasarkan pada teori identifikasi.[86] Oleh sebab itu, ketika perbuatan itu memenuhi ciri dan karakteristik dari psikopati dalam lingkup kejahatan korporasi, maka pilihan nama yang akan digunakan untuk melabeli pelaku kejahatan, dalam literatur di bidang psikopati dan kejahatan korporasi sering menggunakan bahasa yang berfokus pada gangguan mental melalui penggunaan label "psikopat korporasi".[87] Robert Hare yang merupakan seorang pelopor dalam studi psikofisiologis tentang pemrosesan emosi pada psikopati menyatakan, ciri lainnya dari gangguan psikopati dalam dimensi korporasi adalah kurangnya penyesalan dan ketidakmampuan untuk belajar dari hukuman.[88] Tegasnya, perbuatan korporasi yang mendesain keterlibatannya dalam perdagangan satwa liar jaringan transnasional, tidak dapat dilepaskan dari perbuatan organ korporasi. Di mana, dari perbuatan organ

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79 Murray, Gore, dan Dilkina, "Encoding and Decoding Illegal Wildlife Trade Networks Reveals Key Airport Characteristics and Undetected Hotspots."

80 Sina Duensing, et al., *Op.Cit.,* 10.

81 Ayu Anggraini Putri, "Illegal Animal Trade by Crime Groups between Indonesia and Australia Becomes a Phenomenon That Threatens Global Issues," *Indonesian Journal of Social Research (IJSR)* 6, no. 2 (Agustus 2024): 122, https://doi.org/10.30997/ijsr.v6i2.453.

82 Clif Kainama, Irma Halima Hanafi, dan Dyah R. A. Daties, *Perlindungan Satwa Langka Berdasarkan Asean Aggrement On The Conservation of Nature and Nature Resources 1985*, 3, no. 1 (April 2025): 48, https://doi.org/10.47268/palasrev.v3i1.19703.

83 Weiyi Zhang dan Yong Wang, "The Impact of Different Recommendation Algorithms on Consumer Search Behavior and Merchants Competition," *International Review of Economics & Finance* 98 (Maret 2025): 1–2, https://doi.org/10.1016/j.iref.2025.103943.

84 FATF Report, "Money Laundering and the Illegal Wildlife Trade," The Financial Action Task Force (FATF), Paris, France, 2020, 13.

85 Luke Danagher, "Stigma, Labelling, and 'Corporate Psychopaths': A Legal Perspective," *Criminal Law Forum* 36, no. 3–4 (Desember 2025): 493, https://doi.org/10.1007/s10609-025-09516-3.

86 Elies Van Sliedregt, "The Future of International Criminal Justice Is Corporate," *Journal of International Criminal Justice* 23, no. 1 (Maret 2025): 20, https://doi.org/10.1093/jicj/mqaf004.

87 Luke Danagher, *Loc.Cit.*

88 Hedwig Eisenbarth dkk., "Psychophysiological Investigation of Psychopathy: From Robert Hare to Contemporary Research," *Journal of Psychopathology and Behavioral Assessment* 48, no. 1 (Maret 2026): 3, https://doi.org/10.1007/s10862-026-10274-8.

korporasi tersebut, konstruksi kesalahan korporasi dapat terlihat melalui instrumen teori psikopati.

3.2. Konstruksi Kesalahan Korporasi yang Melakukan Kejahatan Perdagangan Satwa Liar Jaringan Transnasional melalui Teori Psikopati

Pada pembahasan sebelumnya, penulis telah menguraikan dengan dasar argumentasi konseptual, bagaimana korporasi berperan dalam mendesain perdagangan satwa liar lintas negara. Jika korporasi dapat melakukan desain perdagangan satwa liar, yang di Indonesia dipandang sebagai tindak pidana, lantas bagaimana memintakan pertanggungjawaban pidana terhadap korporasi. Bukankah di Indonesia menganut paham dualistis, di mana subjek hukum yang melakukan tindak pidana tidak serta merta dapat dimintakan pertanggungjawaban pidana, mesti harus dilihat terlebih dahulu apakah subjek hukum tersebut memiliki kesalahan ataukah tidak.[89] Hal ini sejalan dengan asas *actus non facit reum nisi mens sit rea* yang berarti suatu perbuatan tak dapat menjadikan seseorang bersalah bilamana maksudnya tak bersalah.[90] Dalam beberapa literatur, asas ini biasa disebut *geen straf zonder schuld* yang berarti "tiada pidana tanpa kesalahan".[91] Artinya, untuk dapat dimintakan pertanggungjawaban pidana terhadap subjek tindak pidana, mesti harus ada kesalahan. Pertanyaannya kemudian, apakah korporasi memiliki kesalahan? Bukankah kesalahan erat kaitannya dengan subjek hukum perorangan (*natural person*)? Apabila korporasi dipandang memiliki kesalahan, bagaimana mengukur dan menentukan kesalahan korporasi?

Untuk menjawab pertanyaan ini, banyak teori pertanggungjawaban pidana korporasi yang dapat menjelaskannya, seperti teori identifikasi, teori agregasi, maupun teori *corporate culture model*.[92] Teori-teori pertanggungjawaban pidana korporasi ini, mengukur kesalahan korporasi dari tindakan personal atau pengurus atau organ dari korporasi tersebut. Kecuali teori *corporate culture model* atau teori budaya kerja korporasi. Teori budaya kerja korporasi (*corporate culture model*) memfokuskan pada kebijakan korporasi, baik tersirat maupun tersurat di mana kebijakan tersebut mempengaruhi cara kerja korporasi.[93] Tampaknya, dalam spektrum perdagangan satwa liar yang didesain oleh korporasi, teori *corporate culture model* menjadi relevan untuk digunakan dalam mengungkap pertanggungjawaban pidana korporasi. Tetapi, menurut penulis, teori *corporate culture model* saja tidak cukup untuk menjelaskan kesalahan korporasi. Untuk melengkapi kerangka analisis kesalahan korporasi dalam mendesain perdagangan satwa liar lintas negara, maka diperlukan teori psikopati dalam ilmu psikologi untuk menjelaskannya.

Istilah psikopati atau *psychopathy theory* merujuk pada gangguan kepribadian yang terkait dengan sifat kepribadian yang tidak berperasaan dan perilaku anti sosial.[94] Psikopati juga didefinisikan sebagai gangguan kepribadian kronis yang terdiri dari kecenderungan manipulatif, menipu, tidak berperasaan, impulsif, dan anti sosial.[95] Perdefinisi psikopati tersebut, lantas apa hubungannya dengan kejahatan perdagangan satwa liar jaringan transnasional yang dilakukan oleh korporasi? Angela Dawn Pardue, Matthew B. Robinson, dan Bruce A. Arrigo, melakukan penelitian dengan memperlihatkan bagaimana hubungan antara teori psikopati dengan kejahatan korporasi. Dalam penelitian ketiganya menunjukkan bagaimana perilaku korporasi menggambarkan beberapa sifat yang konsisten dengan psikopati.[96]

Lebih lanjut dikatakan bahwa konstruksi psikopati terhadap kejahatan korporasi dapat muncul lebih kuat ketika diperparah oleh rendahnya tingkat pengendalian diri, tekanan yang berhubungan dengan keuangan, teknik-

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89 Topo Santoso, *Asas-Asas Hukum Pidana* (Depok: Rajawali Pers, 2023), 99.

90 Zainal Arifin Mochtar dan Eddy O. S. Hiariej, *Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori, Asas dan Filsafat Hukum* (Depok: Rajawali Pers, 2024), 91.

91 Beniharmoni Harefa dan Handar Subhandi Bakhtiar, *Tindak Pidana* (Depok: Rajawali Pers, 2025), 17.

92 Ahmad Yusup dan Sigid Riyanto, *Op.Cit.*, 60–61.

93 *Ibid*.

94 Rasmus Rosenberg Larsen, "Psychopathy as Moral Blindness: A Qualifying Exploration of the Blindness-Analogy in Psychopathy Theory and Research," *Philosophical Explorations* 23, no. 3 (September 2020): 214, https://doi.org/10.1080/13869795.2020.1799662.

95 Darlene A. Ngo dkk., "Psychopathic Traits in Adult versus Adolescent Males: Measurement Invariance across the PCL-R and PCL:YV," *Behavioral Sciences* 14, no. 8 (Agustus 2024): 1, https://doi.org/10.3390/bs14080672.

96 Angela Dawn Pardue, Matthew B. Robinson, dan Bruce A. Arrigo, "Psychopathy and Corporate Crime: A Preliminary Examination, Part 1," *Journal of Forensic Psychology Practice* 13, no. 2 (Maret 2013): 117, https://doi.org/10.1080/15228932.2013.765745.

teknik maksimisasi, dan pembelajaran sosial dalam korporasi.[97] Misalnya, prioritas budaya secara keseluruhan terhadap keberhasilan finansial dan tekanan untuk mencapai pencapaian ekonomi individu dan tujuan keuangan perusahaan dapat meningkatkan kemungkinan perilaku yang konsisten dengan psikopati.[98] Dalam konteks korporasi, dampak pembelajaran sosial mengenai pentingnya keberhasilan finansial organisasi dan keuntungan yang terus meningkat serta pemanfaatan teknik-teknik maksimisasi yang inovatif membantu menjelaskan alasan mengapa perilaku psikopat telah menjadi hal yang normal dan dihargai di antara karyawan korporasi. Faktanya, maksimisasi, norma dalam korporasi besar dapat terjadi hanya jika ada psikopati.[99]

Berdasarkan kerangka penjelasan tersebut, sederhananya menurut penulis, korporasi dalam domain kejahatan perdagangan satwa liar, dapat dinilai sebagai individu yang mandiri (*crime for corporation*) dan sebuah entitas yang memerlukan peran individu atau *person* sebagai *actor intelectualis* dalam melakukan kegiatan perdagangan satwa liar (*cirminal corporation*). Keduanya berpotensi diidentifikasi sebagai psikopat, dalam arti korporasi merupakan tubuh fisiknya, sedangkan individu yang menjadi organ atau pengurus korporasi merupakan jiwa dari korporasi.[100] Oleh sebab itu, dalam perspektif teori psikopati, konstruksi kesalahan korporasi tidak bisa dilepaskan dari individu yang menjadi organ dari korporasi tersebut, di mana dalam menjalankan pengurusan korporasi sedikit banyaknya dipengaruhi oleh budaya kerja dari korporasi yang memenuhi ciri-ciri dari psikopati, seperti tidak berperasaan dan perilaku anti sosial, manipulatif, menipu, dan impulsif.[101] Apabila dikaitkan dengan korporasi sebagai aktor dalam mendesain perdagangan satwa liar ilegal jaringan transnasional, maka sebenarnya terdapat dua model konstruksi kesalahan korporasi berdasarkan jenis tipologi kejahatannya menurut teori psikopati.

Pertama, dalam domain tipologi *crime for corporation*,[102] konstruksi kesalahan korporasi menurut teori psikopati pada tipologi ini berakar pada desain awal korporasi itu sendiri. Pada tipologi ini, korporasi berfungsi sebagai sarana untuk mencapai kepentingan ekonomi dari pemilik korporasi dalam hal ini pemegang saham, atau penerima manfaat (*beneficial owner*), dengan mengorbankan nilai-nilai moral, sosial, dan ekologis. Struktur organisasi, sistem pengambilan keputusan, serta budaya kerja korporasi secara sengaja dibentuk untuk menormalkan perilaku eksploitatif, manipulatif, dan tidak berperikemanusiaan dalam memperdagangkan satwa liar, di mana hal ini merupakan karakteristik utama psikopati. Korporasi dalam tipologi *crime for corporation* tidak secara eksplisit dirancang untuk melakukan kejahatan, namun menciptakan kondisi struktural yang mendorong terjadinya pelanggaran hukum dan kerusakan sosial sebagai konsekuensi yang dianggap wajar. Praktik perusakan lingkungan, eksploitasi sumber daya alam, perdagangan satwa liar lintas negara, maupun pengabaian keselamatan manusia, satwa liar dan ekologi adalah contoh dari perbuatan yang memenuhi ciri-ciri dari psikopati.

Kedua, dalam domain tipologi *criminal corporation*,[103] konstruksi kesalahan korporasi menurut teori psikopati tidak lagi semata-mata bersifat desain struktural, melainkan telah termanifestasi secara aktif dalam praktik kejahatan korporasi. Pada tipologi ini, korporasi tidak hanya menjadi instrumen pasif (sebagai topeng) dari kehendak individu psikopatik di baliknya, tetapi bertransformasi menjadi entitas yang secara sistematis, berulang, dan terorganisasi melakukan perbuatan melawan hukum. Pola ini sejalan dengan karakteristik utama psikopati, seperti manipulatif, minim rasa bersalah, serta kecenderungan melakukan pelanggaran norma tanpa penyesalan secara berulang.[104] Dalam konteks *criminal corporation*, budaya organisasi dan kebijakan internal korporasi secara sadar diarahkan untuk melegitimasi tindakan kriminal, termasuk pelanggaran hukum lingkungan, perdagangan satwa liar ilegal ke mancanegara, serta praktik korupsi dan penipuan. Oleh sebab itu, dibutuhkan

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[97] Angela Dawn Pardue, Matthew B. Robinson, dan Bruce A. Arrigo, "Psychopathy and Corporate Crime: A Preliminary Examination, Part 2," *Journal of Forensic Psychology Practice* 13, no. 2 (Maret 2013): 165, https://doi.org/10.1080/15228932.2013.765746.

[98] *Ibid*.

[99] *Ibid*.

[100] Yusup dan Riyanto, *Limited Diversion Sanction (Sanksi Pengalihan Terbatas) dalam Tindak Pidana Korupsi untuk Korporasi*, 117.

[101] Pardue, Robinson, dan Arrigo, "Psychopathy and Corporate Crime," Maret 2013, 116.

[102] Eddy O. S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional* (Depok: Rajawali Pers, 2024), 185.

[103] Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*.

[104] Ioannis Almas dan Alexandros Lordos, "A Narrative Review of Psychopathy Research: Current Advances and the Argument for a Qualitative Approach," *The Journal of Forensic Psychiatry & Psychology* 36, no. 3 (Mei 2025): 357, https://doi.org/10.1080/14789949.2025.2456208.

desain hukum yang mengatur perdagangan satwa liar ilegal secara memadai dalam menentukan efektivitasnya, tidak hanya secara prinsip tetapi juga dalam praktik.[105]

Menyadari kondisi keterlibatan korporasi yang begitu masif dalam perdagangan satwa liar lintas negara, sehingga UU Konservasi SDAHE mengalami perubahan parsial dengan memasukkan korporasi sebagai subjek tindak pidana dalam kejahatan konservasi. Bahkan dalam kerangka normatif Pasal 40A ayat (5) dan (6) Perubahan UU Konservasi SDAHE, secara tegas menentukan ancaman pidana penjara jika perbuatan memperdagangkan secara konvensional atau melalui media elektronik atau menyelundupkan atau memasukkan dan mengeluarkan satwa yang dilindungi. Terdapatnya ancaman pidana penjara dalam konstruksi norma tersebut, menunjukkan bahwa secara tidak langsung konstruksi kesalahan korporasi diletakkan pada persona atau organ dari korporasi. Oleh sebab itu, dengan penelitian ini yang mengulas bagaimana mengonstruksi kesalahan korporasi melalui pendekatan psikopati dapat berkontribusi dalam mendukung paradigma pemidanaan dan pertanggungjawaban pidana korporasi yang melakukan perdagangan satwa liar dalam Perubahan UU Konservasi SDAHE. Perlu diingat juga, bahwa dimensi perdagangan satwa liar yang dilakukan oleh korporasi bersifat luas sampai dengan mencakup wilayah negara lain atau lintas negara, sehingga instrumen UU Konservasi SDAHE saja tidak cukup untuk menanggulangi kejahatan dalam spektrum ini. Mesti dibutuhkan integrasi kerangka hukum, baik kerangka hukum nasional maupun internasional.

Kerangka hukum internasional yang menangani perdagangan satwa liar ilegal seperti *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) maupun *International Consortium on Combating Wildlife Crime* (ICCWC), dianggap belum mampu untuk mengakomodir kejahatan perdagangan satwa liar, hal ini disebabkan kelompok kriminal terorganisasi menunjukkan kemampuan adaptasi yang luar biasa, memungkinkan kelompok tersebut untuk dengan mudah menghindari peraturan dan upaya penegakan hukum untuk memaksimalkan keuntungan mereka.[106] Penelitian terdahulu menunjukkan bahwa perdagangan satwa liar sering melintasi batas negara, penegakan hukum nasional saja tidak cukup untuk menghadapi tantangan tersebut. Hambatan seperti perbedaan sistem hukum, tidak terpadunya prosedural, hingga keterbatasan kapasitas teknis lembaga penegak hukum sering menjadi penyebab rendahnya efektivitas tindakan hukum terhadap pelaku kejahatan ini. Hal ini menggarisbawahi kebutuhan akan mekanisme yang dapat mendukung pertukaran informasi dan bukti antara yurisdiksi yang berbeda.[107]

Untuk mengatasi problematika kompleksitas tersebut, PBB melalui UNODC memfasilitasi kerja sama internasional melawan kejahatan, termasuk perdagangan satwa liar. Hal ini sebagaimana didukung pula melalui ketentuan Pasal 18 UNTOC terkait dengan adanya kewajiban bagi setiap negara untuk memberikan bantuan hukum timbal balik (*mutual legal asisstance*).[108] *Mutual Legal Assistance* (MLA) adalah mekanisme kerja sama internasional dalam pencegahan dan pemberantasan kejahatan, khususnya kejahatan lintas negara (*transnational crime*).[109] MLA menjadi instrumen penting dalam penegakan hukum tindak pidana transnasional karena memungkinkan aparat penegak hukum (APH) mengatasi keterbatasan yurisdiksi dalam rangka penyelidikan, penyidikan, hingga pelaksanaan putusan.[110] Penggunaan instrumen MLA dalam domain pemberantasan perdagangan satwa liar lintas negara, sedikit banyaknya akan mengalami tantangan. Khususnya, dengan adanya keterlibatan korporasi digital dalam kerangka penyertaan tindak pidana (*deelneming*) yang memfasilitasi instrumen pemasaran melalui *platform digital e-commerce.* Tantangan tersebut berhubungan dengan instrumen teknologi yang digunakan dengan basis *big data* yang servernya bisa bersifat global dan tidak hanya terbatas pada satu negara saja. Dengan adanya pembaruan KUHAP yang baru melalui Undang-Undang Nomor 20 Tahun 2025

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[105] Chad Patrick Osorio dan Nadia Bernaz, "Addressing the International Illegal Wildlife Trade through a Human Rights Approach," *Review of European, Comparative & International Environmental Law* 33, no. 3 (November 2024): 510, https://doi.org/10.1111/reel.12563.

[106] United Nations Office on Drugs and Crime, *Trafficking of Wildlife*, https://www.unodc.org/unodc/en/pccp/wildlife-trafficking.html?utm, diakses pada Minggu, 21 Desember 2025.

[107] I. Made Pasek Diantha, *Hukum Pidana Transnasional Suatu Studi Awal* (Jakarta: Kencana, 2020), 96.

[108] Lihat Pasal 18 United Nations Convention Against Transnational Organized Crime.

[109] Erisa Febriani, *Apa itu Mutual Legal Assistance (MLA) dalam Hukum Internasional?*, Kantor Wilayah Kementerian Hukum Republik Indonesia Provinsi Nusa Tenggara Barat, Mataram, released 2025, https://ntb.kemenkum.go.id/artikel-layanan/apa-itu-mutual-legal-assistance-mla-dalam-hukum-internasional, diakses pada Minggu, 21 Desember 2025.

[110] Andika Jinaratana, Yofi Permatasari, dan Jean Claudia, "Mutual Legal Assistance International Agreement in Eradicating Transnational Crime," *Asian Journal of Social and Humanities* 1, no. 08 (Mei 2023): 343, https://doi.org/10.59888/ajosh.v1i08.39.

tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP Nasional), yang salah satu instrumen perubahannya mengakui secara tegas terkait dengan keberadaan alat bukti elektronik,[111] sehingga diharapkan mempermudah penggunaan mekanisme MLA dalam kasus perdagangan satwa liar yang menggunakan basis teknologi, meskipun tantangan administratif, diplomasi dan perbedaan sistem hukum juga akan sangat menentukan tingkat keberhasilannya.

Selain melalui instrumen MLA, penegakan hukum terhadap perdagangan satwa liar yang tergolong kejahatan lintas negara (*transnational crime*) juga dapat dilakukan melalui perjanjian ekstradisi. Selain itu, kerja sama internasional lainnya, baik bersifat bilateral maupun multilateral, juga dapat ditempuh melalui *Mutual Legal Assistance Treaties* (MLATs) atau perjanjian bantuan yudisial (*judicial assistance treaty*) antara dua negara atau lebih.[112] Di tingkat regional ASEAN, terdapat *Treaty on Mutual Legal Assistance in Criminal Matters* tahun 2004, yang dikenal sebagai AMLAT. Konvensi regional ini bertujuan memberikan bantuan hukum timbal balik secara maksimal dalam perkara pidana, termasuk dalam hal penyelidikan, penuntutan, serta pelaksanaan proses hukum yang terkait.[113]

Pendekatan MLA menjadi instrumen penting dalam konteks penegakan hukum lintas batas khususnya perdagangan satwa liar. Hal ini tidak dapat dilepaskan dari konteks bukti dan alat bukti yang sering kali berada di luar wilayah hukum sebuah negara yang sedang menyelidiki kasus perdagangan satwa liar, sehingga membutuhkan dasar hukum yang kuat untuk mengumpulkan bukti di luar negeri (*gathering evidence abroad*), penyitaan aset yang terkait, dan koordinasi proses peradilan. Sebagai bagian dari kerangka kerja internasional, *Mutual Legal Assistance Treaty (MLAT)* telah lama berkembang untuk mencakup aksi kolaboratif antarnegara dalam menghadapi berbagai tindak pidana.[114]

Pemerintah Indonesia saat ini menempatkan pemberantasan kejahatan lintas negara (*transnational crime*) sebagai salah satu prioritas utama. Kejahatan yang melintasi kedaulatan negara menjadi perhatian serius, tercermin dari politik hukum Indonesia dalam penyelenggaraan bantuan hukum timbal balik (*mutual legal assistance*), yang diatur melalui Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana (UU MLA). Undang-undang ini dipandang sebagai pelengkap bagi undang-undang ekstradisi dalam upaya menghadapi kejahatan transnasional. Pengaturan mengenai bantuan hukum timbal balik tidak terlepas dari perkembangan praktik kejahatan lintas negara, termasuk perdagangan satwa liar secara internasional. Selain itu, Indonesia melalui Undang-Undang Nomor 5 Tahun 2009 Tentang Pengesahan *United Nations Convention Against Transnational Organized Crime* telah meratifikasi UNTOC, di mana salah satu muatannya mengharuskan setiap negara memberikan MLA seluas-luasnya dalam konteks penegakan hukum lintas batas.[115] Tidak hanya sampai di situ saja, Indonesia yang merupakan bagian dari negara-negara G-20 melalui *Convention on Transnational Organized Crime* (TOC) juga memuat kerangka hukum yang memadai dalam memerangi kejahatan transnasional melalui MLA.[116]

Mengingat perdagangan satwa liar termasuk kejahatan lintas negara, mekanisme penegakan hukumnya tidak hanya mengacu pada regulasi internasional yang mengatur penanganan kejahatan tersebut dan kerja sama antarnegara, baik secara bilateral maupun multilateral melalui instrumen seperti MLA, tetapi juga memerlukan pendekatan berdasarkan asas-asas hukum, serta teori atau doktrin yang berkembang dalam pemberantasan kejahatan transnasional. Dalam pelaksanaan MLA, proses atau mekanismenya dilakukan tidak melalui antara penegak hukum dengan penegak hukum antar negara, melainkan melalui Pemerintah. Di Indonesia, lembaga atau instansi pemerintah yang berwenang untuk melakukan hubungan koordinasi MLA adalah Kementerian Hukum

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[111] Lihat Pasal 235 ayat (1) huruf f Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, Legislation Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149.

[112] I. Nyoman Sindhu Gautama, "Pemberatasan Kejahatan Internasional berdasarkan Mutual Legal Assistance Treaties (MLATs)," *Jurnal Aktual Justice* 4, no. 1 (Juni 2019): 54–65, https://doi.org/10.47329/aktualjustice.v4i1.474.

[113] Lihat Pasal 1 ayat (1) Treaty Mutual Legal Assistance in Criminal Matters (2004).

[114] Anna-Maria Osula, "Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data," *Masaryk University Journal of Law and Technology* 9, no. 1 (Juni 2015): 46, https://doi.org/10.5817/MUJLT2015-1-4.

[115] Lihat Pasal 18 United Nations Convention Against Transnational Organized Crime.

[116] Yoserwan, "Harmonization of Law on Mutual Legal Assistance by Indonesia in Eradicating Transnational Economic Crime in ASEAN Economic Community:," conference paper presented pada 1st International Conference on Law and Human Rights 2020 (ICLHR 2020), Jakarta, Indonesia, 2021, 26, https://doi.org/10.2991/assehr.k.210506.005.

dan HAM[117] yang saat ini terpecah menjadi tiga kementerian di bawah koordinator satu kementerian, yakni Kementerian Hukum, Kementerian HAM, Kementerian Imigrasi dan Pemasyarakatan (IMIPAS), di bawah koordinator Kementerian Koordinator (Kemenko) Hukum, HAM, dan IMIPAS. Terkait dengan pecahnya kementerian tersebut, Putusan MK Nomor 180/PUU-XXII/2024 menyatakan:[118]

"...dengan adanya perubahan nomenklatur kementerian yakni adanya pemisahan antara urusan hukum, HAM, imigrasi, atau pemasyarakatan, Mahkamah menilai bahwa perubahan administratif tersebut merupakan dinamika penyelenggaraan pemerintahan yang tidak secara otomatis menghapus eksistensi maupun keabsahan kewenangan yang telah ditetapkan dalam undang-undang. Terlebih, struktur organisasi yang menjalankan *central authority* masih tetap berada dalam tanggung jawab **Menteri Hukum**. Oleh karena itu, substansi pengaturan mengenai kementerian yang berperan sebagai pemegang otoritas (*central authority*) tetap sah secara hukum selama tidak ada perubahan norma melalui revisi undang-undang. Demikian pula, mengenai isu yang menyatakan adanya potensi tumpang tindih kewenangan antara Menteri Hukum dan Jaksa Agung, terutama dalam praktik pemulihan aset lintas yurisdiksi, menurut Mahkamah isu tersebut bukan merupakan persoalan konstitusionalitas norma, melainkan berkaitan dengan tata kelola dan implementasi antar instansi."

Berdasarkan Putusan MK Nomor 180/PUU-XXII/2024 tersebut, maka Kementerian Hukum adalah lembaga pemegang Otoritas Pusat (*Central Authority*) penanganan MLA di Indonesia. Selain Kementerian Hukum, Kementerian Luar Negeri menjadi salah satu institusi dalam hal pelaksanaan perjanjian timbal balik dan beberapa institusi terkait lainnya sebagai suatu hubungan yang bersifat koordinatif.[119]

Setelah seluruh persyaratan pengajuan permintaan sebagaimana dimaksud dalam ketentuan Pasal 10 UU Bantuan Timbal Balik Masalah Pidana[120] dipenuhi, maka berlanjut pada proses verifikasi yang dilakukan oleh pihak negara yang diminta. Jika kecocokan dipastikan antara profil yang dikirimkan dan yang disimpan dalam file pihak yang diminta, poin nasional dari Negara yang meminta secara otomatis menerima informasi tentang keberadaan kecocokan dan referensinya.[121] Pengajuan MLA dilakukan untuk menemukan atau mengidentifikasi individu yang diyakini berada di negara lain, yang diduga memiliki keterkaitan dengan proses penyelidikan, penuntutan, atau pemeriksaan di pengadilan Indonesia, atau yang dapat memberikan keterangan maupun bantuan lain yang diperlukan dalam rangka penyelidikan, penuntutan, dan pemeriksaan persidangan.[122]

Sebagaimana telah dijelaskan sebelumnya, bahwa salah satu fungsi utama dari MLA adalah memfasilitasi pertukaran informasi dan bukti antarnegara. Dalam konteks perdagangan satwa liar, bukti mengenai jaringan korporasi yang terlibat sering tersebar di berbagai yurisdiksi, termasuk komunikasi elektronik, catatan transaksi keuangan, dan dokumen lainnya yang relevan dengan investigasi. MLA memungkinkan negara yang menyelidiki untuk mendapatkan bantuan dari negara lain dalam pengumpulan bukti tersebut sesuai prosedur hukum masing-masing negara.

Untuk mempermudah pemahaman pembaca mengenai penerapan MLA dalam penegakan hukum terhadap pelaku perdagangan satwa liar, penulis akan memaparkan analisis terhadap sebuah kasus nyata. Kasus ini terkait peredaran bagian tubuh satwa dilindungi dari Indonesia ke Amerika Serikat melalui *platform* jual beli daring, yang terungkap setelah *United States Fish and Wildlife Service* (USFWS) memberikan informasi mengenai penyitaan kiriman satwa liar dilindungi asal Indonesia di Amerika Serikat.[123] Informasi tersebut ditindaklanjuti oleh Tim Patroli Siber Direktorat Jenderal Penegakan Hukum Kementerian Kehutanan (Ditjen Gakkum Kemenhut), yang berhasil melacak dan *memprofiling* akun penjualan terkait. Selanjutnya, Tim Ditjen Gakkum Kemenhut melaksanakan Operasi Peredaran TSL yang dilindungi Undang-Undang dan berhasil mengamankan dua pelaku. Berdasarkan keterangan pelaku, mereka telah melakukan aktivitas jual beli selama satu tahun dengan

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[117] Lihat Pasal 1 angka 10 Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik, Legislation Lembaran Negara Republik Indonesia Tahun 2006 Nomor 18, Tambahan Lembaran Negara Republik Indonesia Nomor 4607 (2006).

[118] Putusan Mahkamah Konstitusi Nomor 180/PUU-XXII/2024 (2025), 485–86.

[119] Putusan Mahkamah Konstitusi Nomor 180/PUU-XXII/2024, 485.

[120] Lihat Pasal 10 Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik..

[121] Amparo Salom Lucas dan Maria Isabel Llambés Sánchez, "Mutual Legal Assistance on Criminal Matters: When Theory Meets Practice - A Real Story," ERA Forum, 2021, 345.

[122] Lihat Pasal 11 Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik.

[123] Ikwan Eduard Ruitan, *Ditjen Gakkum Gagalkan Penyelundupan 94 Spesimen TSL, Dua Pelaku Dijadikan Tersangka*, Siaran Pers, Kementerian Kehutanan, Jakarta, released 2025, https://www.kehutanan.go.id/pers/ditjen-gakkum-gagalkan-penyelundupan-94-spesimen-tsl-dua-pelaku-dijadikan-tersangka, dikases pada Minggu, 21 Desember 2025.

lebih dari sepuluh transaksi ke Amerika Serikat dan Inggris. Dari pengungkapan kasus ini, penegakan hukum akan dilanjutkan hingga menyasar *beneficial owner* melalui kerja sama dengan lembaga penegak hukum lainnya, baik di dalam maupun luar negeri.[124]

Berdasarkan kasus tersebut, memang secara eksplisit tidak disebutkan adanya keterlibatan korporasi, tetapi adanya penyebutan dan pengejaran sampai pada *beneficial owner* yang merupakan organ luar korporasi tetapi mengendalikan atau sebagai penerima manfaat dari suatu korporasi, menunjukkan bahwa dari kasus tersebut terdapat indikasi keterlibatan suatu korporasi. Dalam kasus ini, korporasi bisa saja berada di Amerika maupun di Indonesia atau bahkan di negara lain selain dari kedua negara tersebut. Kerumitan dari kasus ini adalah menentukan yurisdiksi yang berwenang mengadili untuk subjek korporasi yang berada di Amerika atau di negara lainnya, ditambah dengan mekanisme perbuatan perdagangan satwa liar ilegal ini dilakukan melalui sarana elektronik.

Dalam perspektif teori *locus delicti,* yakni teori *leer der lichamelijk daad* atau teori perbuatan materiil atau perbuatan jasmaniah, *locus delicti* adalah tempat di mana tindakan atau kelakuan terjadi.[125] Artinya, jika perbuatan dua orang dalam kasus tersebut terdapat aktor korporasi di belakangnya, dan dalam perbuatan tersebut dilakukan untuk dan atas nama korporasi atau korporasi menerima keuntungan langsung dari perbuatan kedua orang tersebut, maka korporasi dianggap terlibat melakukan perbuatan pidana sebagaimana dimaksud dalam ketentuan Pasal 40A ayat (4) huruf h jo. ayat (5) huruf b UU Konservasi SDAHE.

Apabila korporasi berada di luar yurisdiksi Indonesia, maka yurisdiksi yang berwenang untuk mengadili berdasarkan teori *leer der lichamelijk daad* adalah Indonesia. Akan tetapi, hal ini cukup sulit untuk dilakukan, mengingat ada prinsip *double criminality* yang harus dipenuhi terlebih dahulu. Jika negara di mana tempat korporasi tersebut berada tidak menganggap bahwa perbuatan korporasi tersebut bukan merupakan tindak pidana di negaranya, maka korporasi tidak dapat diadili meskipun melanggar hukum Indonesia. Kendatipun korporasi memenuhi prinsip tersebut, masih terdapat kesulitan untuk mengadili korporasi yang berada di luar Indonesia. Hal ini disebabkan terdapat asas *dignitie nationale*[126] yaitu suatu asas yang menyatakan untuk tidak menyerahkan warga negara sendiri. Artinya, jika tersangka, terdakwa, atau terpidana yang diminta adalah warga negara, maupun entitas bisnis dari negara yang diminta, maka negara yang diminta berhak untuk tidak menyerahkan warga negaranya atau entitas bisnis tersebut kepada negara yang meminta. Asas ini juga berlaku untuk subjek hukum korporasi, mengingat korporasi adalah suatu entitas bisnis pada suatu negara.

Persoalan terbenturnya penegakan hukum terhadap korporasi dengan beberapa asas tersebut, sebenarnya bisa diselesaikan melalui mekanisme MLA. Dalam ketentuan Pasal 18 ayat (2) UNTOC disebutkan bahwa "Bantuan hukum timbal balik harus diberikan secara maksimal sesuai dengan ketentuan undang-undang, perjanjian, kesepakatan, dan pengaturan dari negara yang dimintai bantuan, dengan tetap memperhatikan proses penyelidikan, penuntutan, dan persidangan terkait tindak pidana, di mana **suatu badan hukum** dapat dikenai tanggung jawab sesuai Pasal 10 Konvensi di negara peminta". Selain itu, meskipun pada suatu negara tidak mengakui bahwa perbuatan yang dilakukan oleh korporasi sebagai bagian dari tindak pidana di negaranya, tetapi negara tersebut tetap berkewajiban untuk melakukan kerja sama dengan negara lain yang menganggap perbuatan tersebut sebagai tindak pidana di negaranya. Hal ini didasarkan pada asas *aut dedere aut judicare* yang menyatakan bahwa setiap negara memiliki kewajiban untuk menuntut dan mengadili pelaku kejahatan internasional, serta wajib bekerja sama dengan negara lain dalam rangka penahanan, penuntutan, dan pemeriksaan pengadilan terhadap pelaku kejahatan lintas negara.[127]

Apa saja yang dapat dimintakan melalui mekanisme pendekatan MLA dalam mengejar aktor korporasi dalam perdagangan satwa liar lintas negara? Hal ini telah diatur dalam ketentuan Pasal 18 ayat (3) UNTOC yakni "bantuan hukum timbal balik yang diberikan berdasarkan pasal ini dapat dimintakan untuk berbagai tujuan, antara lain: (a) memperoleh bukti atau keterangan dari seseorang; (b) menyampaikan dokumen pengadilan; (c) melakukan pencarian, penyitaan, dan pembekuan aset; (d) memeriksa barang dan lokasi tertentu; (e) memberikan informasi, termasuk keterangan ahli terkait pembuktian; (f) menyerahkan dokumen asli atau salinan resmi yang relevan, termasuk laporan pemerintah, perbankan, keuangan, perusahaan, atau catatan usaha; (g) mengidentifikasi atau melacak hasil tindak pidana, aset, sarana, atau benda lain untuk kepentingan pembuktian; (h) memfasilitasi

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[124] *Ibid*.

[125] Eddy O.S. Hiariej, 2016, *Op.Cit.,* 299.

[126] Eddy O. S. Hiariej, *Pengantar Hukum Pidana Internasional* (Jakarta: Erlangga, 2009), 41–42.

[127] Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*, 302.

kehadiran sukarela seseorang di negara peminta; dan (i) bentuk bantuan lain sepanjang tidak bertentangan dengan hukum nasional negara yang dimintai bantuan."

Meskipun MLA adalah instrumen yang dapat digunakan dalam menyelesaikan konflik keterlibatan korporasi dalam perdagangan satwa liar lintas negara, akan tetapi dalam penerapannya, hal ini tidak mudah untuk dilakukan. Paling tidak menurut penulis, terdapat 2 tantangan dalam menerapkan MLA. *Pertama,* perbedaan sistem hukum dan prosedur. Dalam kasus tersebut, terdapat perbedaan sistem hukum antara Indonesia dengan Amerika, di mana sistem hukum berbasis *civil law* dan *common law* dapat memiliki persyaratan berbeda dalam hal kewenangan penegak hukum, *admissibility* bukti, serta proses permintaan dan eksekusi permintaan MLA. Hal ini sering kali menyebabkan keterlambatan atau bahkan kegagalan dalam mendapatkan bukti penting untuk kasus perdagangan satwa liar.[128] *Kedua,* kurangnya harmonisasi perjanjian. Walaupun banyak negara termasuk Indonesia telah meratifikasi UNTOC dan menandatangani MLAT, ketidakhadiran perjanjian bilateral atau multilateral yang efektif khususnya antarnegara tertentu masih menjadi kendala. Dalam beberapa kasus, setelah perjanjian MLA ditandatangani, implementasi di tingkat praktis masih berjalan lambat akibat kurangnya *political will* atau kapasitas teknis lembaga penegak hukum di negara-negara terkait untuk mengeksekusi permintaan.[129]

4. Kesimpulan

Keterlibatan korporasi dalam perdagangan satwa liar jaringan transnasional, tidaklah bersifat insidental, melainkan dirancang secara sistematis sebagai bagian dari arsitektur kejahatan transnasional. Korporasi berperan sebagai pendorong sekaligus pengatur dan arsitek dengan memanfaatkan struktur legal dan bisnis yang sah untuk menyamarkan aktivitas ilegal. Desain keterlibatan tersebut dapat diwujudkan melalui pendirian badan usaha fiktif atau dengan menggunakan mekanisme perusahaan grub, bahkan bekerja sama dengan jaringan kejahatan lintas batas dengan cara menggunakan rantai pasok lintas negara, pemanfaatan jasa logistik dan keuangan internasional, serta manipulasi dokumen perdagangan dan perizinan.

Terdapatnya pembaruan parsial UU Konservasi SDAHE dengan salah satu materi muatannya memasukan korporasi sebagai subjek tindak pidana, menempatkan konsep pertanggungjawaban pidana terhadap korporasi pada aspek krusial, khususnya dalam hal menemukan kesalahan korporasi dalam perdagangan satwa liar. Teori psikopati memberikan kerangka konseptual yang kuat untuk memahami konstruksi kesalahan korporasi dalam kejahatan perdagangan satwa liar jaringan transnasional. Korporasi ditempatkan sebagai entitas yang dapat merefleksikan karakteristik psikopatik, seperti tidak adanya empati, rasa bersalah, dan tanggung jawab moral terhadap manusia, satwa liar, dan ekosistem. Oleh karena itu, diperlukannya pendekatan pertanggungjawaban pidana yang mampu menjangkau dimensi sistemik kesalahan korporasi dalam kejahatan perdagangan satwa liar lintas negara yang dilakukan oleh korporasi. Dalam konteks kejahatan yang melibatkan korporasi multinasional, mekanisme MLA menjadi instrumen kunci untuk membangun konstruksi perkara yang utuh dan berbasis bukti lintas negara.

Berdasarkan temuan penelitian, penulis menyarankan beberapa hal. *Pertama,* penguatan kerangka regulasi dalam implementasi pembaruan UU Konservasi SDAHE, khususnya terkait pengaturan pertanggungjawaban pidana korporasi. Penguatan tersebut perlu diarahkan pada perumusan mekanisme yang lebih jelas mengenai konstruksi kesalahan korporasi, termasuk standar pembuktian yang mampu menjangkau tindakan yang dilakukan melalui struktur organisasi, jaringan bisnis, maupun rantai pasok lintas negara. *Kedua,* aparat penegak hukum perlu mengembangkan pendekatan penegakan hukum yang tidak hanya berfokus pada pelaku individu, tetapi juga pada struktur dan kebijakan korporasi yang memungkinkan terjadinya perdagangan satwa liar secara sistematis. Dalam hal ini, pendekatan konseptual seperti teori psikopati korporasi dapat dijadikan sebagai perspektif analitis untuk memahami pola pengambilan keputusan korporasi yang mengabaikan tanggung jawab sosial dan ekologis. *Ketiga,* pemerintah perlu memperkuat kerja sama internasional dalam penanggulangan perdagangan satwa liar jaringan transnasional, terutama melalui optimalisasi mekanisme MLA, pertukaran informasi dan koordinasi lintas yurisdiksi antara otoritas penegak hukum. Hal ini penting mengingat karakter kejahatan yang melibatkan korporasi multinasional sering kali memanfaatkan perbedaan yurisdiksi dan sistem hukum antarnegara. *Keempat,* diperlukan penguatan sistem pengawasan terhadap aktivitas korporasi yang bergerak di sektor perdagangan,

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[128] Hilly Moodrick-Even Khen, "Mutual Legal Assistance and Double Criminality," *Journal of International Criminal Justice* 23, no. 1 (Maret 2025): 87, https://doi.org/10.1093/jicj/mqaf008.

[129] Francesco Calderoni, *UNTOC At 25: Achievements, Challenges, And Diverging National Responses To Organized Crime Offences*, 4, no. 1 (2025): 28.

logistik, dan *platform digital* yang berpotensi dimanfaatkan sebagai sarana perdagangan satwa liar ilegal. Pengawasan tersebut dapat dilakukan melalui integrasi teknologi, transparansi rantai pasok, serta penerapan prinsip *corporate compliance* dan *due diligence* yang lebih ketat dalam praktik bisnis.

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Restorative Justice dalam KUHAP Baru: Antara Kepastian Hukum dan Diskresi Aparat Penegak Hukum

Restorative Justice in the New Criminal Procedure Code: Between Legal Certainty and Law Enforcement Officer Discretion

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Abstract

The restorative justice provisions in the New Criminal Procedure Code mark a paradigm shift in the Indonesian criminal justice system from a retributive approach to a more humanistic and recovery-oriented approach. This study aims to analyze the construction of restorative justice provisions in the New KUHAP and assess their implications for the principle of legal certainty and the limits of the authority of law enforcement officers. The research method used is normative legal research with a statutory and conceptual approach, through an examination of the principles of legality, legal certainty, and the theory of discretion in criminal law. The results show that although restorative justice provides flexibility in case resolution and has the potential to deliver substantive justice, its provisions, which have not been formulated in a limited and measurable manner, have the potential to create disparities in implementation and open up room for abuse of authority. Therefore, the formulation of more stringent norms regarding case boundaries, procedures, and oversight mechanisms is needed to ensure that the application of restorative justice remains within the corridor of the principles of legality and the principle of equality before the law.

Abstrak

Pengaturan *restorative justice* dalam KUHAP Baru menandai pergeseran paradigma sistem peradilan pidana Indonesia dari pendekatan retributif menuju pendekatan yang lebih humanis dan berorientasi pada pemulihan. Namun demikian, integrasi konsep tersebut menimbulkan persoalan normatif terkait keseimbangan antara kepastian hukum dan ruang diskresi aparat penegak hukum. Penelitian ini bertujuan untuk menganalisis konstruksi pengaturan restorative justice dalam KUHAP Baru serta menilai implikasinya terhadap prinsip kepastian hukum dan batasan kewenangan aparat. Metode penelitian yang digunakan adalah penelitian hukum normatif dengan pendekatan perundang-undangan dan pendekatan konseptual, melalui kajian terhadap asas legalitas, asas kepastian hukum, dan teori diskresi dalam hukum pidana. Hasil penelitian menunjukkan bahwa meskipun restorative justice memberikan fleksibilitas dalam penyelesaian perkara dan berpotensi menghadirkan keadilan substantif, pengaturannya yang belum dirumuskan secara limitatif dan terukur berpotensi menimbulkan disparitas penerapan serta membuka ruang penyalahgunaan kewenangan. Ketegangan antara kebutuhan fleksibilitas dan tuntutan kepastian hukum menjadi isu sentral dalam implementasinya. Oleh karena itu, diperlukan perumusan norma yang lebih tegas mengenai

batasan perkara, prosedur, dan mekanisme pengawasan guna memastikan bahwa penerapan restorative justice tetap berada dalam koridor asas legalitas dan prinsip equality before the law.

1. Pendahuluan

Sistem peradilan pidana Indonesia sejak lama dibangun di atas paradigma retributif yang menempatkan tindak pidana sebagai pelanggaran terhadap negara, sehingga penyelesaiannya difokuskan pada pemberian sanksi kepada pelaku melalui mekanisme peradilan formal. Paradigma ini tercermin secara kuat dalam Undang-Undang Nomor 8 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP lama) yang menitikberatkan pada proses penegakan hukum yang bersifat prosedural, adversarial, dan berorientasi pada pembuktian kesalahan terdakwa. Dalam kerangka tersebut, posisi korban dan relasi sosial yang rusak akibat tindak pidana belum memperoleh perhatian yang memadai. Akibatnya Korban lebih diposisikan sebagai alat bukti (saksi) daripada subjek yang memiliki kepentingan pemulihan dan proses peradilan cenderung berorientasi pada hubungan antara negara dan pelaku (*state vs offender*), bukan pelaku dengan korban. Bahkan dalam praktiknya, korban sering kali tidak dilibatkan dalam proses pengambilan keputusan, tidak memperoleh kesempatan menyampaikan kebutuhan pemulihan secara langsung dan tidak mendapatkan jaminan kompensasi atau restitusi yang efektif.

Dalam KUHAP lama, keadilan dipahami terutama sebagai kepatuhan terhadap prosedur hukum dan penerapan sanksi pidana sesuai dengan ketentuan peraturan perundang-undangan. Mekanisme penyelesaian perkara pidana hampir sepenuhnya diserahkan kepada aparat penegak hukum, dengan ruang diskresi, di mana diskresi sendiri merupakan kewenangan yang diberikan oleh hukum kepada pejabat atau aparat penegak hukum untuk mengambil keputusan berdasarkan pertimbangan sendiri dalam situasi tertentu, ketika peraturan perundang-undangan tidak mengatur secara lengkap, terjadi keadaan mendesak yang sangat terbatas untuk mempertimbangkan kepentingan korban, pelaku, dan masyarakat secara seimbang. Akibatnya, sistem peradilan pidana sering kali menghasilkan putusan yang sah secara hukum, tetapi belum tentu memulihkan kerugian korban maupun memperbaiki relasi sosial yang terganggu.

Paradigma tersebut tercermin dalam praktik penegakan hukum berdasarkan Undang-Undang Nomor 8 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP lama), yang lebih berorientasi pada proses pembuktian kesalahan dan penjatuhan pidana. Dalam praktiknya, pendekatan retributif seringkali belum sepenuhnya memberikan ruang pemulihan bagi korban maupun penyelesaian konflik secara komprehensif, serta berkontribusi pada permasalahan overkapasitas lembaga pemasyarakatan dan tingginya angka residivisme.

Perkembangan pemikiran hukum pidana modern menunjukkan kritik yang semakin kuat terhadap pendekatan retributif yang kaku dan berorientasi pada pemidanaan semata. Dalam konteks ini, konsep *restorative justice* muncul sebagai alternatif paradigma yang menempatkan tindak pidana sebagai konflik sosial yang menimbulkan kerugian bagi korban, pelaku, dan masyarakat. *Restorative justice* menekankan pemulihan, tanggung jawab pelaku, partisipasi korban, serta pemulihan harmoni sosial, bukan sekadar penghukuman.

Meskipun KUHAP lama tidak secara eksplisit mengadopsi konsep *restorative justice*, praktik-praktik yang bernuansa restoratif mulai berkembang melalui kebijakan diskresi aparat penegak hukum dan regulasi sektoral, seperti peraturan internal Kepolisian dan Kejaksaan serta Mahkamah Agung (MA). Namun, karena tidak memiliki dasar hukum yang kuat dalam hukum acara pidana, penerapan keadilan restoratif dalam kerangka KUHAP lama bersifat terbatas, tidak seragam, dan rentan terhadap inkonsistensi serta penyalahgunaan diskresi.

Dalam perkembangan sistem peradilan pidana di Indonesia, pemidanaan dengan memenjarakan pelaku kejahatan merupakan sanksi yang utama terhadap pelaku kejahatan yang terbukti bersalah di pengadilan. Sementara jika dikaji lebih dalam, masyarakat memerlukan bukan hanya sekedar pemenjaraan kepada pelaku pidana, namun harapan untuk bisa mengembalikan keadaan kepada sebelum terjadinya pidana. Harapan masyarakat tersebut yang mendesak untuk dilakukan penyelesaian dengan cara *restorative justice* atau keadilan restorative.[1]

Penyelesaian perkara pidana dengan pendekatan keadilan restoratif menawarkan penyelesaian dan pendekatan berbeda dalam menangani suatu tindak pidana. *Restorative Justice* membutuhkan usaha-usaha yang kooperatif dari pihak-pihak yang bersangkutan serta pemerintah dalam menciptakan kondisi di mana pelaku dan korban dapat menyelesaikan konflik mereka dengan keadilan. *Restorative Justice* juga memfokuskan pada

[1] Armunanto Hutahaean, Penerapan *Restorative Justice* Oleh Kepolisian NegaraRepublik Indonesia Untuk Mewujudkan Tujuan Hukum, Jurnal Hukum to-ra: Hukum untuk Mengatur dan Melindungi Masyarakat, Volume 8 Issue 2 (2022): 143

hak asasi manusia dan kebutuhan untuk mengenali dampak dari ketidakadilan sosial dan mekanisme yang sederhana untuk mengembalikan mereka.[2]

Perubahan signifikan terlihat dalam perumusan Undang-Undang No. 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP baru) mulai mengakomodasi nilai-nilai *restorative justice* secara lebih eksplisit dan sistematis. Konsep ini kini diatur secara jelas pada Pasal 79 sampai Pasal 88 KUHAP baru, yang mendefinisikan *restorative justice* sebagai pendekatan yang melibatkan semua pihak (korban, pelaku, keluarga, dan pihak terkait) untuk berupaya memulihkan keadaan semula akibat tindak pidana.

KUHAP baru tidak lagi memandang proses peradilan pidana semata-mata sebagai sarana penghukuman, tetapi juga sebagai instrumen penyelesaian konflik dan pemulihan keadilan substantif. Melalui pengaturan mengenai penghentian penuntutan demi keadilan, penyelesaian perkara di luar pengadilan, serta penguatan peran korban, KUHAP baru menandai pergeseran paradigma dari keadilan retributif menuju keadilan restoratif.

Namun demikian, integrasi *restorative justice* ke dalam KUHAP baru tidak serta-merta bebas dari persoalan. Tantangan konseptual muncul terkait batasan penerapan *restorative justice*, hubungan antara kepentingan publik dan kepentingan para pihak, serta potensi ketegangan antara kepastian hukum dan fleksibilitas penyelesaian perkara. Selain itu, secara institusional, perubahan paradigma ini menuntut kesiapan aparat penegak hukum, budaya hukum yang mendukung, serta mekanisme pengawasan yang memadai agar keadilan restoratif tidak disalahgunakan sebagai alat pragmatis semata. Disamping itu juga bagaimana mekanisme pengawasan terhadap diskresi aparat penegak hukum dalam menerapkan pendekatan tersebut dan sejauh mana perlindungan hak korban dijamin dalam proses penyelesaian yang bersifat restorative.

Prinsip keadilan restoratif atau *restorative justice* merupakan alternatif penyelesaian perkara tindak pidana, yang dalam mekanisme (tata cara peradilan pidana) fokus pidana diubah proses dialog dan mediasi Dialog dan mediasi dalam keadilan *restoratif* melibatkan beberapa pihak di antaranya pelaku, korban, keluarga pelaku atau korban, dan pihak-pihak lainnya yang terkait. Secara umum, tujuan penyelesaian hukum tersebut untuk menciptakan kesepakatan atas penyelesaian perkara pidana.

Selain itu, tujuan lain dari *restorative justice* adalah untuk mendapatkan putusan hukum yang adil dan seimbang bagi pihak korban maupun pelaku. Prinsip utama dalam keadilan restoratif adalah penegakan hukum yang selalu mengedepankan pemulihan kembali pada keadaan semula, dan mengembalikan pola hubungan baik dalam masyarakat. Penerapan keadilan restoratif bermula dari pelaksanaan sebuah program penyelesaian di luar peradilan yang dilakukan masyarakat, yang disebut dengan *victim offender mediation (VOM*)[3].

Untuk lebih memahami gambaran umum tentang *restorative justice*, dari dalam konteks Sejarah. Menurut pakar Australia Jhon Braithwaite, sepanjang sejarah umat manusia, *Restorative Justice* menjadi model peradilan yang dominan. Hakikatnya*, Restorative Justice* merupakan tawaran untuk kembali ke sistem peradilan yang relatif belum lama kehilangan perannya, akibat terus menerus di intervensi negara dan kelompok kepentingan yang berpengaruh.

Untuk itulah secara umum pendekatan *restorative* diperkenalkan untuk pertama kalinya oleh Albert Eglash dengan menyebut istilah *Restorative Justice*. Dalam tulisan yang mengupas tentang *Reparation* dia mengatakan bahwa *Restorative Justice* adalah suatu alternatif pendekatan *restitutive* terhadap pendekatan keadilan *retributive* dan keadilan *rehabilitative*. Konsep pendekatan *restorative justice* merupakan suatu perkembangan dari pemikiran manusia yang didasarkan pada tradisi-tradisi peradilan dari peradaban bangsa-bangsa Arab Purba, Yunani dan bangsa Romawi dalam menyelesaikan masalah termasuk penyelesaian tindak pidana.[4]

Dalam sistem peradilan pidana dewasa telah menciptakan dasar kebijakan untuk *responsive justice* (RJ) dalam peradilan komunitas, sebuah sistem yang di Skotlandia diorganisasikan melalui pekerjaan sosial otoritas lokal daripada lembaga peradilan pidana nasional. Undang-Undang 2010 memperkenalkan Perintah Pengembalian Komunitas (*Community Payback Order*), sebuah hukuman komunitas yang fleksibel di mana *responsive justice* dapat dikaitkan dengan salah satu persyaratan yang dikenakan pada pelaku. Misalnya sebagai bagaian dari persyaratan pengawasan atau program.[5]

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[2] Warzuk, Dadang Suprijatna dan dkk, Penerapan *Restorative Justice* Dalam Sistem Hukum Pidana Indonesia, Jurnal Karimah Tauhid, Volume 3 Nomor 3 (2024): 3518

[3] Aryo Putranto Saptohutomo, "Restorative Justice: Pengertian dan Penerapannya Dalam Hukum di Indonesia" Kompas, (25 Februari 2022), hlm. 2 .

[4] Ahmad Syahril Yunus dan Irsyad, Restorative Justice di Indonesia (Jakarta: Guepedia, 2007), hlm.16.

[5] Butler, S., Maglione, G., & Buchan, J, Institutionalising restorative justice for adults in Scotland: An empirical study of criminal justice practitioners' perspectives, Criminology and Criminal Justice, 24

Demi mewujudkan keadilan, kemanfaatan dan kepastian hukum, yang mana hal tersebut merupakan harapan masyarakat, maka Polri telah membuk peluang untuk menyelesaikan perkara pidana melalui mekanisme *restorative justice*. Dalam pelaksanaan penyelesaian perkara tindak pidana melalui keadilan restoratif Penyelidik atau Penyidik harus terlebih dahulu melengkapi persyaratan-persyaratan baik materiil dan formiil sebagaimana tertuang dalam Peraturan Kepolisian Republik Indonesia No. 8 tahun 2021.

Tabel 1. Perbandingan KUHP Lama dan KUHP Baru

No	Aspek	KUHAP Lama (1981)	(KUHAP Baru 2025)
1	Status hukum *restorative justice*	Tidak diatur dalam KUHAP	Diatur tersendiri dalam KUHAP (Pasal 79–88)
2	Pendekatan utama	Retributif/pidana formal	Substantif (pemulihan korban & hubungan sosial)
3	Keterlibatan korban	Terbatas, bukan sebagai subjek formal	Diakui secara formal dalam proses
4	Batasan pelaksanaan	Tidak ada mekanisme formal	Ada syarat & kriteria khusus dalam KUHAP Baru

Berdasarkan perbandingan antara KUHAP lama dan KUHAP baru, terlihat bahwa *restorative justice* merepresentasikan perubahan mendasar dalam cara hukum acara pidana memaknai keadilan. Jika KUHAP lama menempatkan keadilan dalam kerangka prosedural dan legalistik, maka KUHAP baru berupaya memperluas makna keadilan ke arah pemulihan dan keseimbangan kepentingan para pihak. Oleh karena itu, kajian kritis terhadap *restorative justice* dalam KUHAP baru menjadi penting untuk menilai sejauh mana perubahan normatif tersebut benar-benar mampu menjawab kelemahan sistem peradilan pidana sebelumnya dan mewujudkan keadilan substantif.

Dari hasil penelitian sebelumnya belum ada aturan yang seragam tentang penerapan *restorative justice* karena masih bersifat sektoral, mulai dari Kepolisan, Kejaksaan hingga Pengadilan. Dalam penelitian yang dilakukan oleh penulis jelas sekali bahwa pengaturan *restorative justice* telah diatur sedemikian rupa dalam KUHAP yang baru sehingga memberikan keadilan, kepastian dan kemanfaatan bagi masyarakat.

Meskipun demikian ketidakjelasan formulasi norma (norma kabur) merupakan satu problem utama pengaturan *restorative justice* dalam KUHAP baru, diantanya tidak merumuskan definisi secara tegas, tidak menjelaskan batasan perkara yang dapat diselesaikan atau mengandung frasa multitafsir seperti “demi kepentingan umum” atau “berdasarkan pertimbangan tertentu”. Akibatnya berpotensi menimbulkan perbedaan interpretasi antar aparat, mengurangi kepastian hukum (*legal certainty*). Selain itu juga potensi disharmoni dengan Asas Legalitas hukum pidana yang menyebutkan tidak ada perbuatan dapat dipidana kecuali berdasarkan undang-undang sehingga upaya *restorative justice* yang menghentikan proses perkara berpotensi dipersoalkan secara normatif apabila tidak memiliki dasar hukum eksplisit dan dianggap menyimpangi kewajiban penuntutan.

Disamping itu pengaturan *restorative justice* dalam KUHAP baru menghadirkan persoalan normatif yang tidak sederhana. Di satu sisi, pengakuan terhadap mekanisme penyelesaian perkara berbasis pemulihan mencerminkan langkah progresif dalam reformasi sistem peradilan pidana. Di sisi lain, perlu dipastikan bahwa pemberian ruang diskresi kepada aparat penegak hukum dalam menerapkan *restorative justice* tidak menggerus asas kepastian hukum dan asas legalitas yang menjadi fondasi utama hukum pidana.

Ketegangan antara kepastian hukum dan diskresi aparat menjadi isu sentral dalam pengaturan *restorative justice*. Kepastian hukum menuntut norma yang jelas, tegas, dan tidak multitafsir agar setiap warga negara memperoleh perlakuan yang sama di hadapan hukum (*equality before the law*). Sementara itu, diskresi diperlukan untuk memberikan fleksibilitas dalam menangani perkara konkret yang tidak selalu dapat diakomodasi secara kaku oleh norma tertulis. Tanpa batasan yang jelas, diskresi berpotensi menimbulkan disparitas penerapan, inkonsistensi penegakan hukum, bahkan penyalahgunaan kewenangan.

Oleh karena itu, pengaturan *restorative justice* dalam KUHAP baru harus mampu menemukan titik keseimbangan antara kebutuhan akan fleksibilitas dan tuntutan kepastian hukum. Reformasi hukum acara pidana tidak hanya memerlukan inovasi normatif, tetapi juga perumusan parameter yang objektif, transparan, dan akuntabel dalam penggunaan diskresi aparat penegak hukum. Dalam konteks inilah, penelitian mengenai

restorative justice dalam KUHAP Baru menjadi relevan dan penting untuk mengkaji sejauh mana pengaturannya mampu menjaga integritas sistem peradilan pidana sekaligus menghadirkan keadilan substantif.

1.2 Rumusan Masalah

a. Bagaimana pengaturan *Restorative Justice* (RJ) dalam KUHAP baru menjamin kepastian hukum (*rechtssicherheit*) saat perkara dihentikan di luar pengadilan?
b. Sejauh mana penerapan *Restorative Justice* dapat menyeimbangkan antara keadilan formal (prosedur) dan keadilan substantif (pemulihan korban) tanpa menimbulkan disparitas putusan?

1.3 Tujuan Penulisan

a. Menganalisis implemtasi keadilan restoratif dalam kerangka hukum acara pidana yang baru, serta mencari keseimbangan antara pemulihan korban/pelaku (diskresi) dengan konsistensi penegakan hukum (kepastian hukum)
b. Mengkaji diskresi aparat penegak hukum (Kepolisian/Kejaksaan) agar penerapan RJ tidak sewenang-wenang dan tetap terukur, guna menghindari penyalahgunaan wewenang

2. Metode

Penulisan dalam penelitian ini menggunakan metode yuridis normatif dengan pendekatan perundang-undangan (statute approach) dan Pendekatan konsep (conceptual approach) menggunakan pandangan, doktrin, teori, dan konsep-konsep hukum yang berkembang dalam literatur ilmiah sebagai dasar analisis terhadap suatu isu hukum. Seperti: norma hukum belum jelas, terjadi kekaburan konsep, aturan belum memadai, atau diperlukan pemaknaan teoritis terhadap suatu istilah hukum. Penelitian dilakukan dengan menggunakan studi pustaka, melalui elaborasi objektif terhadap bahan hukum primer berupa peraturan perundang-undangan, dan telaah bahan sekunder dari jurnal, buku, dan literatur yang relevan dengan topik penelitian untuk menghasilkan sintesis penelitian yang kredibel dan dapat dipertanggungjawabkan secara akademik, bersifat komprehensif, sistematis dan terpadu dan bahan hukum tersier seperti: Kamus Besar Bahasa Indonesia, Kamus Hukum, Kamus Bahasa Inggris. Bahan Hukum Primer yang digunakan berupa diantaranya Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak, Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana, Undang-Undang Nomor 8 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP lama) dan Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP baru), serta peraturan perundang-undangan yang relevan dengan topik penelitian. Selanjutnya bahan hukum sekunder didapatkan dari buku-buku literatur, jurnal-jurnal, maupun laporan-laporan hasil penelitian hukum yang berhubungan dengan masalah yang diteliti dan bahan hukum tersier yang digunakan diperoleh dari bahan-bahan hukum di luar bahan hukum primer dan bahan hukum sekunder.

3. Pembahasan

3.1. Penerapan Restorative Justice Sebelum Berlakunya UU No. 20 Tahun 2025 Tentang KUHP

Istilah *restorative justice* ini muncul sejak tahun 1977 yang diperkenalkan oleh Albert Eglash yang menggolongkan sistem peradilan pidana ke dalam 3 (tiga) bentuk, yaitu *restributive justice, distributive justice,* dan *restorative justice*.[6] *Retributive justice* berfokus pada penghukuman pelaku, *distributive justice* berfokus pada rehabilitasi, dan *restorative justice* menekankan pada pemulihan keadaan ke situasi semula sebelum terjadinya tindak pidana.[7] Menurut Marshall sebagaimana dikutip dalam *Restorative Justice and Criminal Justice: Competing or reconcilable Paradigm*, menyatakan *restorative justice* merupakan sebuah proses yang melibatkan semua pihak dalam penyelesaian tindak pidana untuk memulihkan dampak yang timbul akibat adanya tindak pidana tersebut sehingga mekanisme penanganan tindak pidana dilakukan dengan lebih efektif.[8] Tujuan adanya

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6 James Dignan, *Understanding Victimms and Restorative Justice*, Open University Press, 2014: 94.
7 *Ibid*
8 Andrew von Hirsch, *et al*, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Hart Publishing, Oregon, 2003: 44

konsep *restorative justice* adalah untuk memulihkan kehidupan komunitas yang di dalamnya terdapat pelaku tindak pidana yang dihadapkan pada tanggung jawab mereka atas tindak pidana yang dilakukan. Konsep keadilan restoratif ini dapat diimplementasikan dengan mediasi penal yang sudah banyak diterapkan di Indonesia. Mediasi penal dikenal sebagai jalan penyelesaian suatu perkara pidana dengan adanya kesepakatan antara pelaku dengan korban di mana mediasi penal pada hakikatnya adalah mekanisme penyelesaian perkara pidana melalui dialog antara pelaku dan korban dengan bantuan mediator yang netral untuk mencapai kesepakatan pemulihan. Di mana marwah mediasi penal terletak pada: sukarela (*voluntary*), keadilan substantif, proporsionalitas dan akuntabilitas. Pemidanaan baru dilakukan apabila tidak tercapai kesepakatan di antara kedua belah pihak.

Pertama kalinya Indonesia mengakomodir konsep keadilan restoratif tertuang dalam Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak (UU SPPA) yang dikenal dengan adanya diversi. Diversi merupakan penyelesaian perkara Anak dari proses peradilan pidana ke proses di luar peradilan pidana.[9] Pasal 6 UU SPPA menjelaskan terkait dengan tujuan diversi, yaitu untuk mencapai perdamaian antara korban dan anak, menyelesaikan perkara anak di luar persidangan, menghindarkan anak dari perampasan kemerdekaan, mendorong masyarakat untuk berpartisipasi, dan menanamkan rasa tanggung jawab kepada anak.[10]

Pasal 1 butir 6 UU SPPA menjelaskan bahwa "*Keadilan restoratif adalah penyelesaian perkara tindak pidana dengan melibatkan pelaku, korban, keluarga pelaku/korban, dan pihak lain yang terkait untuk bersama-sama mencari penyelesaian yang adil dengan menekankan pemulihan kembali pada keadaan semula, dan bukan pembalasan*". Pada prinsipnya, pengaturan konsep *restorative justice* dan diversi dalam UU SPPA merupakan bentuk perwujudan dari *United Nation Standard Minimum Rules for* the *Administrative of Juvenile Justice* (SMRJJ) tahun 1985 (*Beijing Rules*). Dalam butir 5 dijelaskan bahwa tujuan dari sistem peradilan pidana anak yaitu untuk menciptakan sistem peradilan yang lebih menekankan pada hak-hak anak serta kewajaran penerapan hukum terhadap anak sebagai pelaku tindak pidana. Konsep ini memastikan adanya sistem yang akan menjamin hak-hak anak sekalipun mereka adalah pelaku tindak pidana. [11]

Peraturan kelembagaan yang mengatur terkait dengan mekanisme penerapan konsep keadilan restoratif mulai muncul seiring dengan berjalannya waktu diantaranya adalah Peraturan Kepolisian Negara Republik Indonesia Nomor 8 Tahun 2021 tentang Penanganan Tindak Pidana Berdasarkan Keadilan Restoratif (Perpol 8/2021), Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif (Perja 15/2020), dan Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2024 tentang Pedoman Mengadili Perkara Pidana Berdasarkan Keadilan Restoratif (Perma 1/2024).[12]

Instansi Kepolisian melalui Perpol 8/2021 ini dijadikan sebagai dasar hukum dan pedoman bagi Penyelidik dan/atau Penyidik yang melaksanakan Penyelidikan dan/atau Penyidikan dalam rangka penerapan konsep keadilan restoratif sebagai upaya mewujudkan kepentingan umum dan rasa keadilan bagi masyarakat sehingga dapat mewujudkan kesepahaman serta keseragaman dalam penerapan konsep keadilan restoratif di lingkungan Polri. Pedoman penanganan penyelesaian perkara melalui mekanisme *restorative justice* di lingkungan Polri diantaranya:

1. Memenuhi syarat materiil, yaitu:
    a. Tidak menimbulkan keresahan dan/atau penolakan dari masyarakat;
    b. Tidak berdampak konflik sosial;
    c. Tidak berpotensi memecah belah bangsa;
    d. Tidak bersifat radikalisme dan separatisme;
    e. Bukan pelaku pengulangan tindak pidana berdasarkan putusan pengadilan; dan
    f. Bukan tindak pidana terorisme, tindak pidana terhadap keamanan negara, tindak pidana korupsi dan tindak pidana terhadap nyawa orang.[13]
2. Memenuhi syarat formil, yaitu:
    a. Perdamaian dari kedua belah pihak, kecuali untuk tindak pidana narkotika; dan

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9 Pasal 1 Angka 7 Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak.

10 Pasal 6 Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak

11 Muhammad Fatahillah Akbar, "Keadilan Restoratif Dalam Sistem Peradilan Pidana Sebagai Perwujudan Nilai-Nilai Pancasila," *Justitia et Pax* 37, no. 1 (8 Juni 2021), https://doi.org/10.24002/jep.v37i1.3821

12 Moch Fauzan Zarkasi, Nur Azisa, and Haeranah, "Implications of Renewal System of Criminal Justice Based on the Principles of Restorative Justice on The Role of Probation and Parole Officer," *Khazanah Hukum* 4, no. 1 (April 1, 2022): 29–44, https://doi.org/10.15575/kh.v4i1.17354.

13 Pasal 5 Peraturan Kepolisian Negara Republik Indonesia Nomor 8 Tahun 2021 tentang Penanganan Tindak Pidana Berdasarkan Keadilan Restoratif.

b. Pemenuhan hak-hak korban dan tanggung jawab pelaku, kecuali untuk tindak pidana narkoba.[14]

Kejaksaan Republik Indonesia juga memiliki regulasi internal yang mengatur mekanisme penerapan konsep keadilan restoratif dalam penyelesaian perkara pidana melalui Perja 15/2020.[15] Pasal 3 ayat (2) huruf e menyatakan bahwa Penuntut Umum berwenang menutup perkara demi kepentingan hukum di mana penutupan perkara demi kepentingan hukum ini dilakukan dalam hal telah terdapat penyelesaian perkara di luar pengadilan (*afdoening buiten process*).[16] Penyelesaian perkara di luar pengadilan dapat dilakukan dengan ketentuan telah ada pemulihan kembali keadaan semula dengan menggunakan pendekatan keadilan restoratif.[17] Terdapat pertimbangan bagi Penuntut Umum dalam melakukan penghentian penuntutan berdasarkan keadilan restoratif yaitu 1) subjek, objek, kategori, dan ancaman tindak pidana; 2) latar belakang terjadinya tindak pidana; 3) tingkat ketercelaan; 4) kerugian atau akibat yang ditimbulkan dari tindak pidana; 5) *cost and benefit* penanganan perkara; 6) pemulihan kembali pada keadaan semula; dan 7) adanya perdamaian antara Korban dan Tersangka.[18]

Perja 15/2020 mengatur syarat tertentu yang menyatakan bahwa perkara tindak pidana dapat ditutup demi hukum dan dihentikan penuntutannya berdasarkan keadilan restoratif apabila:

1. Tersangka baru pertama kali melakukan tindak pidana;
2. Tindak pidana hanya diancam dengan pidana denda atau diancam dengan pidana penjara tidak lebih dari 5 (lima) tahun; dan
3. Tindak pidana dilakukan dengan nilai barang bukti atau nilai kerugian yang ditimbulkan akibat dari tindak pidana tidak lebih dari Rp 2.500.000,00 (dua juta lima ratus ribu rupiah).[19]

Mahkamah Agung melalui Surat Edaran Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2024 tentang Pedoman Mengadili Perkara Pidana Berdasarkan Keadilan Restoratif juga mengatur terkait dengan mekanisme penanganan perkara pidana melalui penerapan konsep keadilan restoratif. Sema 1/2024 menjelaskan penerapan prinsip keadilan restoratif bertujuan: 1) memulihkan korban tindak pidana; 2) memulihkan hubungan antara terdakwa, korban, dan/atau masyarakat; 3) menganjurkan pertanggungjawaban terdakwa; dan 4) menghindarkan setiap orang, khususnya anak dari perampasan kemerdekaan.[20] Akan tetapi, penerapan prinsip keadilan restoratif tidak bertujuan untuk menghapuskan pertanggungjawaban pidana. Hakim dapat menerapkan pedoman mengadili perkara pidana berdasarkan prinsip keadilan restoratif apabila:

1. Tindak pidana yang dilakukan merupakan tindak pidana ringan atau kerugian korban bernilai tidak lebih dari Rp 2.500.000,00 (dua juta lima ratus ribu rupiah) atau tidak lebih dari upah minimum provinsi setempat;
2. Tindak pidana merupakan delik aduan;
3. Tindak pidana dengan ancaman hukuman maksimal 5 (lima) tahun penjara dalam salah satu dakwaan, termasuk tindak pidana jinayat menurut qanun;
4. Tindak pidana dengan pelaku anak yang diversinya tidak berhasil; atau
5. Tindak pidana lalu lintas yang berupa kejahatan.[21]

Berbagai aturan mengenai penerapan *restorative justice* menyebabkan ketidakselarasan antara lembaga satu dengan lembaga lainnya. Apabila dilihat dari syarat-syarat suatu tindak pidana yang dapat diselesaikan melalui mekanisme keadilan restoratif, dapat dilihat bahwa Kepolisian, Kejaksaan, dan Mahkamah Agung memiliki parameter tersendiri. Hal ini dapat menimbulkan kebingungan bagi masyarakat terkait dengan aturan-aturan yang

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14 Pasal 6 Peraturan Kepolisian Negara Republik Indonesia Nomor 8 Tahun 2021 tentang Penanganan Tindak Pidana Berdasarkan Keadilan Restoratif.

15 Dian Ekawaty Ismail et al., "Collocation of Restorative Justice with Human Rights in Indonesia," *Legality: Jurnal Ilmiah Hukum* 32, no. 2 (2024): 394–417, https://doi.org/https://doi.org/10.22219/ljih.v32i2.35374.

16 Pasal 3 ayat (2) huruf e Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif.

17 Pasal 3 ayat (3) huruf b Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif.

18 Pasal 4 ayat (2) Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif.

19 Pasal 5 ayat (1) Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif.

20 Pasal 3 Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2024 Tentang Pedoman Mengadili Perkara Pidana Berdasarkan Keadilan Restoratif.

21 Pasal 6 ayat (1) Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2024 Tentang Pedoman Mengadili Perkara Pidana Berdasarkan Keadilan Restoratif.

berlaku, meskipun aturan tersebut mengikat bagi masing-masing lembaga. [22] Efeknya baik bagi pelaku dan korban kejahatan karena mereka akan mendapat perlakuan yang subjektif dari berbagai penegak hukum karena tidak terintegrasinya pengaturan keadilan restoratif.[23] Keadilan restoratif tidak dapat diartikan dengan meniadakan pidana penjara, namun membawa kasus pada jalan di luar proses persidangan melalui perdamaian.[24]

Konsep *restorative justice* harus diterapkan secara menyeluruh dan terintegrasi di semua tahap dalam sistem peradilan pidana, mulai dari Polisi, Penuntut Umum, hingga Pengadilan. Selain itu, konsep *restorative justice* harus diterapkan secara menyeluruh dalam sistem peradilan pidana Indonesia untuk mencapai keselarasan hukum.[25] Hal ini penting karena jika salah satu bagian sistem tidak menggunakan konsep keadilan restoratif, maka keputusan yang dibuat tidak akan mencerminkan penerapan konsep tersebut. Oleh karena itu, konsep *restorative justice* harus dijalankan dengan terintegrasi antara berbagai bagian dari sistem penegakan hukum untuk mencapai tujuan hukum yang sejati, yaitu keadilan, kepastian, dan kemanfaatan hukum bagi masyarakat. Jika tidak dilakukan, konsep keadilan restoratif tidak akan terwujud dan terimplementasi dengan baik.

3.2. Implementasi Restorative Justice Berdasarkan UU No. 20 Tahun 2025 Tentang KUHAP

Perubahan paradigma penegakan hukum pidana di Indonesia beberapa tahun terakhir mengalami perubahan drastis, sebelumya arah hukum pidana semata-mata tujuannya mengarah kepada pembalasan atau *retributive justice*, di era modern sekarang paradigma penegakan hukum pidana sudah mengarah ke arah mekanisme pemulihan atau *restorative justice,* meskipun hanya berlaku pada bentuk tindak pidana tertentu saja sebagaimana yang diatur dalam KUHAP baru. Hal ini ditandai dengan diberlakukannya berbagai peraturan pelaksana penerapan *restorative justice* dari tingkat Kepolisian, Kejaksaan hingga Pengadilan, perubahan ini membawa penegakan hukum pidana kearah yang lebih baik hal ini disebabkan tujuan dari penegakan hukum pidana tidak hanya sekedar pembalasan melainkan pemulihan terhadap korban.

Keadilan restoratif selama beberapa tahun terakhir disosialisasikan, baik di tingkat penyelidikan, penyidikan, penuntutan maupun pengadilan sebagai jalan tengah antara kepastian hukum dan rasa keadilan. Kehadiran *restorative justice* dalam pembaruan hukum acara pidana dipandang sebagai instrumen modernisasi sistem peradilan, bentuk integrasi nilai keadilan sosial dan sarana mengharmonisasikan hukum positif dengan nilai kemanusiaan. Dengan demikian, kehadirannya bukan sekadar kebijakan teknis, melainkan bagian dari reformasi sistem peradilan pidana nasional. Namun di balik idealisme tersebut, praktik keadilan restoratif kerap memunculkan pertanyaan serius. Siapa sebenarnya yang mengendalikan proses ini, dan sejauh mana negara memastikan keadilan tidak berubah menjadi kompromi yang timpang.

Kitab Undang-Undang Hukum Pidana (KUHP baru) dan Kitab Undang-Undang Hukum Acara Pidana (KUHAP baru) telah mengintegrasikan *restorative justice* (RJ) sebagai paradigma baru, di mana tujuan pemidanaan bukan hanya pembalasan dengan mengatur penerapannya di setiap tahap hukum demi kepastian hukum. Mulai dari penyelidikan, penyidikan, penuntutan, sampai ke pengadilan dengan melibatkan musyawarah sukarela antara pelaku, korban, keluarga dan masyarakat untuk pemulihan hubungan, serta memprioritaskan penyelesaian di luar pengadilan untuk tindak pidana ringan, dengan hakim atau pengadilan yang menjadi penentu akhir sah tidaknya kesepakatan untuk menjamin keadilan dan transparansi.

Hal ini sejalan dengan teori kepastian hukum dari Hans Kelsen yang mendefinisikan hukum sebagai suatu sistem norma yang mengatur perilaku manusia dan dilengkapi dengan sanksi. Norma hukum bukan sekadar pernyataan deskriptif, melainkan preskriptif (memerintahkan). Kepastian hukum tercapai apabila norma tersebut dibentuk berdasarkan prosedur yang sah, memiliki struktur yang jelas, berlaku secara umum dan dapat diprediksi penerapannya.[26]

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22 M.R. Alwy, "The 'afw Principle and The Indonesian Restorative Justice System," *Jurnal Hukum Islam* 19, no. 2 (2021): 313–28, https://doi.org/10.28918/jhi.v19i2.4726.

23 L. Andriyani, Hartiwiningsih, and P. Suwadi, "reconceptualization of restorative justice in the attorney general's office of the republic of Indonesia," *Revista De Gestao Social E Ambiental* 18, no. 1 (2024), https://doi.org/10.24857/rgsa.v18n1-053.

24 Brilian Capera, "Keadilan Restoratif Sebagai Paradigma Pemidanaan Di Indonesia," *Lex Rennaisance* 6, no. 2 (April 2021), https://doi.org/https://doi.org/10.20885/JLR.vol6.iss2.art1.

25 Rebecca Banwell-Moore, "Restorative Justice: Adopting a Whole System Approach to Address Cultural Barriers in Criminal Justice," *Criminology and Criminal Justice* 24, no. 5 (November 1, 2024), https://doi.org/10.1177/17488958241268005.

26 Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (Berkeley: University of California Press, 1967)

Dari keseluruhan pemikiran Kelsen, dapat disimpulkan bahwa kepastian hukum terwujud apabila hukum disusun dalam sistem norma yang hierarkis, setiap norma memiliki legitimasi formal, aparat penegak hukum bertindak berdasarkan norma yang berlaku, tidak ada tindakan tanpa dasar hukum yang sah. Dengan demikian, kepastian hukum menurut bersifat formal-normatif, bukan substantif-moral.

Berdasarkan Pasal 54 ayat (1) UU No. 1 Tahun 2023 tentang KUHP dalam pemidanaan wajib dipertimbangkan: a. bentuk kesalahan pelaku Tindak Pidana; b. Motif dan tujuan melakukan Tindak Pidana; c. sikap batin pelaku Tindak Pidana; d. Tindak Pidana dilakukan dengan direncanakan atau tidak direncanakan; e. cara melakukan Tindak Pidana; f. sikap dan tindakan pelaku sesudah melakukan Tindak Pidana; g. riwayat hidup, keadaan sosial, dan keadaan ekonomi pelaku Tindak Pidana; h. pengaruh pidana terhadap masa depan pelaku Tindak Pidana; i. Pengaruh Tindak Pidana terhadap Korban atau keluarga Korban; j. pemaafan dari Korban dan/atau keluarga Korban; dan/atau k. nilai hukum dan keadilan yang hidup dalam masyarakat, ayat (2) Ringannya perbuatan, keadaan pribadi pelaku, atau keadaan pada waktu dilakukan tindak pidana serta yang terjadi kemudian dapat dijadikan dasar pertimbangan untuk tidak menjatuhkan pidana atau tidak mengenakan tindakan dengan mempertimbangkan segi keadilan dan kemanusiaan.[27]

Berdasarkan Pasal 54 UU No. 1 Tahun 2023 tentang KUHP baru tampak jelas memperkuat *restorative justice* dengan mewajibkan hakim mempertimbangkan faktor-faktor seperti sikap pelaku pasca-kejahatan dan pemaafan korban/keluarganya, serta nilai hukum dan keadilan di masyarakat sebagai pedoman pemidanaan. Ini sejalan dengan tujuan *restorative justice* untuk menyelesaikan konflik, memulihkan keseimbangan, dan menciptakan kedamaian, memberi dasar hukum kuat bagi mediasi dan kesepakatan damai, bukan hanya pidana retributif, dengan pertimbangan seperti kerugian korban dan kondisi pelaku untuk mencapai keadilan substansial.

Pasal 54 KUHP ini juga mengatur pedoman pemidanaan yang di dalamnya terdapat faktor-faktor *restorative justice*. Hal penting dalam *restorative justice* meliputi:

1. Pertimbangan wajib dalam pemidanaan (Pasal 54 Ayat (1) huruf j dan k);
2. Pemaafan dari Korban/Keluarganya**:** Jika korban memaafkan, ini menjadi faktor penting yang harus dipertimbangkan hakim, menunjukkan pemulihan hubungan.
3. Nilai hukum dan Keadilan di Masyarakat: Hakim harus mempertimbangkan nilai-nilai yang hidup di masyarakat untuk menentukan putusan yang adil.

Dari ketiga faktor di atas ada juga faktor pendukung lain dalam dilakukannya *restorative justice* antar lain;

1. Sikap Pelaku**:** Sikap dan tindakan pelaku setelah kejahatan (misal, menunjukkan penyesalan, membayar ganti rugi) wajib dipertimbangkan hakim.
2. Tujuan Pemidanaan: Pasal 51 KUHP baru juga menyebutkan tujuan pemidanaan adalah menyelesaikan konflik, memulihkan keseimbangan, dan mendatangkan rasa aman, sejalan dengan filosofi *restorative justice*.

Dengan landasan hukum ini penerapan *restorative justice* tidak lagi hanya kebijakan teknis akan tetapi sudah mendapatkan landasan hukum yang kuat setingkat undang-undang dengan memperkuat peraturan Kapolri, Kejaksaan dan Mahkamah Agung tentang *restorative justice*. Hal menegaskan perubahan paradigma dengan menggeser penekanan dari pidana retributif (pembalasan) kearah yang lebih holistik dengan beriorentasi kepada pemulihan korban dan pertanggungjawaban pelaku. Di mana ini merupakan dasar pengampunan hakim (*Rechterlijk Pardon*) dengan memberikan peluang bagi Hakim untuk tidak menjatuhkan pidana jika proses pemulihan berjalan baik, menjadikan hukum pidana sebagai upaya terakhir (*ultimum remedium*).

Hal ini sejalan dan terintegrasi dengan mekanisme keadilan restoratif menurut Pasal 79 KUHAP merupakan penyelesaian perkara pidana di luar proses peradilan formal dengan berorientasi pada pemulihan keadaan korban, tanggung jawab pelaku, dan keharmonisan masyarakat serta dilakukan dengan melibatkan korban, pelaku, keluarga, dan/atau masyarakat. Sehingga negara tidak lagi menjadi satu-satunya pusat konflik, melainkan fasilitator penyelesaian. Hal ini ditegaskan sesuai dengan bunyi Pasal 79 KUHAP Ayat (l) Mekanisme Keadilan Restoratif dilakukan untuk memulihkan keadaan semula yang berupa: a. Pemaafan dari Korban dan/atau Keluarganya; b. Pengembalian barang yang diperoleh dari tindak pidana kepada Korban; c. Penggantian biaya perawatan medis dan/atau psikologis; d. Ganti rugi atas kerugian lain yang diderita Korban sebagai akibat tindak pidana yang dialami Korban; e. memperbaiki kerusakan yang ditimbulkan dari akibat tindak pidana yang dialami Korban; atau f. membayar Ganti rugi yang ditimbulkan dari akibat tindak pidana. Ayat (2) Pemulihan keadaan semula sebagaimana dimaksud pada ayat (l) harus dituangkan dalam kesepakatan. Ayat (3) Kesepakatan

[27] Pasal 54 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP)

sebagaimana dimaksud pada ayat (2) wajib dilaksanakan dalam jangka waktu paling lama 7 (tujuh) Hari. Ayat (4) Pencabutan Laporan atau Pengaduan hanya dapat dilakukan setelah Pelaku memenuhi seluruh kesepakatan sebagaimana dimaksud pada ayat (2).

Sementara ayat (5) Pasal 79 KUHAP berbunyi (5) Setelah seluruh kesepakatan terlaksana, perkara wajib dihentikan dan dimintakan penetapan pengadilan; (6) Apabila kesepakatan tidak dilaksanakan oleh pelaku sampai dengan berakhirnya jangka waktu sebagaimana dimaksud pada ayat (3), Penyidik wajib membuat berita acara pelaksanaan mekanisme Keadilan Restoratif yang memuat: a. Identitas para pihak; b. Isi kesepakatan; c. Bukti pelaksanaan sebagian atau seluruh kesepakatan; dan d. Alasan tidak dipenuhinya kesepakatan oleh Pelaku. Ayat (7) Berita acara sebagaimana dimaksud pada ayat (6) menjadi bagian tidak terpisahkan dari berkas perkara sebagai dasar untuk melanjutkan proses peradilan. Dan Ayat (8) Mekanisme Keadilan Restoratif dilaksanakan pada tahap: a. Penyelidikan; b. Penyidikan; c. Penuntutan; dan d. pemeriksaan di siding pengadilan.[28]

Selanjutnya dalam tahapan aturan hukumnya, *restorative justice* bisa dilakukan dalam tahap penyedikan oleh penyedik, penuntutan oleh penuntut umum dan pemeriksaan di pengadilan oleh hakim. Hal ini berdasarkan Pasal 80 dan 81 KUHAP. Di mana bunyinya Pasal 80 Ayat (1) Mekanisme Keadilan Restoratif dapat dikenakan terhadap tindak pidana yang memenuhi syarat sebagai berikut: a. Tindak pidana diancam hanya dengan pidana denda paling banyak kategori III atau diancam dengan pidana penjara paling lama 5 (lima) tahun; b. Tindak pidana yang pertama kali dilakukan; dan/atau c. bukan merupakan pengulangan tindak pidana, kecuali terhadap tindak pidana yang putusannya berupa pidana denda atau tindak pidana yang dilakukan karena kealpaan. Sedangkan Ayat (2) Dalam hal belum terdapat tindak pidana sebagaimana dimaksud pada ayat (1), berdasarkan laporan Korban dilakukan mekanisme Keadilan Restoratif pada Tahap Penyelidikan berupa kesepakatan damai antara pelaku dan Korban.[29]

Meskipun keadilan restoratif ini diterapkan dalam KUHAP tapi dilakukan dengan selektif dan syarat dan kriteria tertentu yang harus dipenuhi sehingga bisa diselesaikan dengan keadilan restorarif. Hal ini diatur dalam Pasal 81 KUHAP yang berbunyi ayat (1) Mekanisme Keadilan Restoratif dilakukan melalui: permohonan yang diajukan oleh pelaku tindak pidana, Tersangka, Terdakwa, atau Keluarganya, dan/atau Korban tindak pidana atau Keluarganya; atau penawaran dari Penyelidik, Penyidik, Penuntut Umum, atau Hakim kepada Korban, pelaku tindak pidana, Tersangka, atau Terdakwa sedangkan Ayat (2) Mekanisme Keadilan Restoratif sebagaimana dimaksud pada ayat (l) dilakukan tanpa tekanan, paksaan, intimidasi, tipu daya, ancaman kekerasan, kekerasan, penyiksaan, dan Tindakan yang merendahkan kemanusiaan terhadap Tersangka, Terdakwa, Korban, dan/ atau Keluarganya.[30]

Restorative justice hanya dapat dilakukan apabila korban dan pelaku menyatakan persetujuan secara sukarela, tidak ada paksaan, tekanan, atau intimidasi, pelaku mengakui perbuatannya dan ada kesepakatan pemulihan, seperti: Penggantian kerugian, permintaan maaf dan tindakan sosial tertentu. Dan yang lebih penting adalah persetujuan dari korban syarat mutlak dilakukannya *restorative justice*.

Meskipun KUHAP lama tidak secara eksplisit mengadopsi konsep *restorative justice*, praktik-praktik yang bernuansa restoratif mulai berkembang melalui kebijakan diskresi aparat penegak hukum dan regulasi sektoral, seperti peraturan internal Kepolisian dan Kejaksaan serta Mahkamah Agung (MA) sendiri. Namun, karena tidak memiliki dasar hukum yang kuat dalam hukum acara pidana, penerapan keadilan restoratif dalam kerangka KUHAP lama bersifat terbatas, tidak seragam, dan rentan terhadap inkonsistensi serta penyalahgunaan diskresi. Sehingga dalam prakteknya keadilan restoratif sering kali berhenti di meja aparat penegak hukum. Kesepakatan damai cukup dituangkan dalam dokumen, perkara dihentikan, dan proses pidana pun berakhir.

Di banyak kasus, mekanisme ini memang menyelamatkan hubungan sosial antara pihak yang berperakara dan memberi ruang pemulihan bagi korban. Namun di kasus lain, ia membuka celah negosiasi tertutup, relasi kuasa yang timpang, bahkan transaksi yang mengaburkan makna keadilan itu sendiri.

Untuk menghilangkan semua hal tersebut di atas secara tegas diatur dalam KUHAP mulai dari penghentian Penyidikan, penuntutan hingga pemeriksaan di sidang pengadilan. Berdasarkan Pasal 84 KUHAP jelas disebutkan ketika penyidik menghentikan penyidikan harus memberitahukan hal itu kepada penuntut umum atau jaksa untuk

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28 Pasal 79 Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP)

29 Pasal 80 Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP)

30 Pasal 81 Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP)

mendapatkan penetapan dari ketua pengadilan negeri. Hal ini sesuai dengan bunyi Pasal 84 KUHAP yakni Surat penghentian Penyidikan sebagaimana dimaksud dalam Pasal 83 Ayat (4) diberitahukan oleh Penyidik kepada Penuntut Umum dan dimintakan Penetapan kepada ketua pengadilan negeri dalam jangka waktu paling lama 3 (tiga) Hari.[31]

Hal yang sama juga berlaku pada tahap penuntutan, apabila penuntut umum mengeluarkan surat penetapan penghentian penuntutan dalam waktu 3 (tiga) hari penuntut umum meminta penetapan dari ketua pengadilan negeri dan penuntut umum wajib disampaikan kepada penyidik. Sesuai dengan bunyi Pasal 86 KUHAP Ayat (1) Surat ketetapan penghentian Penuntutan sebagaimana dimaksud dalam Pasal 85 ayat (3) dalam jangka waktu paling lama 3 (tiga) Hari dimintakan penetapan kepada ketua pengadilan negeri. Ayat (2) Penetapan ketua pengadilan negeri sebagaimana dimaksud pada ayat (1) wajib disampaikan oleh Penuntut Umum kepada Penyidik.[32]

Dari ketentuan Pasal 83 hingga 86 menyebutkan bahwa semua perkara yang diselesaikan lewat *retorative justice*, apakah di tahap penyidikan maupun penuntutan harus mendapat penetapan dari ketua pengadilan negeri setempat. Hal ini merupakan kemajuan baru yang ada dalam KUHAP untuk menjadi adanya keadilan dan kepastian hukum di masyarakat.

Untuk menjawab dan menindaklanjuti aturan yang ada di KUHAP, Mahkamah Agung (MA) sendiri telah mengeluarkan produk hukum berupa Surat Edaran Mahkamah Agung (SEMA) Nomor 1 Tahun 2026 tentang Pedoman Implemntasi KUHP 2023 dan KUHAP 2025. Melalui pedoman implementasi KUHP 2023 dan KUHAP 2025, Mahkamah Agung menempatkan pengadilan, khususnya Ketua Pengadilan Negeri, sebagai penentu sah atau tidaknya penghentian perkara berbasis mekanisme keadilan restoratif sebagaimana ditegaskan dalam bagian Perihal Pelaksanaan KUHAP angka 2 huruf b Lampiran SEMA 1 Tahun 2026. Sejak saat itu, keadilan restoratif tidak lagi dapat dijalankan secara sepihak oleh penyidik atau penuntut umum.

SEMA 1 Tahun 2026 ini tentu mengubah aturan secara mendasar. Penghentian penyidikan atau penuntutan berbasis keadilan restoratif kini wajib dimintakan penetapan Ketua Pengadilan Negeri, baik pada tingkat penyidikan maupun penuntutan, sebagaimana diatur dalam angka 2 huruf b angka 1 dan angka 2 Lampiran SEMA 1 Tahun 2026.

Dalam Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP) sangatlah jelas bahwa paradigma penegakan hukum pidana bergeser kepada pendekatan *restorative justice*. Dan ini ditandai dengan diaturnya mekanisme keadilan restoratif pada Pasal 79-88 KUHAP 2025 sementara ketentuan mekanisme keadilan restoratif pada Sema *Restorative Justice* dan UU No. 20 Tahun 2025 tentang KUHAP memiliki perbedaan sebagai berikut:

[31] Pasal 84 Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP)

[32] Pasal 86 Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana (KUHAP)

Tabel 2. Perbandingan Pengaturan *Restorative Justice* antara SEMA dan KUHAP Baru

No.	SEMA No. 1 Tahun 2026 tentang Pedoman KUHP dan KUHAP terkait *Restorative Justice*	UU No. 20 Tahun 2025 tentang KUHAP terkait *Restorative Justice*
	Pasal 6 ayat (1) Hakim menerapkan pedoman mengadili perkara pidana berdasarkan Keadilan Restoratif apabila terpenuhi salah satu dari tindak pidana di bawah ini: a. tindak pidana yang dilakukan merupakan tindak pidana ringan atau kerugian korban bernilai tidak lebih dari Rp2.500.000,00 (dua juta lima ratus ribu rupiah) atau tidak lebih dari upah minimum provinsi setempat; b. tindak pidana merupakan delik aduan; c. tindak pidana dengan ancaman hukuman maksimal 5 (lima) tahun penjara dalam salah satu dakwaan, termasuk tindak pidana jinayat menurut qanun; d. tindak pidana dengan pelaku Anak yang diversinya tidak berhasil; atau e. tindak pidana lalu lintas yang berupa kejahatan	Pasal 80 ayat (1) Mekanisme Keadilan Restoratif dapat dikenakan terhadap tindak pidana yang memenuhi syarat sebagai berikut: a. tindak pidana diancam hanya dengan pidana denda paling banyak kategori III atau diancam dengan pidana penjara paling lama 5 (lima) tahun; b. tindak pidana yang pertama kali dilakukan; dan/atau c. bukan merupakan pengulangan tindak pidana, kecuali terhadap tindak pidana yang putusannya berupa pidana denda atau tindak pidana yang dilakukan karena kealpaan.
	Pasal 6 ayat (2) Hakim tidak berwenang menerapkan pedoman mengadili perkara pidana berdasarkan Keadilan Restoratif dalam hal: a. Korban atau Terdakwa menolak untuk melakukan perdamaian; b. terdapat Relasi Kuasa; atau c. Terdakwa mengulangi tindak pidana sejenis dalam kurun waktu 3 (tiga) tahun sejak Terdakwa selesai menjalani putusan Pengadilan yang berkekuatan hukum tetap.	Pasal 82 Mekanisme Keadilan Restoratif dikecualikan untuk: a. tindak pidana terhadap keamanan negara, tindak pidana terhadap negara sahabat, kepala negara sahabat serta wakilnya, tindak pidana ketertiban umum, dan tindak pidana kesusilaan; b. tindak pidana terorisme; c. tindak pidana korupsi; d. tindak pidana kekerasan seksual; e. tindak pidana yang diancam dengan pidana penjara 5 (lima) tahun atau lebih, kecuali karena kealpaannya; f. tindak pidana terhadap nyawa orang; g. tindak pidana yang diancam dengan pidana minimum khusus; h. tindak pidana tertentu yang sangat membahayakan atau merugikan masyarakat; dan/atau i. tindak pidana narkotika kecuali yang berstatus sebagai pengguna atau penyalahguna.

Sumber data: SEMA Nomor 1 Tahun 2026 tentang Pedoman Implemntasi KUHP 2023 dan KUHAP 2025

Berdasarkan data perbandingan di atas bahwa UU No. 20 Tahun 2025 tentang KUHAP memberikan dasar hukum yang lebih kuat dan komprehensif karena mengatur *restorative justice* secara normatif dalam sistem hukum acara pidana nasional. Sementara Sema No. 1 Tahun 2026 tentang Pedoman KUHP dan KUHAP berfungsi sebagai regulasi teknis pelaksanaan di lingkungan peradilan, sehingga lebih bersifat operasional dan aplikatif. Jadi secara hierarki peraturan perundang-undangan, UU memiliki kedudukan lebih tinggi dibanding Sema, sehingga Sema berfungsi sebagai aturan pelaksana.

Kalau diperhatikan kedua peraturan tersebut memiliki kemiripan antara Sema dan KUHAP baru, yakni hakim memberikan kesempatan kepada terdakwa untuk mengakui atau tidak mengakui dakwaan yang didakwakan kepada terdakwa, yang membedakan pada Sema apabila terdakwa membenarkan dakwaan maka pemeriksaan dilanjutkan dengan mekanisme keadilan restoratif, sedangkan pada KUHAP baru apabila terdakwa mengakui perbuatannya maka hakim akan menentukan perkara akan diperiksa dengan acara singkat. Dan baik pada Sema ataupun KUHAP baru apabila terdakwa tidak mengakui perbuatannya maka pemeriksaan dilanjutkan dengan acara pemeriksaan biasa.

4. Kesimpulan

Pengaturan restorative justice dalam KUHAP Baru menunjukkan adanya pergeseran paradigma dari sistem peradilan pidana yang bersifat retributif menuju pendekatan yang lebih humanis dan berorientasi pada pemulihan. Konsep ini memperluas tujuan pemidanaan tidak hanya pada penghukuman, tetapi juga pada pemulihan korban, tanggung jawab pelaku, dan rekonsiliasi sosial. Meskipun restorative justice memberikan fleksibilitas dalam penyelesaian perkara, keberadaannya menimbulkan ketegangan normatif antara asas kepastian hukum yang menuntut aturan jelas, tegas, dan limitatif dan diskresi aparat penegak hukum yang membutuhkan ruang pertimbangan dalam menangani perkara konkret.

Apabila pengaturan dalam KUHAP Baru belum dirumuskan secara rinci mengenai batasan perkara, prosedur, dan syarat penerapannya, maka berpotensi menimbulkan: disparitas penerapan antar wilayah, inkonsistensi penegakan hukum, dan potensi penyalahgunaan kewenangan. Untuk menjaga legitimasi sistem peradilan pidana, penerapan restorative justice harus tetap berada dalam koridor asas legalitas, prinsip equality before the law, mekanisme pengawasan yang akuntabel. Tanpa pengaturan normatif yang jelas, restorative justice dapat dianggap menyimpangi prinsip due process of law. Diskresi aparat merupakan instrumen untuk mewujudkan keadilan substantif, bukan ruang kebebasan tanpa batas. Oleh karena itu, diskresi harus dibatasi secara normatif, didasarkan pada parameter objektif serta dapat dipertanggungjawabkan secara administratif dan yuridis. Secara keseluruhan, restorative justice dalam KUHAP Baru merupakan langkah progresif dalam reformasi sistem peradilan pidana, namun pengaturannya harus dirumuskan secara limitatif dan akuntabel agar tidak menimbulkan ketidakpastian hukum dan penyalahgunaan diskresi aparat penegak hukum.

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Integration of the Estoppel Principle as a Complement to Good-Faith Regulation in Indonesian Private Law

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Abstract

This study seeks to investigate the concept of estoppel and its potential incorporation into Indonesian civil law. This research is important not because Indonesian civil law lacks protection, but because the existing framework may not always provide optimal conceptual articulation in addressing losses arising from reliance. The Civil Code recognizes principles such as *pacta sunt servanda* and good faith; however, protection of reliance is not limited to these principles, as it is also addressed through unlawful acts (Article 1365) and the doctrine of culpa in contrahendo. Therefore, it would be overstated to claim the existence of a legal vacuum. In many legal systems, particularly in the common law tradition, estoppel has developed to address reliance, detriment, and unconscionability. In civil law systems, the protection of reliance is not contingent upon estoppel as a separate doctrine; rather, it is integrated within established legal principles. This study uses normative legal research methods, including statutory, conceptual, and comparative approaches, by examining laws, court decisions, and legal doctrines. The findings show that estoppel has evolved from a rule of evidence into a doctrine concerned with fairness. In Indonesia, similar values are reflected in good faith, rechtsverwerking, and unlawful acts, which demonstrate how these concepts align with the evolving understanding of estoppel in promoting fairness within the legal system. Accordingly, this research does not posit estoppel as a response to a legal gap but as a complementary and adaptive conceptual framework, consisting of representation, reasonable reliance, and detriment, which may be integrated through interpretation, jurisprudential development, and gradual legal refinement.

1. Introduction

The principle of *pacta sunt servanda* means that a valid agreement has the force of law between the parties, subject to limitations such as defects of consent, unlawful cause, and bad faith.[1] This principle is explicitly stated in Article 1338, paragraph (1), of the Civil Code (*KUHPerdata*), which states that "all agreements made in accordance with the law shall have the force of law for those who make them".[2] Thus, if someone breaches a promise agreed upon in a contract, one of the legal mechanisms available to enforce it is through a lawsuit in court.[3]

KUHPerdata also guarantees legal certainty for parties who have executed the agreement in good faith, as emphasized in Article 1338 paragraph (3).[4] In practice, the Supreme Court of the Republic of Indonesia, through several Supreme Court Circular Letters (SEMA)—including SEMA Number 1 of 2017, SEMA Number 4 of 2016, SEMA Number 5 of 2014, and SEMA Number 7 of 2012—highlights the importance of legal protection for third parties or good faith buyers in criminal, civil, and land dispute cases. However, SEMA emphasizes the significance of legal protection for third parties or bona fide purchasers in criminal, civil, and land disputes. It clarifies that these matters do not constitute a generally binding source of law but rather function as an internal judicial guideline.

In the context of criminal law, protection is granted to third parties holding civil rights over goods seized in corruption cases, as regulated by Article 19 of the Corruption Crime Law. Meanwhile, in the civil realm, buyers who are considered to have good faith are those who purchase land through legitimate procedures, conduct research on the legal status of the land and the identity of the seller, and transact at a fair price. The principle of caution and diligence in every transaction process constitutes an important indicator in assessing good faith; however, good faith encompasses both subjective honesty (intention) and objective standards of proper conduct. Thus, it is not limited to administrative verification alone. A buyer may still be considered in good faith if both elements are fulfilled, even if the seller is later found to lack the right to the object being sold. Conversely, if the buyer knows that the land ownership document is not in the seller's name or that the object of sale is an undivided inheritance sold without the consent of all heirs, the buyer cannot be regarded as acting in good faith. In such circumstances, the buyer may only claim compensation from the seller. A buyer may still be considered in good faith if both elements are fulfilled, even if the seller is later found to lack the right to the object being sold.

Estoppel in the common law tradition is a specific doctrine, whereas good faith is a general principle in civil law; although they share similar underlying values, they are not identical.[5] This doctrine essentially prevents a person from denying or retracting a statement, promise, or legal stance that they had previously made if another party has relied on it and subsequently suffered a loss. "In brief, estoppel is a doctrine that prevents injustice arising from inconsistent legal positions.[6] This doctrine is important, it is necessary to examine whether the existing legal norms in Indonesian are sufficient before its incorporation into the national legal system. Article 1338 of the KUHPerdata says that Indonesian civil law already recognizes the principle of "*pacta sunt servanda* and good faith." These two rules say that "agreements bind the parties and must be performed in good faith and honesty." However, doctrinally, the principle of good faith is more inclined to function as a "guideline" in the execution or interpretation of contracts rather than as a separate mechanism to protect trust that arises before the formation of a valid agreement.

This limitation is evident when an individual incurs a loss due to reliance on the statements or legal stance of another party, despite the absence of a formal binding agreement. In such situations, while the principles of pacta sunt servanda and good faith may not always provide optimal protection for reliance interests, the legal

[1] S Cornelius, "Die Formeelregtelike Grondslag van Die Ex Contractu-Eis Vir Skadevergoeding Weens Kontrakbreuk," *Tydskrif Vir Die Suid-Afrikaanse Reg* 2024, no. 1 (2024), https://doi.org/10.47348/tsar/2024/i1a5.

[2] Dolot Alhasni Bakung, Zamroni Abdussamad, and Mohamad Hidayat Muhtar, "The Principle of Freedom of Contract in Agricultural Product Sharing Based on Islamic Law," *Jambura Law Review* 4, no. 2 (2022), https://doi.org/10.33756/jlr.v4i2.11645.

[3] Ryan H. Nelson, "An Employment Discrimination Class Action By Any Other Name," *Fordham Law Review* 91 (2023), https://doi.org/10.2139/ssrn.4197404.

[4] Sudjana Sudjana, "Principle Of Good Faith In Confidentiality Agreements Of Trade Secret Information," *Dialogia Iuridica* 14, no. 1 (2022), https://doi.org/10.28932/di.v14i1.5376.

[5] Janet O'Sullivan, "5. Consideration and Estoppel," in *O'Sullivan & Hilliard's The Law of Contract*, 2022, https://doi.org/10.1093/he/9780192856555.003.0005.

[6] Elaine Palser, "Proprietary Estoppel and the Position of the Stranger," *Trusts & Trustees* 29, no. 3 (2023), https://doi.org/10.1093/tandt/ttac125.

framework does not lack protection, as remedies can be found in tort law (Article 1365 of the KUHPerdata) and the doctrinal development of unjust enrichment. Accordingly, the issue lies not in a regulatory gap but in the limitations of implementation and conceptual application of existing mechanisms, which can lead to inadequate protection for individuals who suffer losses due to reliance on non-binding statements. In many common law countries, the doctrine of estoppel addresses similar concerns by preventing a person from acting inconsistently with a prior representation when such conduct causes harm to a party who has relied upon it. Therefore, estoppel may be understood as a supplementary doctrine that could strengthen the practical application of good faith in Indonesia.

Regarding the principle of estoppel, several studies in Indonesia identify parallels, rather than an equivalent, in the doctrine of *rechtsverwerking*, which involves the loss of rights due to inaction, as recognized under Article 32 paragraph (2) of Government Regulation No. 24 of 1997. However, they are not identical: rechtsverwerking is based on inaction, whereas estoppel prohibits inconsistent conduct that harms reliance.[7] In the common law system, estoppel is an exception to the principle *nemo dat quod non habet* and protects the party acting in good faith from detrimental changes in attitude, as reflected in Supreme Court Decision No. 1012 K/Pdt/2021, which emphasizes legal protection for third parties acting in good faith.[8] In the context of a Memorandum of Understanding (MoU), promissory estoppel becomes relevant when a promise in the MoU is relied upon by another party in taking action and thus cannot be unilaterally withdrawn if it causes harm.[9] Unlike the common law and Dutch systems, which have begun to recognize protection against pre-contractual losses based on the principle of good faith, Indonesian law still adheres to Article 1320 of the KUHPerdata, which does not yet regulate compensation at the pre-contract stage.[10] In the field of insurance, the principle of estoppel is used to prevent illegal double claims, therefore prompting recommendation for the establishment of a national insurance database.[11] Globally, Greenwood estoppel in the case of PT Asuransi Tugu Pratama Indonesia Tbk v Citibank N.A. [2023] HKCFA 3 strengthens the bank's defense by preventing the corporation from denying its agent's wrongdoing if it has previously remained silent.[12]

It is important to note, though, that the estoppel doctrine has grown in countries with common law systems, while Indonesia has a civil law system. Common law systems evolve and expand estoppel through various court decisions that set precedents and influence subsequent cases. The Indonesian legal system, on the other hand, sees written laws as the most important source. To use estoppel in Indonesia, it should not rely solely on jurisprudence or the Supreme Court's guidelines, although jurisprudence remains an important persuasive source of law in practice. Such an arrangement does not necessarily lead to legal uncertainty, considering that many legal doctrines have evolved through jurisprudence despite the codified nature of the Indonesian legal system. Before formally acknowledging estoppel, it is imperative to comprehend the scope of prevailing norms, including regulations pertaining to "the principle of *pacta sunt servanda*, the principle of good faith, and doctrines such as *rechtsverwerking*," which effectively offer legal safeguards against losses incurred from justifiable reliance on legal relationships.

Based on the explanation above, existing studies have not yet fully developed a comprehensive and adaptive formulation of estoppel for application in the Indonesian legal system. Therefore, there is an urgency to conduct the present research. This research aims to develop an integrative estoppel concept relevant to the national legal context. To achieve this goal, this research will address two main questions, namely: (1) What is the position, development, and role of the principle of estoppel in theory and practice across various legal systems; and (2)

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[7] Togi Marolop Pangaribuan Joseph Noviandri, "Perbandingan Rechtsverwerking Sebagai Doktrin Hukum Di Indonesia Dan Doktrin Estoppel Di Amerika Serikat Pada Bidang Hukum Perjanjian," *Lex Patrimonium* 2, no. 2 (2023): 1–18.

[8] Melan Yakob, Mercy M. M. Setlight, and Djefry W. Lumintang, "Kajian Hukum Asas Nemo Dat Qui Non Habet Atas Peralihan Hak Benda Bergerak Dalam Hukum Perdata Di Indonesia," *Lex Privatum* 15, no. 3 (2025).

[9] Andi Dadi Mashuri Makmur et al., "Amatan Hukum Perikatan Mengenai Otoritas Memorandum of Understanding (MoU) Sebagai Tahapan Pra Kontrak," *Andi Dadi Mashuri Makmur, Yustiana, Andi Wira Saputra, Besse Muqita Dewi* 2, no. 2 (2023): 36–45.

[10] Elyatul Azizah, Armansyah Armansyah, and Yulianingsih Yulianingsih, "Development of Indonesian Business Contract Law in The Globalization Era," *International Journal Of Social Science And Education Research Studies* 03, no. 04 (2023), https://doi.org/10.55677/ijssers/v03i4y2023-14.

[11] Kanon Mommsen Wongkar, "Legal And Ethical Aspect Of Double Insurance In Indonesia: A Literature Review," *Ultima Management : Jurnal Ilmu Manajemen*, 2023, https://doi.org/10.31937/manajemen.v15i1.3011.

[12] Christy Suen, "Bank Payments on Instructions of Delinquent Agents: A Paradigm Shift," *Trusts & Trustees* 30, no. 1 (2024), https://doi.org/10.1093/tandt/ttad082.

How can the integrative concept of estoppel be adaptively formulated for the Indonesian legal system? This research aims to examine the theoretical and practical aspects of the principle of estoppel in various countries while also formulating a conceptual model that aligns with the needs and characteristics of Indonesian law.

2. Method

This research employs a doctrinal legal research methodology, including statutory, conceptual, and comparative approaches. This method is used to examine the adequacy of Indonesian positive legal norms in regulating contractual relationships and the principle of good faith, as well as to assess whether existing norms provide sufficient protection against losses arising from breach of contract or unlawful acts (Article 1365 of the KUHPerdata.

There are two types of legal materials used: primary and secondary. The KUHPerdata and Government Regulation No. 24 of 1997 on Land Registration are examples of primary legal materials. Other examples include relevant Supreme Court Circular Letters and related judicial regulations. This study also utilizes court rulings from Indonesia and several comparable jurisdictions. International legal instruments, such as the 1969 Vienna Convention on the Law of Treaties, are referred to in a limited manner to illustrate the general development of the principles of pacta sunt servanda and good faith, although their direct applicability is confined to public international law rather than private contractual relations.

Books, scholarly articles, and legal doctrines serve as secondary legal materials, discussing the principles of pacta sunt servanda, good faith, rechtsverwerking, and the doctrine of estoppel. These doctrines originate from different legal traditions—civil law and common law—and therefore have distinct normative functions and positions. Accordingly, they are used to build normative arguments and to interpret the development of legal principles within their respective legal contexts.

The collection of legal materials is carried out through a systematic search of regulations, court decisions, and relevant academic literature. Comparative analysis is conducted on several countries that have developed doctrines related to estoppel or the protection of reliance, such as England, India, Australia, the United States, Canada, South Africa, and France, despite their differing legal traditions (common law and civil law). This comparative approach is not intended to directly adopt foreign doctrines but rather to identify functional similarities, particularly in terms of the protection of reliance interests, consistency in legal conduct, and mechanisms for preventing unfairness, to develop a more comprehensive understanding of legal protection in civil relations.

The analysis is performed qualitatively in multiple stages. First, this research identifies and systematizes Indonesian positive legal norms that relate to contract law. These include the principles of *pacta sunt servanda*, good faith, and the doctrine of *rechtsverwerking*. Second, this research examines the legal issues addressed by courts to understand how Indonesian courts handle situations where changes in legal positions cause losses to parties relying on previous representations. Third, this research analyzes how the principle of estoppel has developed in different jurisdiction by conducting a comparative doctrinal analysis. This stage aims to explain the doctrinal function and legal implications of estoppel across legal systems.

The normative argumentation in this research is structured by considering its alignment with primary legal sources, its relation to developing legal doctrines and theories, its consistency with judicial practices, and its openness to the developments in international and comparative law. Through these stages of analysis, this research aims to conceptually explain the relationship between the principle of good faith, *pacta sunt servanda*, and the protection of legal trust within the Indonesian civil law system.

3. Findings and Discussion

3.1 The Position, Development, and Role of the Principle of Estoppel in Theory and Practice in Various Countries

Estoppel is a legal doctrine in common law that may prevent a party from denying a prior promise, statement, or legal stance if another party has reasonably relied upon it and would suffer loss as a result. However, its application is not absolute, as it is subject to considerations of reasonableness and unconscionability. For example, if a person promises to provide a piece of land and the other party incurs expenses in reasonable reliance on that promise, the promisor may, in certain circumstances, be precluded from acting inconsistently.

Nevertheless, from the perspective of the KUHPerdata, providing such a promise does not automatically create a binding obligation unless it fulfills the legal requirements of agreement, lawful cause, and a definite object as stipulated under Article 1320.[13] The main purpose of this principle is to protect reasonable reliance and prevent injustice due to inconsistent behavior.[14] In the common law tradition, including in England, estoppel is considered part of the principle of equity, which is a legal mechanism to prevent unfair behavior. This principle is often described as "a shield, not a sword," meaning that estoppel is used to uphold a legal position, not to attack or acquire new rights.[15] A party should not benefit from its own inconsistency, especially if it harms another party who has acted in good faith.

Estoppel appears in various forms according to its context. Promissory estoppel applies when someone makes a promise that is relied upon by another party and then fails to fulfill it. Estoppel by representation occurs when someone makes a statement that is relied upon and serves as the basis for another party's action. Estoppel by convention arises if two parties agree on a legal state, and one of them later unilaterally denies that agreement.[16] All these forms aim to prevent deviations from the trust that has been legitimately placed.

In the field of civil law, estoppel is often used in cases of contract disputes and ownership. For example, if someone appears to agree to the sale of land and allows the transaction to proceed without protest, they cannot cancel that agreement if it causes harm to another party.[17] In certain situations, estoppel does not extinguish rights but precludes their enforcement due to prior conduct or Inconsistency. Etymologically, the term "estoppel" comes from Old French, meaning "stopper." In the legal context, this term refers to a mechanism to prevent a party from acting inconsistently with previous statements or legal positions.[18]

In India, the principle of estoppel is regulated under the Indian Evidence Act 1872, specifically in Sections 115–117. Although initially a rule of evidence, in practice, estoppel has a function comparable to substantive law because it can determine the outcome of a case.[19] Someone who, by words, actions, or negligence, has caused another person to believe that a certain state of affairs is true, and that person acts based on that belief, cannot later deny the truth of that state of affairs. This principle is also recognized in various important rulings, such as *Pickard v. Sears* (1837), an early English case that laid the foundation of estoppel, and *Motilal Padampat Sugar Mills v. State of UP* (1979), an Indian case that established that a government promise may give rise to estoppel against the state. Meanwhile, in *Pritam Singh v. State of Punjab* (1956), the Supreme Court of India affirmed the principle of issue estoppel, stating that a legal issue that has been decided cannot be re-litigated in subsequent cases between the same parties. However, its regulation in the law is considered inadequate because Section 115 only contains a formulation that is too brief.[20]

From the experience in India, we gain additional understanding that, although estoppel was initially regulated as a rule of evidence, through judicial interpretation, estoppel then developed into a doctrine of private law. This development shows that estoppel not only regulates matters of evidence but also serves as a legal institution to maintain the consistency of parties in legal relationships. Such dynamics are certainly relevant for countries that have not explicitly regulated it, including Indonesia.

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[13] Fatima Idrees, "Comparative Analysis of the Principle of Estoppel With Principle of Res Judicata," *Available at SSRN 4864710*, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4864710.

[14] Mohd Asmadi Mohd Angsor and Nazir Adi, "View of The Doctrine of Promissory Estoppel: As a Shield or Sword?," *Research in Management of Technology and Business* 1, no. 1 (2020): 918–25, https://publisher.uthm.edu.my/periodicals/index.php/rmtb/article/view/530/272.

[15] Jorge Larroucau Torres, "The Doctrine of Estoppel in Chilean Civil Justice," *Revista de Derecho* 33, no. 1 (2020), https://doi.org/10.4067/S0718-09502020000100273.

[16] Svitlana Rabovska, "Estoppel Principle Or Venire Contra Factum Proprium: Their Co-Existence And Priority," *Bulletin of Taras Shevchenko National University of Kyiv. Legal Studies*, no. 125 (2023), https://doi.org/10.17721/1728-2195/2023/1.125-14.

[17] Clireesh Terry Joshua, "The Constitutionality of Estoppel in the Context of Vindication," *Constitutional Court Review* 11, no. 1 (2021), https://doi.org/10.2989/ccr.2021.0005.

[18] Liu Guoqing, "A Comparative Study Of The Doctrine Of Estoppel: A Civilian Contractarian Approach In China," Canberra Law Review 1 (2010), https://classic.austlii.edu.au/au/journals/CanLawRw/2010/5.pdf.

[19] Ashish Mishra, Harsh Bhardwaj, and Shailender Singh Rana, "The Doctrine of Estoppel as a Rule of Evidence: An Overview," *International Journal of Legal Science and Innovation* 4, no. 2 (2022): 307.

[20] Prachi Sahay, "Relevance of the Principle of Estoppel under Indian Evidence Law," *Supremo Amicus* 75, no. 17 (2021): 399–405.

The principle of estoppel also plays an important role in achieving a swift, simple, and cost-effective justice system, as it can prevent inconsistency in legal positions that may lead to disputes. However, estoppel is distinct from res judicata, which concerns the finality of judgments. In England, the principle is reflected in the *Henderson v. Henderson* doctrine, which asserts that all claims must be submitted at once and cannot be split into separate cases.[21] In English law, estoppel is divided into three types according to the situation. First, estoppel by representation occurs when someone makes a representation that is relied upon by another party, and then that person acts based on that belief—therefore, the representing party cannot deny it. Second, promissory estoppel arises if someone makes a promise and the other party has relied on it; then the promise cannot be unilaterally revoked. Third, formal estoppel usually occurs if someone has signed an official document such as a deed; then they cannot deny the contents of that document later.[22] Additionally, the terms "positive estoppel" and "negative estoppel" are also known.[23] Positive estoppel grants the right to enforce a promise made, whereas negative estoppel only prohibits the other party from acting contrary to their previous stance without providing a basis for a claim.[24]

The forms of estoppel are now expanding and continuously evolving. For example, estoppel by deed occurs when someone has made a statement in an official document, thereby precluding them from denying its content. Estoppel by record occurs when a court has already decided a matter, preventing it from being disputed again in another case involving the same issue. There is also equitable estoppel, which is a form of estoppel aimed at upholding equity, including the type of promissory estoppel due to a promise and proprietary estoppel arising from representations relating to property rights.[25] In essence, if someone has given another person a reasonable expectation, they cannot arbitrarily retract their statement.

In the United States, the application of estoppel to the government is highly complex and case-specific, particularly due to the doctrine of sovereign immunity. In *Office of Personnel Management v. Richmond* (1990), the Supreme Court rejected a claim for estoppel in the absence of a statutory basis. Meanwhile, in *Heckler v. Community Health Services* (1984), the Court suggested that estoppel against the government may be considered in limited circumstances, particularly where there is evidence of affirmative misconduct. These cases indicate that the application of estoppel in this context is not absolute but depends on specific legal and factual considerations.[26] Therefore, even though estoppel can apply to the government, the requirements are very strict and cannot be used carelessly.

In Australia, proprietary estoppel has rapidly developed to protect promised property rights. In the case of *Giumelli v. Giumelli* (1999), the High Court of Australia affirmed that the court must fairly assess the expectations arising from the promise and the losses incurred if it is not fulfilled. The final outcome could be monetary compensation or the fulfillment of the promise itself, depending on which is more just. In the case *of Sidhu v. Van Dyke* (2014), the High Court of Australia ruled that Van Dyke was entitled to relief because he had reasonably relied on Sidhu's promise, who repeatedly said that a house would be granted. Van Dyke did not seek any other benefit because he trusted that promise, but suffered loss when the promise was not fulfilled.

The court affirmed that in proprietary estoppel, it is necessary to establish reliance, detriment, and unconscionability, rather than merely demonstrate a reasonable expectation and resulting loss. Accordingly, it is not sufficient to rely solely on expectation and loss without considering these core elements.[27]

In Canada, two important types of estoppel are recognized, namely estoppel in pais and issue estoppel. In the case of *Ryan v. Moore* (2005 SCC 38), the Supreme Court explained that estoppel by convention—a part of estoppel in pais—applies when two parties agree on something and make it the basis of their legal relationship,

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[21] Myron Phua and Serena Seo Yeon Lee, "The Applicability of Henderson v Henderson in an Arbitration Seated in England," *Arbitration International* 38, no. 4 (2022), https://doi.org/10.1093/arbint/aiac016.

[22] Lex Humana and Rio De Janeiro, "Some Issues Of Borrowing The Estoppel Doctrine In Civil Proceedings Of The Russian Federation," *Lex Humana* 15, no. 1 (2023): 167–79.

[23] Ying Khai Liew, "Proprietary Estoppel in Australia: Two Options for Exercising Remedial Discretion," *University of New South Wales Law Journal* 43, no. 1 (2020), https://doi.org/10.53637/bzfg3327.

[24] Joel Horsman, "Starting Afresh: Reformulating and Reconceptualising the Law of Estoppel," *Oxford U. Undergraduate LJ*, no. XIII (2024): 166–95.

[25] Social Scienceshumanities, "Civil Procedual Tools For Filtering Legal Actions Considering The Contradictory Behavior Of The Parties," *Cluj University Journal. Interdisciplinary: Social Sciences And Humanities* 2, no. 3 (2024): 65–68.

[26] Leonard C. Brahin, "A Jacksonian Theory of Estoppel in IP Litigation Against the United States," *Wash. & Lee L. Rev. Online* 82, no. 2 (2024).

[27] Liew, "Proprietary Estoppel in Australia: Two Options for Exercising Remedial Discretion."

so that one party cannot later deny it. Meanwhile, in *Danyluk v. Ainsworth Technologies Inc*. (2001 SCC 44), the Court affirmed that issue estoppel prevents the same party from re-litigating a legal issue that has already been decided. This principle is part of the *res judicata* doctrine, which aims to maintain legal certainty and prevent people from abusing the legal process by repeatedly bringing the same case to court.[28]

In South Africa, estoppel is recognized in two forms: estoppel by representation and estoppel by conduct, which occur when someone, through their words or actions, causes another party to believe that a certain state of affairs exists, and then that party acts based on that belief. This principle is often used in contract disputes, such as in the case of SA Eagle v. Norman's Transport Lines, where a party that has created reliance in another party should not act inconsistently and harm that party.[29] In France, although the term estoppel is not used directly, the underlying principle is still recognized in legal practice as part of the principles of justice and good faith, especially in arbitration and civil matters. For example, in the case of Golshani v. The Islamic Republic of Iran, the plaintiff is not allowed to act contrary to its past actions, as it is considered unfair. This principle was then reinforced in legal reforms through Décret No. 48/2011 and Article 1466 of the Code de procédure civile, which states that if someone remains silent despite knowing of a violation, such silence can be considered a waiver of rights. This indicates that French law protects the principles of reliance and consistency in actions.[30]

From the comparative study, it is understood that, although the terms and structures of estoppel differ across jurisdictions, its function is not identical across legal systems. In common law, estoppel operates as a distinct legal doctrine to prevent contradictory conduct and protect reliance. In contrast, civil law systems do not recognize estoppel as an independent doctrine, but similar values—such as consistency (venire contra factum proprium), good faith, and the protection of legitimate expectations—are reflected through general principles and other legal mechanisms. This comparison shows that, while estoppel is characteristic of the common law system, the underlying values it embodies are also recognized in other legal traditions.

If one examines the Indonesian legal system, this development can be adapted to fill the regulatory gap. Basically, Indonesian civil law recognizes the principle of pacta sunt servanda as reflected in Article 1338, paragraph (1), of the KUHPerdata, while Article 1320 sets out the validity requirements of a contract. However, these regulations do not always provide an explicit framework to address situations arising outside formal contractual relationships. In such cases, legal protection may instead be examined through the doctrine of unlawful acts (Article 1365 of the KUHPerdata), particularly where a party suffers loss due to reliance on pre-contractual conduct, informal statements, or even silence that gives rise to reasonable expectations. Accordingly, the issue lies not in the absence of legal protection but in how existing doctrines are applied to such situations.

Historically, estoppel was once considered merely a part of evidentiary law. However, over time, many legal experts have stated that estoppel is also part of substantive law because it can serve as a basis for substantive consideration in delivering a verdict. Lord Wright even emphasized that estoppel is part of substantive legal rules.[31] The debate regarding the scope of estoppel is also evident in the two developing approaches: the strict view and the broad view. The strict view emphasizes the existence of a clear statement, reliance, and actual loss. Conversely, the broad view emphasizes the importance of consistency without requiring proof of reliance or direct loss.[32]

If estoppel is only viewed as a rule of evidence, then its function will be limited to technical evidentiary aspects in judicial proceedings. However, estoppel can influence the judge's decision. The rules of evidence are temporary and only apply during the trial process, whereas substantive rules create rights and obligations that have a broader application. Therefore, in modern law, estoppel is viewed as an important instrument to ensure that the law is not applied arbitrarily and remains in line with the principles of justice, consistency, and legal

[28] Felicity Maher, "Doing the Same Work? Estoppel by Convention and Failure of Basis," *University of Western Australia Law Review* 50, no. 2 (2023).

[29] Tumo Charles Maloka and Isaiah Mmatipe Sefoka, "Accountability, Estoppel and Bypassing of the Municipal Finance Management Act: A Note on Merifon (Pty) Ltd v Greater Letaba Municipality Trilogy," *Southern African Public Law* 37, no. 2 (2023), https://doi.org/10.25159/2522-6800/13240.

[30] Scienceshumanities, "Civil Procedual Tools For Filtering Legal Actions Considering The Contradictory Behavior Of The Parties."

[31] Sara Qayum, Muhammad Ifzal Mehmood, and Sajjad Hussain, "Review of Doctrine of Estoppel as Substantive Rule of Law and Its Application in Civil and Criminal Law," *Pakistan Journal of Criminology* 3, no. 3 (2021): 101–16.

[32] Dingley Gavin, "Estoppel," Jus Mundi, 2024, https://jusmundi.com/en/document/publication/en-estoppel.

certainty.[33] By considering the various forms, applications, and developments of estoppel in different countries, it can be understood that this principle has evolved from a rule of evidence into an essential substantive legal instrument for ensuring justice, consistency, and legal certainty. Estoppel functions to prevent someone from acting contrary to a previous stance or promise that has created reasonable reliance by another party and effectively protects the established legal relationship. In relation to modern law, estoppel serves as both a procedural and substantive mechanism and embodies the principle of justice that can prevent abuse of process and injustice due to inconsistent legal positions.

Based on the explanation above, there are three ways to understand estoppel's role and place in modern legal systems. First, estoppel ensures consistency in parties' legal conduct by restricting a party from departing from its prior representations or conduct. Second, estoppel is a mechanism to prevent repetitive litigation and abuse of judicial process. Third, estoppel protects reliance interest arising from reasonable expectations in a legal relationship. These three factors demonstrate that estoppel is no longer regarded merely as an evidentiary rule in numerous jurisdictions but has evolvedinto a substantive legal doctrine. This comparative overview is significant for Indonesia, as it highlights that, although reliance-based interests are not formulated as a distinct doctrinal mechanism, protection can be derived from existing legal principles, including unlawful acts (Article 1365 of the KUHPerdata), good faith (Article 1338 paragraph (3)), and the doctrinal development of *culpa in contrahendo*. There are principles that are closely related, such as the principle of good faith and the doctrine of *rechtsverwerking*, but neither fully addresses situations where someone acts inconsistently, thereby harming another party who has relied on their previous conduct or statements. Consequently, understanding the status and evolution of estoppel across different jurisdictions can provide an analytical framework for evaluating the potential adaptation of this principle to enhance Indonesian civil law.

3.2. The Formulation of an Integrative and Adaptive Estoppel Concept for the Indonesian Legal System

A contract is one of the essential parts of civil law, as regulated in Book III of the Indonesian Civil Code (KUHPerdata). Every person, in principle, has the legal right to make agreements, including setting their terms, whether orally or in writing. The provisions regarding the validity of an agreement are explicitly regulated in Article 1320 of the Indonesian Civil Code, which formulates four conditions for the validity of an agreement, namely, "the existence of an agreement between the parties, legal capacity to bind oneself, the existence of a specific object, and a cause that is not contrary to law".[34] The first two requirements are subjective, as they concern the parties involved, while the other two are objective, as they pertain to the agreement's content. If the subjective conditions are not met, the agreement can be voidable at the request of the aggrieved party. On the other hand, if the objective conditions are not met, the agreement is null and void from the beginning because it is considered never to have existed.[35] However, in the KUHPerdata, freedom of contract is not absolute, as it is limited by Article 1337 concerning lawful cause, as well as by considerations of public order and morality.

Contract law is rooted in ancient moral and spiritual values that emphasize the importance of keeping promises. The principle of *pacta sunt servanda* (Latin: "agreements must be kept"), although not explicitly mentioned in the Digest of Justinian, is implied in Ulpian's view, who stated, "For what is more in accordance with human honesty than keeping what they have agreed upon?" This concept was first explicitly known in the writings of Hostiensis, a church jurist in the Middle Ages, who stated that agreements, even if unwritten or informal, must be honored in accordance with the teachings of the Gospel. He referred to Bible verses such as Matthew 5:37 and James 5:12, which emphasize integrity in speech and the avoidance of falsehood. Even in medieval England, church courts declared that covenant breakers were considered "sinners who must be corrected".[36] However, these arguments are historical and theological in nature and do not constitute binding

[33] Qayum, Mehmood, and Hussain, "Review of Doctrine of Estoppel as Substantive Rule of Law and Its Application in Civil and Criminal Law."

[34] Widaningsih Widaningsih et al., "The Balance Of Legal Position Of Farmers With Dairy- Producing Industries In The Contents Of Milk Deposit Contracts At KUD," *Technium Social Sciences Journal* 41 (2023), https://doi.org/10.47577/tssj.v41i1.8444.

[35] Wardatul Fitri, Fx Djoko Priyono, and Bambang Eko Turisno, "The Juridical Review on Legal Position of Illegal Online Loans Based on Article 1320 of the Civil Code (Burgerlijk Wetboek)," *Baltic Journal of Law & Politics* 15, no. 7 (2022).

[36] Dmitrii A. Torkin, "Specific Performance and Damages in Anglo-American and Continental Law," *Vestnik Sankt-Peterburgskogo Universiteta. Pravo* 14, no. 2 (2023), https://doi.org/10.21638/spbu14.2023.212.

normative sources within the framework of positive law in Indonesia.

A similar principle is also found in Islamic teachings. Surah At-Taubah verse 4 states that if the polytheists uphold their promise and do not assist the enemies, then Muslims are obliged to honor that promise until the agreed-upon time, because Allah loves those who are pious. In canon law, the principle of *pacta sunt servanda* contrasts with ancient Roman law, which only recognized certain contracts that fulfilled specific legal forms. Canon law introduced this principle universally: "every form of agreement, in whatever form, can be enforced".[37] This principle is also formally recognized in Article 26 of the 1969 Vienna Convention on the Law of Treaties, which explicitly states that every binding treaty must be performed in good faith. This convention, on the other hand, only applies to relations between states in the realm of public international law. It does not directly govern private contractual relations under the Civil Code. Nevertheless, it illustrates the close relationship between the principles of *pacta sunt servanda* and good faith in maintaining the validity of legal obligations and promoting certainty and trust within a legal system.[38]

In Indonesia, the principle of *pacta sunt servanda* is regulated in Article 1338 paragraph (1), of the Indonesian Civil Code, which states that "all agreements made in accordance with the law shall have the force of law for those who make them." To strengthen the implementation of the agreement, Article 1338, paragraph (3), of the Indonesian Civil Code emphasizes that it must be executed in good faith.[39] The principle of *bona fides*, or good faith, in Roman contract law also highlights the importance of morality in the execution of contracts. However, the historical approach reveals that this principle did not develop into a definite substantive norm but rather served as an ethical guideline for judges to fairly assess the behavior of the parties. In *bonae fidei* contracts such as sales and partnerships, judges are given the authority to consider the context and justice comprehensively, including in determining the form of *condemnatio*.[40] This principle of good faith is also closely related to the concept of rechtsverwerking, which does not arise automatically from mere passive behavior or delay but requires circumstances where the other party has reasonably relied on such inaction and adjusted their legal position accordingly. In this sense, it may be understood as a loss of the right to assert a claim under certain conditions. This principle is normatively reflected in Article 32, paragraph (2) of Government Regulation Number 24 of 1997 concerning Land Registration, which provides that if a person acquires a land certificate legally and in good faith, other parties cannot assert their rights if they fail to raise an objection within five years from the issuance of the certificate.[41] [42]

Article 1335 and Article 1337 of the Indonesian Civil Code also reinforce the importance of the principle of good faith. Article 1335 states that "an agreement without a lawful cause, or made based on a false or prohibited cause, shall have no legal effect," while Article 1337 explains that "a cause is prohibited if it is contrary to law, morality, or public order".[43] These provisions leave issues of inconsistency in conduct or reliance unregulated, which are more closely associated with the doctrine of estoppel in common law and are not explicitly recognized in the KUHPerdata. In the Indonesian context, such issues are more appropriately addressed through the doctrine of unlawful acts (Article 1365 of the KUHPerdata). This principle can be seen in the Sigli District Court Decision Number 25/Pdt.G/2023/PN Sgi, where the Plaintiff filed a claim for an unlawful act concerning the sale and purchase of a plot of land and a house in Gampong Blang Paseh, Kota Sigli. The Plaintiff had purchased the land from Defendant I based on a sale agreement in 2021 but was unable to proceed with certification because Defendant I refused to execute a formal sale and purchase deed. Meanwhile, Defendant II, the sibling of Defendant I, constructed a concrete fence that obstructed access to the Plaintiff's house.

The panel of judges stated that the sale and purchase agreement is legally valid, including the boundaries

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[37] Torkin

[38] Sebastian Denst, "Znaczenie Zasad Pacta Sunt Servanda i Dobrej Wiary w Prawie Traktatów," *Kortowski Przegląd Prawniczy*, no. 4 (2022), https://doi.org/10.31648/kpp.7387.

[39] Faizal Kurniawan et al., "Auction Winner as a New Criteria in The Concept of Good Faith Buyer in Indonesia," *Jambe Law Journal* 4, no. 2 (2021), https://doi.org/10.22437/jlj.4.2.171-190.

[40] Philip Thomas, "Wishful Thinking; The Role and Development of Good Faith in the Roman Law of Contracts," *Pravnehistoricke Studie* 51, no. 3 (2021), https://doi.org/10.14712/2464689X.2021.30.

[41] Marina Satya, "Legal Protection of Land Right Holders Against The Establishment of The Rechtsverwerking Institution," *JIHK* 2, no. 2 (2021), https://doi.org/10.46924/jihk.v2i2.138.

[42] Widyorini Indriasti Wardani, "Eksistensi Lembaga Rechtsverweking Dalam Sistem Publikasi Pendaftaran Tanah Di Indonesia," *MAGISTRA Law Review* 2, no. 02 (2021), https://doi.org/10.35973/malrev.v2i2.2332.

[43] Habib Adjie, "Kedudukan Hukum Perjanjian Internasional Yang Tidak Menggunakan Bahasa Indonesia," *Jurnal Education and Development* 9, no. 2 (2021).

of the land, as stated in the document. The action of Defendant II in blocking access is deemed an unlawful act as it infringes upon the right to use the property. However, the request for Defendant I to be obligated to execute a sale and purchase deed was rejected, as no such obligation was stipulated in the agreement or required by applicable law, reflecting the court's adherence to the principle of contractual freedom rather than the application of estoppel. The Plaintiff's lawsuit was partially granted, with one of the orders stating, "the Defendants are ordered to dismantle the concrete fence." This decision was upheld by the Banda Aceh High Court Decision Number 69/PDT/2024/PT BNA and the Supreme Court of the Republic of Indonesia Cassation Decision Number 415 K/PDT/2025.

The decision of the Sigli District Court, as affirmed at both the appellate and cassation level, demonstrates the importance of consistency in the legal stance of the parties involved in the litigation. Although neither the ruling nor the legal considerations explicitly refer to the term "estoppel," the decision substantially reflects the application of the core values of that principle. In the case at hand, the plaintiff had legally purchased a piece of land but suffered losses due to the passivity and subsequent inconsistent conduct of the seller and his family, which effectively restricted the plaintiff's access to the house that had been purchased. The court decided to grant the petition for the demolition of the fence as a form of restoration of the plaintiff's rights, thereby demonstrating that the court has considered the protection of the plaintiff's legitimate position and prevented the abuse of rights that contradict the principles of propriety and legitimate expectation.

This condition underscores the relevance of further conceptualizing the principle of estoppel within the Indonesian legal system, not as a response to a legal vacuum, but as a complementary framework alongside existing provisions such as Article 1365 and Article 1338 paragraph (3) of the KUHPerdata. This principle is not sufficiently understood merely as a doctrine in comparative law studies but needs to be developed into a concrete and applicable norm within Indonesia's positive law. In the context of a legal system that adheres to the civil law tradition, such as Indonesia,[44] principles like estoppel cannot be immediately recognized through judge-made law as in the common law system.[45] Therefore, the recognition of this principle must be built through integration into legislation, consistency in jurisprudence, and scholarly doctrine that promotes the renewal of national civil law.

Therefore, the concept of estoppel, when adaptively formulated for the Indonesian legal system, may be understood as a supplementary principle that, in certain circumstances, limits a party from acting inconsistently with a prior representation, promise, or conduct that has induced reasonable reliance and caused detriment to another party. However, within the framework of the KUHPerdata, a party generally retains the freedom to change its legal position in the absence of a binding agreement, so any such limitation must be carefully aligned with existing doctrines such as unlawful acts and good faith.

This concept contains three essential elements that must be cumulatively fulfilled: (1) representation or legal conduct, (2) reliance or reasonable reliance, and (3) detriment (actual loss). However, these elements are not recognized as a formal normative structure within the KUHPerdata and may instead be understood in relation to the elements of unlawful acts (Article 1365), namely act, loss, causation, and fault. The following table systematically presents and clarifies these three elements. The following table systematically presents and clarifies these three elements:

[44] Amelia Dwi and Dr. Jonaedi Efendi, "Juridical Analysis Of Fintech Lending Agreement Based On Civil Law Perspective In Indonesia," *Journal Of Law Theory And Law Enforcement*, 2023, https://doi.org/10.56943/jlte.v2i3.344.

[45] Payam Akhavan and Frédéric Mégret, "The Problem of 'Uncertainty' in International Criminal Law and the Common Law 'Method,'" *British Yearbook of International Law*, 2023, https://doi.org/10.1093/bybil/brad002.

Table 1. Essential Elements of the Estoppel Principle in the Indonesian Legal System

Element	Description	Application Example
Representation / Legal Attitude	A statement, promise, or conduct action by a person that establishes a particular legal position, whether expressed explicitly (oral/written) or implicitly (conduct/behavior).	A seller executes a sale agreement or permits the buyer to act as though ownership rights have already been transferred.
Reliance / Reasonable Belief	Reasonable reliance by another party on that representation, which materially influences their decision-making or legal actions.	The buyer reasonably relies on the seller's representation and incurs expenses in pursuing land certification.
Actual Loss	Detriment suffered by the relying party as a result of the promisor's subsequent inconsistency or failure to perform.	The buyer suffers detriment when access to or certification of the land is obstructed by the seller or related parties.

Source: Author's analysis, 2025.

These three elements, when assessed cumulatively, serve as a theoretical framework rather than a binding normative standard. In the Indonesian civil law system, judges remain bound by statutory provisions and cannot rely solely on non-normative conceptual benchmarks. Accordingly, the application of similar considerations must be grounded in existing legal doctrines, particularly unlawful acts (Article 1365) and the principle of good faith (Article 1338 paragraph (3)). In this context, estoppel has not been acknowledged as a positive legal norm but may serve as a conceptual reference in the interpretation of such provisions. Furthermore, any guidance from the Supreme Court, including Circular Letters (SEMA), functions only as internal judicial guidance and does not create new legal norms or introduce independent principles such as estoppel. Therefore, the development of this concept must remain aligned with the existing legal framework, ensuring that judges assess disputes based on established legal provisions while promoting consistency, fairness, and the protection of legitimate interests in civil relations.

To elucidate the operational dimension of the concept within the Indonesian legal framework, the principle of estoppel may be articulated into a conceptual model comprising three principal dimensions: doctrinal structure, application prerequisites, and normative integration mechanisms. At the doctrinal level, estoppel originates from equity in the common law tradition and functions as a supplementary concept, rather than deriving directly from the principle of good faith in civil law. While good faith, as reflected in Article 1338 paragraph (3) of the KUHPerdata, provides a general normative standard, it is not conceptually identical to estoppel. Furthermore, Articles 1335 and 1337 of the KUHPerdata regulate the requirement of a lawful cause in contractual relations and are not directly concerned with issues of inconsistent conduct or reliance.

In this context, estoppel does not aim to establish new contractual obligations; instead, it can be perceived as a conceptual mechanism that, under specific circumstances, restricts inconsistent behavior. However, the Civil Code only permits the restriction of rights through established legal provisions, not through non-codified doctrines. Therefore, any limitation on rights must be grounded in existing doctrines, such as unlawful acts (Article 1365) and the principle of good faith (Article 1338, paragraph 3). Judges may, in this regard, employ an analytical approach by examining elements such as representation, reliance, and detriment, not as an independent legal test, but as considerations within the application of existing legal norms. Accordingly, even if these elements are present, a party cannot automatically be prevented from changing their legal position unless such restriction is justified under applicable law.

Furthermore, in the context of normative integration, the principle of estoppel may be operationalized through three pathways: (i) judicial interpretation of the principle of good faith in Article 1338 of the KUHPerdata, (ii) reinforcement in jurisprudential practice that emphasizes the importance of consistency in the legal positions of the parties, and (iii) the long term through the reform of national civil law. Through this conceptual model, estoppel can function as a doctrinal bridge that strengthens the relationship between the principle of pacta sunt servanda, the principle of good faith, and the protection of legitimate expectations in civil law relationships.

4. Conclusion

The evolution of the principle of estoppel across various jurisdictions demonstrates its significant role in safeguarding parties acting in good faith from losses arising from reliance on another party's conduct. Within the common law tradition, estoppel has evolved from a mere evidentiary rule into a substantive legal doctrine, primarily concerned with reliance, detriment, and unconscionability, rather than merely inconsistent legal positions. In the context of Indonesian civil law, such losses must be qualified within established legal categories, particularly as breach of contract or unlawful acts (Article 1365 of the KUHPerdata).

Indonesian positive law has not yet explicitly regulated the principle of estoppel. However, its underlying values may be reflected in existing legal principles, particularly pacta sunt servanda as stipulated in Article 1338 paragraph (1) of the KUHPerdata, and the principle of good faith as reflected in Article 1338 paragraph (3), as well as in the doctrine of rechtsverwerking under Article 32 paragraph (2) of Government Regulation Number 24 of 1997. Article 1320 of the KUHPerdata, on the other hand, governs the validity requirements of a contract. Judicial practice, as reflected in the Sigli District Court Decision Number 25/Pdt.G/2023/PN Sgi, which has been upheld to the cassation level, also demonstrates the application of existing legal doctrines in addressing disputes involving reliance and inconsistent conduct that may cause harm to other parties.

Based on that analysis, this research finds that, rather than indicating a clear normative gap, the issue lies in the limited conceptual articulation and application of existing legal mechanisms in addressing losses arising from reasonable reliance in legal relationships. Accordingly, the development of an estoppel concept within the Indonesian legal system should not be framed as a response to a legal vacuum but as a complementary and adaptive framework that builds upon existing doctrines. Such a concept may be analytically structured upon three elements: (i) a clear representation or legal position, (ii) reasonable reliance by another party, and (iii) detriment arising from a subsequent change in position. In the long run, any potential development of this concept should be grounded in demonstrated practical needs, supported by legislative refinement, consistent jurisprudential interpretation, and doctrinal elaboration, in order to enhance fairness in civil legal relationships

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Monopolistic Conduct in Electronic Commerce: A Competition Law Analysis of TikTok

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Abstract

This article analyzes monopolistic behavior in electronic commerce conducted through Electronic Systems (Perdagangan Melalui Sistem Elektronik/PMSE) on the TikTok platform, particularly through the TikTok Shop feature, from the perspective of Indonesian competition law. The purpose of this study is to examine the compatibility of TikTok's social commerce business model with Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, as well as regulations governing PMSE. The research method employed is a normative juridical legal approach, focusing on a socio-legal perspective, which relies on secondary legal materials, including statutory regulations, legal doctrine, academic literature, relevant official reports, and empirical data. The results of this study indicate that integrating social media and e-commerce functions into a single digital ecosystem creates the significant potential for monopolistic practices, including control over content-distribution algorithms, dominance over user data, market access discrimination, and predatory pricing. This condition has the potential to harm fair business competition and suppress the sustainability of micro, small, and medium-sized enterprises (MSMEs). This study concludes that the existing legal framework for business competition has not been fully adaptable to the characteristics of platform-based digital businesses. Therefore, it is necessary to update the regulations framework and strengthen supervision by competition authorities so that the digital commerce ecosystem operates fairly, equitably, and sustainably.

1. Introduction

The rapid growth of e-commerce platforms in recent years reflects the broader digital transformation of trade.[1] This transformation has given rise to technology-based trading models that utilize electronic systems, as recognized in Government Regulation (PP) Number 80 of 2019 concerning Trade Through Electronic Systems. Initially functioning merely as tools for communication and promotion, the internet and social media have evolved into integrated spaces for direct commercial transactions.[2] However, this development has also enabled the emergence of platform-based market structures in which a single digital platform acts not only as an intermediary but as a controller of the entire digital trading ecosystem.[3] Through this position, digital platforms can determine the rules of interaction, regulate access to markets, and control the flow of information and transactions. This structural shift from open competition to more concentrated digital markets poses significant challenges to the principles of fair business competition, thereby necessitating a re-evaluation of existing competition law frameworks to ensure their relevance in the digital economy.[4]

The following table shows the distribution of e-commerce market share in Indonesia for the current period, highlighting the dominance of several digital platforms within the e-commerce ecosystem.

Table 1: Estimated E-commerce Market Share in Indonesia (GMV & User Access)

Platform E-commerce	Estimasi Pangsa Pasar / Akses (%)
Shopee	~36% share of GMV Indonesia
Tokopedia	~35 % share of GMV Indonesia
TikTok Shop (2022)	~5 % share of GMV Indonesia
TikTok Shop (2024)	~11 % share of GMV Indonesia
Shopee Akses Pengguna (2025)	53.22 % of internet users
TikTok Shop Akses Pengguna (2025)	27.37 % of internet users
Tokopedia Akses Pengguna (2025)	9.57 % of internet users
Lazada Akses Pengguna (2025)	9.09 % of internet users

Source: Compiled by the author based on Momentum Works (2024), Katadata (2024), dan Bisnis Indonesia (2024)

The data shows that Indonesia's e-commerce market is still dominated by major platforms such as Shopee and Tokopedia, but TikTok Shop has also experienced significant growth in recent years. This can be seen from the market share of TikTok Shop, which increased from around 5% in 2022 to about 11% of the total Gross Merchandise Value (GMV) in 2024, although it remains below Shopee and Tokopedia, which control around 36% and 35% of the market, respectively.

In this study, several key concepts are employed to frame the analysis of competition issues in platform-based electronic commerce. Digital monopoly refers to a form of market domination achieved not solely through conventional market share control, but through structural control over digital infrastructure, user access, and data flows. Algorithmic dominance describes the ability of digital platforms to determine market visibility and consumer preferences through opaque recommendation and ranking systems. Platform gatekeeping refers to the role of platforms as intermediaries that selectively control market access for enterprises. At the same time, walled garden ecosystems are closed digital environments in which users and merchants are structurally locked into a single platform's services.

The digitalization of trade through electronic systems (PMSE) has transformed not only transaction patterns but also the structure of competition within digital markets. Platform-based business models now integrate multiple functions—social interaction, content distribution, and commercial transactions—within a single

[1] Rezza Akmalya, "Pengaruh Ekonomi Digital Terhadap Pertumbuhan Dan Perkembangan Ekonomi Di Indonesia," *Universitas Islam Tribakti Lirboyo*, 2023.
[2] Rr. Getha Fety Dianari, "Pengaruh E-Commerce Terhadap Pertumbuhan Ekonomi Indonesia," *Bina Ekonomi* 22, no. 1 (2019), https://doi.org/10.26593/be.v22i1.3619.45-64.
[3] Maria R.U.D. Tambunan and Rozan Anwar, "Transformasi Budaya Organisasi Otoritas Perpajakan Indonesia Menghadapi Era Ekonomi Digital," *Jurnal Aplikasi Bisnis Dan Manajemen*, ahead of print, 2019, https://doi.org/10.17358/jabm.5.2.253.
[4] Eri Yanti Nasution et al., "Perkembangan Transaksi Bisnis E-Commerce Terhadap Pertumbuhan Ekonomi Di Indonesia," *Jesya* 3, no. 2 (2020), https://doi.org/10.36778/jesya.v3i2.227.

ecosystem, as exemplified by TikTok's social commerce model through its TikTok Shop feature.[5] This integration enables platforms to exercise control over information flows, algorithmic product visibility, and consumer preference data, thereby creating a significant competitive advantage within a closed or "*walled garden*" ecosystem.[6] While such integration may enhance efficiency and market reach, it simultaneously raises serious legal concerns regarding anti-competitive practices and unfair unfair competition. From a juridical perspective, the hybrid nature of social commerce platforms such as TikTok Shop exposes regulatory gray areas, as existing legal frameworks—particularly Law No. 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition and Law No. 8 of 1999 on Consumer Protection—have not explicitly anticipated platform dominance rooted in algorithmic control and data concentration.[7] [8] [9]

The development of platform-based digital commerce is also a significant concern globally. Various jurisdictions have begun formulating specific regulations to address the dominance of large digital platforms, which could potentially hinder fair competition. The European Union, for example, introduced the Digital Markets Act (DMA), which established the category of gatekeepers for digital platforms with significant market power, and requires such platforms to adhere to principles of fairness, openness, and the prohibition of the abuse dominant positions.[10] This approach suggests a shift in the paradigm in competition regulation from purely conventional market-based regulation to structural oversight of the power of digital platforms. Although Indonesia does not yet have a special regulation equivalent to the DMA, this development serves as an important reference point for assessing the urgency of renewing the national competition law framework in the digital economy era.[11] In Indonesia, the rapid expansion of digital commerce presents significant regulatory challenges for the Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha*).[12] [13]

The gap between *das sollen* and *das sein* becomes increasingly evident in the regulation of digital platform markets. While Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, particularly Article 35, grants the Business Competition Supervisory Commission (KPPU) the authority to supervise and provide policy recommendations related to monopolistic practices, existing legal instruments remain insufficient to anticipate emerging digital business models such as social commerce platforms like TikTok Shop. In practice, MSMEs face structural barriers to market access within algorithm-driven, data-based ecosystems. At the same time, the concentration of consumer data on global digital platforms strengthens their market power. This condition raises broader concerns about data sovereignty and national control over the digital economy.[14] These conditions create legal loopholes that may allow large digital platforms to dominate market access and competitive dynamics, placing smaller business enterprises at a disadvantage. Consequently, the rapid evolution of digital technology has outpaced the existing regulatory framework, leaving practices such as algorithmic control, data concentration, and platform integration in a legal gray area when assessed under

[5] N Ariyanti and W C Nugroho, "Peran Kppu Dalam Melindungi Konsumen Dari Pelaku Usaha Tidak Sehat," *Indonesian Journal of Law and Social-Political Governance* 3, no. 1 (2023).

[6] Alya Anindita Maheswari, "Perlindungan Konsumen dalam Transaksi Jual Beli Melalui E-Commerce Lintas Negara," *JURNAL EDUCATION AND DEVELOPMENT* 11, no. 2 (2023), https://doi.org/10.37081/ed.v11i2.4714.

[7] Suparna Wijaya and Agus Juhana, "Kajian Perpu Nomor 1 Tahun 2020 Terkait Perdagangan Melalui Sistem Elektronik," *JIAFE (Jurnal Ilmiah Akuntansi Fakultas Ekonomi)* 7, no. 2 (2021), https://doi.org/10.34204/jiafe.v7i2.3510.

[8] Khairin Ulyani Tarigan and Mahmul Siregar, "Implikasi Hukum Regional Comprehensive Economic Partnership Terhadap Regulasi Perdagangan Internasional Di Indonesia," *Locus Journal of Academic Literature Review* 2, no. 2 (2023).

[9] Muh.Fathir Maulid Yusuf et al., "Dampak Penutupan Tiktok Shop Terhadap Pengguna Dan Pelaku Bisnis Dalam E-Commerce," *Jurnal Ilmiah Ilmu Sosial Dan Pendidikan (JISDIK)* 2, no. 1 (2024).

[10] Nizar Hamdun et al., "Strategi Pelaku Bisnis Electronic Commerce (E-Commerce)," *Journal Locus Penelitian Dan Pengabdian* 1, no. 2 (2022), https://doi.org/10.36418/locus.v1i2.13.

[11] Rr Lyia Aina Prihadiati, "Analisis Yuridis Klausul Disclaimer Oleh Pelaku Usaha Pada Situs Jual Beli Online (E-Commerce," *LITERATUS* 3, no. 2 (2022), https://doi.org/10.37010/lit.v3i2.1327.

[12] Muhammad Bintang Priyono and Dian Permata Sari, "Dampak Aplikasi Tiktok Dan Tiktok Shop Terhadap UMKM Di Indonesia," *Jurnal Ilmiah Wahana Pendidikan* 9, no. September (2023).

[13] Mafulla Dian Hadianto Nuh Krama, Hestianah Sudiah, "Dampak Penutupan Tik Tok Shop Dalam Konsep Komunikasi Interpersonal," *Jurnal Manajemen* 2, no. 2 (2022).

[14] Widadatul Ulya, "Perlindungan Hukum bagi Pelaku Usaha pada Transaksi Bisnis Social Commerce Tiktok Shop (Perspektif Hukum Positif dan Hukum Islam)," *Journal of Indonesian Comparative of Syari'ah Law* 6, no. 1 (2023), https://doi.org/10.21111/jicl.v6i1.9746.

conventional competition law principles. Addressing this regulatory gap is essential to ensure that Indonesia's digital economy develops within a framework of fair and sustainable competition.[15]

These conditions suggest that the legal challenge of competition law in the PMSE lies not only in the substance of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, but also in the absence of derivative legal instruments that specifically regulate the behavior of digital platforms. Without clear technical guidelines for algorithmic assessment, data control, and cross-service integration, competition regulation risks lagging behind technological innovation. Therefore, normative studies that situate PMSE practices within the framework of the authority of the KPPU are essential as a basis for developing more responsive and context-specific legal policies.[16] The main characteristics of platform-based PMSEs platforms include significant information asymmetry between platform providers and users, including business enterprises. Digital platforms have full access to and control over data, as well as the algorithms that determine product visibility, consumer preferences, and transaction patterns. In contrast, enterprises do not have a balanced bargaining position. This asymmetry has the potential to create structural dependencies that can indirectly affect competition dynamics without requiring conventional monopolistic practices. Based on this background, the author formulates the research questions: 1) How are monopolistic practices defined and regulated under Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition? 2) How is electronic commerce conducted through PMSE on the TikTok platform implemented in practice? 3) How can the alleged monopolistic practices in PMSE-based trading through TikTok be analyzed from the perspective of Indonesian competition law?

These developments require an adjustment to the legal paradigm of competition law, especially in understanding the role and authority of competition supervisory institutions in the digital era. The authority of the KPPU authority is not only tested in law enforcement against existing violations, but also in preventing potential disortions of competition stemming from system design and digital platform policies. Therefore, legal studies that emphasize the analysis of the institutional authority of the KPPU institutional authority in addressing PMSE practices are crucial for filling gaps in normative studies and for advancing competition law that is adaptable to the digital economy.

Existing studies on TikTok Shop and social commerce generally focus on three main themes: the economic impact on MSMEs, pricing strategies within e-commerce platforms, and consumer protection in digital transactions. However, these studies remain fragmented. Research by Isal and Sidik (2023) highlights the structural dependence of MSMEs on social commerce platforms.[17] Whereas Kurniasari and Rahman (2023) discuss the abuse of dominant position in digital marketplaces.[18] Meanwhile, studies on predatory pricing in e-commerce (Fitri & Lesmana, 2021; Jayani et al., 2022) emphasize pricing strategies but do not address algorithmic market control.[19] Consequently, there remains a lack of research that integrates platform governance, algorithmic dominance, and competition law analysis within the framework of PMSE regulation in Indonesia. Next, Ulya (2023) in the study "*Perlindungan Hukum bagi Pelaku Usaha pada Transaksi Bisnis Social Commerce TikTok Shop (Perspektif Hukum Positif dan Hukum Islam)*" examines TikTok from the perspective of legal protection and transaction fairness.[20] This study highlights the importance of legal certainty and business ethics in social commerce practices. However, the study's focus remains limited to the relationship between data and the protection of enterprises, without directly relating it to the legal regime of competition law, monopoly analysis, or dominant position under Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition.

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[15] Novalia Pertiwi and Annisa Azzahrah Burhan, "Efektifitas Penerapan Program Kepatuhan Persaingan Usaha Dalam Pencegahan Persaingan Usaha Tidak Sehat," *Jurnal Studia Legalia* 4, no. 01 (2023), https://doi.org/10.61084/jsl.v4i01.66.

[16] Firlli Wijaksana and Rosalinda Elsina, "Implikasi Yuridis Strategi Flash Sale Oleh Pelaku Usaha E-Commerce," *Bureaucracy Journal : Indonesia Journal of Law and Social-Political Governance* 3, no. 1 (2023).

[17] Muhammad Aryanang Isal and Rahmat Maulana Sidik, "Jeratan Social Commerce: Matinya Masa Depan UMKM Di Indonesia Studi Kasus TikTok Shop Di Indonesia," *Commerce Law* 3, no. 2 (2023), https://doi.org/10.29303/commercelaw.v3i2.3551.

[18] Tri Widya Kurniasari Kurniasari and Arif Rahman, "Perlindungan Hukum bagi Pelaku Usaha UMKM Terhadap Penyalahgunaan Posisi Dominan Platform Digital : Marketplace Melalui Penetapan Harga dan Penguasaan Pasar," *REUSAM: Jurnal Ilmu Hukum* 10, no. 2 (2023), https://doi.org/10.29103/reusam.v10i2.9577.

[19] Adis Nur Hayati, "Analisis Tantangan Dan Penegakan Hukum Persaingan Usaha Pada Sektor E-Commerce Di Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021), https://doi.org/10.30641/dejure.2021.v21.109-122.

[20] Ulya, "Perlindungan Hukum bagi Pelaku Usaha pada Transaksi Bisnis Social Commerce Tiktok Shop (Perspektif Hukum Positif dan Hukum Islam)."

Based on the existing literature, it can be concluded that most studies remain fragmented across the economic impact of MSMEs, pricing strategies, and legal protection. There has been no research that comprehensively analyses TikTok Shop as a social commerce PMSE platform by placing control over algorithms, user data, cross-service integration of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition and the authority of KPPU institutions. Therefore, this research's novelty lies in the juridical approach to studying TikTok Shop as a PMSE platform operating within a closed-platform (*walled garden*) ecosystem, as well as in evaluating the adequacy of Indonesian competition law and the role of KPPU in dealing with the non-conventional forms of digital monopoly, which are primarly based on data concentration and algorithmic control. This research is expected to fill a gap in normative studies while also contributing conceptually to the development of more adaptive competition law frameworks in the digital economy era.

To provide a systematic and comprehensive analysis, this article is divided into several main sections. The first section describes the conceptual and juridical framework of trade through PMSE as well as the basic principles of competition law in Indonesia, including the prohibition of monopoly practices and the abuse of dominant positions under Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition. The second section discusses the characteristics of TikTok Shop's business model as a social commerce platform, with emphasis on the integration of social media and e-commerce, algorithmic control, and user data management, which could create market dominance. Furthermore, the third section analyzes practices indicative of monopoly practices and unfair competition in the TikTok Shop ecosystem, including price strategies, market access controls, and impacts on other enterprises, especially MSMEs. The fourth section examines the role, authority, and challenges of the KPPU in handling monopoly practices on digital-based PMSE platforms. It assesses the adequacy of existing legal instruments in addressing data-based monopolies and algorithmic control. The discussion concludes with a summary of the research findings and recommendations for strengthening policy and law enforcement in competition law enforcement in the digital economy.

2. Method

This research employs a normative juridical method with a statutory and conceptual approach to examine monopolistic conduct in platform-based electronic commerce (PMSE), focusing on TikTok Shop as a case study. Beyond identifying relevant legal materials, this study develops an analytical framework to assess how monopoly indicators manifest within digital platform ecosystems. The analysis operationalizes key competition law concepts—such as monopoly practices, abuse of dominant positions, and barriers to entry—by translating them into measurable legal variables relevant to digital platforms, including algorithmic control, data dominance, and platform integration.[21] Algorithmic control is treated as a legal variable insofar as it determines product visibility, consumer access, and competitive neutrality within the platform. At the same time, data dominance is assessed as a source of market power that enables platforms to predict consumer behavior and reinforce structural dependence among enterprises. Platform integration, particularly the combination of social media functions and e-commerce services within a single ecosystem, is analyzed to evaluate whether such integration creates exclusionary effects or unfair competitive advantages under the principles of competition law. The analytical process follows a structured sequence: first, identifying relevant PMSE practices implemented by TikTok Shop; second, mapping these practices against the legal elements of monopoly practices and unfair competition as regulated under Law No. 5 of 1999; and third, conducting a normative assessment to determine whether such practices fulfill the legal criteria of anti-competitive conduct. Through this framework, legal norms are not merely described but are operationalized as evaluative tools to assess the compatibility of platform-based business models with Indonesian competition law.[22]

3. Findings and Discussion

[21] Wiwik Sri Widiarty, *Buku Ajar Metode Penelitian Hukum*, in *RISTANSI: Riset Akuntansi* (2019).
[22] Rudi Salam Tarigan et al., "Pengembangan Metode Penelitian Hukum Di Indonesia," *Jurnaal Intelek Insan Cendekia* 2, no. 1 (2025).

3.1 Monopoly practices according to Law Number 5 of 1999 on Prohibition of Monopoly Practices and Unfair Business Competition

The rapid development of digital technology has fundamentally transformed trade practices, particularly through the expansion of electronic commerce conducted via Electronic Systems (PMSE). This transformation has not only altered traditional transaction patterns but has also introduced new business models, including the integration of social media and e-commerce, known as social commerce.[23] In Indonesia, this development is reflected in the significant growth of e-commerce transactions, which reached IDR 476.3 trillion in 2022, demonstrating the increasing centrality of digital platforms in the national economy.[24] Within this ecosystem, TikTok Shop has emerged as a prominent actor by combining content distribution and commercial transactions on a single platform. With approximately 125 million monthly active users in Indonesia as of January 2024 and a social commerce transaction value of around USD 2.5 billion in 2023, TikTok possesses extensive access to consumer behavior data and digital interaction patterns.[25] This structural position enables the platform not only to facilitate transactions but also to influence product visibility, consumer preferences, and market access through algorithmic mechanisms, thereby generating significant data-driven market power within Indonesia's digital trade ecosystem.[26] [27]

From the perspective of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, TikTok Shop's dominance poses several risks reminiscent of monopoly practices. First, there are indications of a significant market share, both in terms of users and transaction volume. Second, there are barriers to market entry that are not only conventional, such as capital or technology, but also in the form of control over consumer algorithms and data.[28] For local MSMEs that cannot effectively utilize digital technology, this kind of barrier constitutes a significant obstacle to competing on an equal footing. Bank Indonesia's 2023 report stated that around 57% of digital MSMEs in Indonesia experienced a decrease in turnover due to price competition with cheap imported products sold through social commerce platforms, such as TikTok Shop. Furthermore, the Indonesian E-commerce Association (idEA) recorded a 20-30% decrease in local MSME transactions across several sectors, especially fashion and cosmetics, as a direct result of the proliferation of social commerce.[29]

In addition to market share and entry barriers, the price issue is crucial. TikTok Shop often offers products at remarkably low prices, even below the cost of production, which is economically feasible for local MSMEs. This strategy raises concerns about predatory pricing, specifically the practice of selling goods below cost to eliminate competitors and subsequently dominate the market. Under Article 20 of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, this type of action falls within the prohibition category because it has the potential to eliminate competing enterprises unable to compete profitably in the long run. However, data control is equally essential. TikTok has extensive data on user behavior, encompassing viewing patterns, interests, interactions, and shopping habits. This data then serves as the basis for regulating marketing strategies and highly personalized product recommendations. Control over consumer data gives TikTok a decisive advantage over its competitors. From a legal perspective, this exclusive control over data has the potential to create a data-driven form of market dominance, which, although not explicitly prohibited by Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, poses a new challenge for enforcing competition law in the digital age.[30]

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[23] Muhammad Alfarizi and Zela Zalika, "Isu Persaingan Industri Pelayanan Kesehatan Indonesia: Tantangan Dan 'Perisai' Pengawasan KPPU," *Jurnal Persaingan Usaha* 3, no. 1 (2023), https://doi.org/10.55869/kppu.v3i1.89.

[24] Isal and Sidik, "Jeratan Social Commerce: Matinya Masa Depan UMKM Di Indonesia Studi Kasus TikTok Shop Di Indonesia."

[25] Adis Nur Hayati, "Analisis Tantangan Dan Penegakan Hukum Persaingan Usaha Pada Sektor E-Commerce Di Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021), https://doi.org/10.30641/dejure.2021.v21.109-122.

[26] Shohib Muslim et al., "Implikasi Hukum Penutupan TikTok Shop Terhadap Regulasi Hukum Bisnis Di Indonesia," *Jurnal Hukum Dan HAM Wara Sains* 2, no. 10 (2023), https://doi.org/10.58812/jhhws.v2i10.713.

[27] A K Bih et al., "… of Mouth Dan Flash Sale Terhadap Pembelian Impulsif Pada Social Commerce Tiktok Shop (Studi Kasus Pada Mahasiswa Pengguna Tiktok Shop Di Kota Malang)," *E-JRM: Elektronik Jurnal Riset …*, 2023.

[28] Faruq Abdul Majid et al., "Peran E-Commerce Dalam Perekonomian Indonesia Di Masa Depan.," *Jurnal Ekonomi Manajemen* 17, no. 2 (2022).

[29] Thalia M A Lengkong et al., "Aspek Hukum Persaingan Usaha Pada Pengelolaan Bisnis Berdasarkan Uu No. 5 Tahun 1999 Tentang Praktek Monopoli Dan Persaingan Usaha Tidak Sehat.," *Lex Privatum* IX, no. 4 (2021).

[30] Fitri Fitri and Sri Jaya Lesmana, "Indikasi Predatory Pricing pada Praktek Flash Sale Pelaku Usaha E-Commerce Dalam Perspektif Hukum Persaingan Usaha," *SUPREMASI HUKUM* 17, no. 02 (2021), https://doi.org/10.33592/jsh.v17i2.1365.

Das Sollen, as stated in Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, prohibits enterprises from dominating the market to hinder fair competition. However, das Sein demonstrates that social commerce practices, such as those used by TikTok Shop, can achieve market dominance that is difficult to attain through conventional regulatory frameworks. KPPU itself acknowledges that overcoming this digital domination poses challenges, as existing legal instruments are not fully equipped to anticipate modern business models, such as social commerce. Until now, the KPPU has been conducting market research (*market studies*) on the behavior of social commerce platforms, including TikTok Shop.[31] In several public statements in 2024, the KPPU emphasized that social commerce poses a potential risk of monopoly; however, addressing this risk requires a more modern analytical methodology, including algorithm-based analysis and digital data. The government, through the Ministry of Trade, is also formulating revisions to electronic commerce regulations to tighten the boundaries between social media and e-commerce platforms, aiming to prevent market dominance by foreign digital entities that could harm local enterprises.

3.2 Trade Practices Using Electronic Systems (PMSE) Through TikTok Platform

The phenomenon of Trade through Electronic Systems (PMSE) in Indonesia has grown rapidly alongside the shift in consumer behavior toward digital platforms and the emergence of social commerce, which integrates social media with online trade. One prominent example is TikTok Shop, which allows merchants to sell products directly through live streaming or short videos, supported by features such as Add to Cart that enable instant purchases without leaving the application.[32] This model effectively stimulates impulse buying through engaging visual content and real-time user interaction. According to Bloomberg data in 2023, the transaction value of TikTok Shop in Indonesia reached USD 2.5 billion (approximately IDR 38.5 trillion), a significant figure for a platform that has relatively recently entered the e-commerce sector. However, this integration also raises regulatory concerns because Minister of Trade Regulation No. 31 of 2023 separates social media functions from e-commerce activities to prevent platform dominance and potential unfair competition in the digital market.[33]

The facts on the ground indicate that TikTok Shop is widely used by traders, including international sellers, to sell products directly to the Indonesian market. The TikTok-enabled cross-border commerce business model enables foreign sellers to enter the domestic market more easily, without the need to establish a physical presence, such as a representative office.[34] According to data from the Indonesian E-commerce Association (idEA), approximately 30-40% of products sold on TikTok Shop are imported, and many are sold at remarkably low prices, even below domestic market prices. This situation triggers anxiety among MSMEs across sectors such as fashion, cosmetics, and household accessories, as it is challenging to compete on price and distribution speed.

Additionally, TikTok's algorithmic model creates new challenges for PMSE regulation. TikTok has complete control over the algorithm that determines which products are displayed to consumers. Products that go viral or are promoted by celebrities (*influencers*) receive significantly higher exposure than products from small merchants who lack the capacity to conduct large-scale promotion. This practice raises the potential for discriminatory treatment that contradicts the principle of fair competition, as regulated in Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition. It also creates a significant gap between large businesses and MSMEs.[35]

Empirical observation suggests a gap between legal norms and reality. Although regulations strictly prohibit the integration of social media and e-commerce functions into a single ecosystem, TikTok Shop continues to operate in a legal gray area in practice. The government has indeed announced a temporary policy to suspend

[31] Vicky Darmawan Prahmana and Ditha Wiradiputra, "Predatory Pricing dalam E-Commerce Menurut Perspektif Hukum Persaingan Usaha," *JISIP (Jurnal Ilmu Sosial Dan Pendidikan)* 6, no. 3 (2022), https://doi.org/10.58258/jisip.v6i3.3277.
[32] Suwinto Johan, "Implikasi Yuridis Post Merger Notification oleh Pelaku Usaha di Indonesia," *Dialogia Iuridica: Jurnal Hukum Bisnis Dan Investasi* 12, no. 1 (2020), https://doi.org/10.28932/di.v12i1.2441.
[33] Rahmat, "Tinjauan Hukum Terhadap Praktek Penguasaan Pasar," *Jurnal Hukum Non Diskriminatif (JHND)* 1, no. 1 (2022), https://doi.org/10.56854/jhdn.v1i1.42.
[34] Arina Novizas and Andri Gunawan, "Studi Kasus Analisa Ekonomi atas Hukum Tentang Hukum Anti Monopoli dan Persaingan Usaha," *Jurnal Magister Ilmu Hukum* 2, no. 1 (2021), https://doi.org/10.36722/jmih.v2i1.739.
[35] Komang Kory Jayani et al., "Flash Sale Sebagai Indikasi Predatory Pricing Pada Aplikasi E-Commerce Perspektif Hukum Persaingan Usaha," *Jurnal Preferensi Hukum* 3, no. 1 (2022), https://doi.org/10.22225/jph.3.1.4622.42-47.

TikTok Shop activities by the end of 2023.[36] However, media reports and field observations indicate that many merchants and consumers continue to conduct transactions through live streaming features and external links that direct them to other platforms or facilitate direct transactions via private chat. In fact, some traders admit that they still get orders through TikTok even though the platform is officially restricted. This phenomenon demonstrates that TikTok Shop, as a business model, does not cease to exist; instead, it adapts to regulatory loopholes. This reflects the weakness of legal enforcement in Indonesia and highlights how rapidly technological innovation outpaces regulatory capabilities in anticipating new business models.[37]

Furthermore, this condition poses a risk to local MSMEs that lack the resources to use digital technology effectively. Micro, Small, and Medium Enterprises (MSMEs) are pressured by unfair price competition and the domination of viral content exposure controlled by large merchants or foreign sellers. As reflected in the Bank Indonesia report in 2023, this reality demonstrates that PMSE through TikTok Shop has far-reaching consequences that extend beyond technological innovation, as it impacts the sustainability of small economic actors and the balance of the national market structure.[38] In the context of competition law, KPPU has, until mid-2024, been conducting an in-depth market study of social commerce, including TikTok Shop, to determine whether the platform's business practices violate the principles of fair competition, such as indications of predatory pricing, discrimination, or abuse of dominant positions. KPPU emphasized that digital platforms operating as closed ecosystems (*walled gardens*) pose a high risk of creating unfair digital market dominance, requiring a more modern, technology-based legal approach rather than relying solely on classical parameters such as market share.[39]

Thus, the practice of trading through PMSE on TikTok cannot be viewed solely as a technological phenomenon or business trend; it has become a complex legal and public policy issue. TikTok Shop's business model, although it introduces innovation and efficiency in digital commerce, poses serious challenges to the principles of justice, fair competition, and the sustainability of national MSMEs.[40] More adaptive legal, regulatory, and policy adjustments are required to ensure that digital technology development does not become a loophole for business practices that can harm the public interest and local enterprises.

The phenomenon of social commerce through TikTok Shop can also be examined through the concept of platform neutrality, which requires digital platforms that function as intermediaries to maintain fair and non-discriminatory treatment toward all enterprises operating within the ecosystem. In theory, a platform that simultaneously acts as both an intermediary and a market participant risks creating structural conflicts of interest, particularly when it controls the algorithm that determines product visibility, recommendation systems, and consumer access. In the case of TikTok, the platform does not merely provide a neutral marketplace but also possesses the ability to prioritize certain products, sellers, or promotional content through algorithmic curation integrated with entertainment content. Such control could place TikTok in a platform gatekeeper position, enabling it to influence market outcomes by directing traffic and consumer attention to selected merchants or products. From a competition law perspective, this situation raises concerns regarding discriminatory treatment and unfair competitive advantages that may undermine equal market access for other sellers, particularly MSMEs that rely heavily on platform visibility to reach consumers. Therefore, incorporating the principle of platform neutrality into Indonesia's digital competition policy framework becomes essential, particularly by requiring transparency in algorithmic ranking systems and ensuring that dominant digital platforms do not exploit their intermediary position to distort competition within the electronic commerce ecosystem.

[36] Ayup Suran Ningsih, "Implikasi Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat Pada Pelaku Usaha Mikro Kecil Dan Menengah (UMKM)," *Jurnal Penelitian Hukum De Jure* 19, no. 2 (2019), https://doi.org/10.30641/dejure.2019.v19.207-215.

[37] Ayup Suran Ningsih, "Business Competition Supervisory Institution: A Comparison between Indonesia and Thailand," *Jurnal Hukum Novelty* 13, no. 2 (2022), https://doi.org/10.26555/novelty.v13i2.a20631.

[38] Sopyan Hadi et al., "Perlindungan Hukum Usaha Mikro Kecil Dan Menengah (UMKM) Terhadap Praktik Monopoli Dilihat Dari Perspektif Hukum Persaingan Usaha," *Commerce Law* 2, no. 1 (2022), https://doi.org/10.29303/commercelaw.v2i1.1345.

[39] Aminatuz Zahroh, "Instrumen Pasar Modal," *Iqtishoduna Jurnal Ekonomi Islam* 5, no. 1 (2016).

[40] I Nyoman Sujana, "Pasar Modal Yang Efisien," *Ekuitas: Jurnal Pendidikan Ekonomi* 5, no. 2 (2017), https://doi.org/10.23887/ekuitas.v5i2.12753.

3.3 Legal Analysis of the Alleged Practice of Monopoly in Commerce via Electronic System (PMSE) through TikTok

In conventional competition law analysis, monopoly practices are commonly assessed through indicators such as market share concentration, pricing behavior, and barriers to market entry. In the context of platform-based electronic commerce (PMSE), these indicators remain relevant, particularly in evaluating the dominant position of large digital platforms that integrate multiple commercial functions. Although TikTok Shop does not formally engage in direct price-setting across all transactions, its structural position as both a platform operator and market organizer enables indirect influence over pricing mechanisms and market access. High entry barriers are also evident due to the scale of capital, technology, and network effects required to compete with integrated digital platforms, thereby limiting effective competition from smaller market participants.

Beyond conventional indicators, digital platforms exhibit distinct forms of market power that are not adequately captured by traditional competition metrics. Algorithmic control over product visibility and content distribution functions as a non-price mechanism through which platforms can shape consumer choices and determine competitive outcomes. Simultaneously, the accumulation and exclusive control of consumer data enable platforms to reinforce market dominance by predicting demand patterns and optimizing commercial strategies. This data-driven, algorithm-governed environment fosters platform dependency, in which enterprises—particularly MSMEs—become structurally reliant on the platform for market access, thereby reducing their bargaining power and competitive autonomy.

The integration of social media functions, algorithmic governance, and e-commerce services within a single platform ecosystem creates a causal chain that directly contributes to market distortion. Platform integration allows operators to simultaneously control content exposure, transactional access, and consumer data flows, resulting in asymmetric information and unequal competitive conditions. This structural configuration facilitates exclusionary effects by prioritizing certain products or sellers through opaque algorithmic mechanisms, thereby distorting market competition and undermining the principle of competitive neutrality. Such conditions illustrate how the architecture of digital platforms itself, rather than explicit pricing conduct, can function as a vehicle for anticompetitive practices.

Law Number 5 of 1999 in Article 1, point 1, defines a monopoly as the centralization of economic power by one or more enterprises who control the production and/or marketing of certain goods or services, thereby causing unfair competition and harming the public interest. In addition, Article 25 paragraph (2) established a legal threshold that enterprises are considered to dominate the market if they control a minimum market share of 50% or if two or three business actors control at least 75% of the market share.[41] When applied to the practices of TikTok Shop, several indicators are relevant to the market control criteria outlined in the law.[42]

In addition to market dominance, there are also allegations of predatory pricing practices at TikTok Shop. Many imported products are sold at prices significantly below the domestic market price, which is believed to be a strategy to capture market share quickly. The Indonesian E-commerce Association (ideA) reported that around 30-40% of products on TikTok Shop are imported, many of which are sold at remarkably low prices, causing losses for local MSME enterprises.[43] This has the potential to violate Article 20 of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, which prohibits enterprises from selling goods or services at predatory prices to eliminate competitors, only to later increase prices after the market has been overtaken. Although there is no KPPU decision stating that TikTok Shop engages in predatory pricing, this pattern of extremely low pricing raises indications that require further investigation.[44]

Although minister of Trade Regulation No. 31/23 expressly prohibits the incorporation of social media and e-commerce functions into a single ecosystem, TikTok Shop continues to conduct trading activities, either directly or indirectly. Although the government announced the suspension of TikTok Shop in late 2023, media reports and merchant statements revealed that many transactions were still being conducted through live-streaming features

[41] HabibiMiftakhur Rokhman, *Hukum Pasar Modal Indonesia ; Perkembangan Hukum Pasar Modal Era Kolonial Hingga Era Digital*, in *Inara Publisher*, vol. 5, no. Oktober (2022).

[42] I GUSTI AGUNG WISUDAWAN et al., "Penerapan Sanksi Hukum Terhadap Pelanggaran Keterbukaan yang Dilakukan oleh Emiten di Pasar Modal Indonesia," *GANEC SWARA* 17, no. 2 (2023), https://doi.org/10.35327/gara.v17i2.466.

[43] Azizah Hayatul Zannah et al., "Realisasi Kegiatan Investasi Dalam Pasar Modal Terhadap Pelaksanaan Tanggungjawab Sosialatau Corporate Social Responsibility (Csr)," Jurnal Ilmu Pengetahuan Sosial 9, no. 8 (2022).

[44] Emeralda Putri Anjani et al., "Tinjauan Yuridis Terhadap Influencer Yang Merekomendasikan Saham Tertentu Berdasarkan Hukum Pasar Modal Di Indonesia," *Reformasi Hukum* 26, no. 2 (2022), https://doi.org/10.46257/jrh.v26i2.467.

or via external links.[45] This suggests that TikTok Shop is still operating, albeit factually, by exploiting regulatory loopholes. In fact, some local enterprises have admitted that their turnover has dropped dramatically since the rise of social commerce, as they have been unable to compete on price, technology, or market reach.[46]

Legal analysis of these conditions reveals that although Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition provides a legal framework for prohibiting monopoly practices and abuse of dominant positions, it has also established a strong legal framework for their prohibition. However, its substance and regulatory instruments remain inadequate for addressing the realities of modern digital business. Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition emerged in a conventional market context, where market power is primarily measured by quantitative control over market share for goods or services. Provisions such as Article 25, paragraph (2), which refer to the 50% market share threshold as an indicator of dominant position, serve as a vital tool for assessing market dominance. However, the characteristics of digital businesses show a much more complex dimension of power.[47]

In the context of digital platforms such as TikTok Shop, market dominance is not always measured by transaction volume or conventional market share, but rather by mastery control of user data, control over content distribution algorithms, and control over platform capabilities that enable market access through a closed ecosystem. Digital platforms are unique in that they act as marketplaces, technology infrastructure providers, user data managers, and curators of products presented to consumers. This creates a significant information asymmetry between the platform and the benterprises who use it. Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition has not explicitly regulated these aspects.[48] The term "*market control*" in legislation is more commonly interpreted as the ability to control prices or the supply of goods and services. Still, it does not include the power to control the visibility of products on the consumer screen through algorithms, which are the core power platforms, such as TikTok Shop. The TikTok algorithm can determine which products will appear, to whom they are displayed, and when they will be displayed. This algorithmic power acts as a platform gatekeeper, deciding who gets broad market exposure and who is left to languish in the invisible market.

From the perspective of business competition law, mastery of non-transparent algorithms may give rise to discriminatory treatment prohibited by Article 19, letter d, of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, which prohibits discrimination against certain business operators. For example, TikTok may give sellers who pay for expensive advertising services (e.g., influencer ads, featured products) greater display preference or exposure. In contrast, small enterprises who cannot afford to pay will experience limited market access. This creates a non-tariff barrier to entry that, although it does not directly limit prices, significantly restricts MSMEs' ability to compete fairly.

Additionally, predatory pricing poses a significant risk in social commerce. TikTok Shop, through seller subsidy mechanism or extremely low promotional pricing, may cause local enterprises to be gradually eliminated from the market. Article 20 of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition prohibits pricing strategies that set extremely low prices to eliminate competitors and subsequently increase prices after the market has been captured. However, proving predatory pricing in the context of digital platforms is considerably more complex. This is because the analysis must consider not only the cost of goods but also whether cross-subsidization from other platform businesses segments (e.g., advertising services or data monetization) enables TikTok to sustain extremely low prices. Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition does not provide specific analysis tools to evaluate cost structure and subsidy strategies in digital business models. Consequently, KPPU faces significant methodological challenges, as it must develop a new technology-based approach, for example, by analyzing platform algorithms, content recommendation patterns, and business relationships between platforms and merchants.[49] The assesment

[45] Noufal Ardiyansah et al., "Hukuman bagi Pelaku Penipuan Pasar di Era Ekonomi Digital Ditinjau dari Hukum Pidana," *Jurnal DINAMIKA* 29, no. 2 (2022).

[46] Lindiawatie and Dhona Shahreza, "Tinjauan Rasionalitas Islam : Sebuah Pemikiran Untuk Mendorong Generasi Milenial Y Dan Z Berinvestasi Di Pasar Modal Syariah," *Jurnal Ekonomi Syariah* 6, no. 1 (2023).

[47] Kurniasari and Rahman, "Perlindungan Hukum bagi Pelaku Usaha Umkm Terhadap Penyalahgunaan Posisi Dominan Platform Digital : Marketplace Melalui Penetapan Harga dan Penguasaan Pasar."

[48] Hasanudin et al., "Pengaruh Pengetahuan Investasi, Motivasi Dan Pelatihan Pasar Modal Terhadap Keputusan Investasi Yang Dimediasi Oleh Minat Investasi," *JIMEA | Jurnal Ilmiah MEA (Manajemen, Ekonomi, Dan Akuntansi)* Vol. 5 No., no. 3 (2021).

[49] Vania Evanita Puspitasari et al., "Pengaruh Literasi Keuangan Syariah, Persepsi Imbal Hasil, Dan Motivasi Terhadap Minat Investasi Di Pasar Modal Syariah," *Journal of Islamic Economics and Finance Studies* 2, no. 2 (2021), https://doi.org/10.47700/jiefes.v2i2.3292.

of market dominance in digital platforms is no longer adequately measured solely by quantitative market share, but must also consider behavioral economics, data science, and algorithmic technology.

If not anticipated in advance, the dominance of digital platforms such as TikTok can have a systemic impact, not only on local enterprises but also on Indonesia's digital economic sovereignty. Global platforms that do not maintain strong legal entities in Indonesia can divert profits abroad, complicate tax collection, and marginalize MSMEs, which have been the backbone of the national economy. Therefore, there is an urgent need to revise Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, or, at the very least, to establish special derivative regulations (guidelines) governing digital platforms as enterprises, which characteristics that differ significantly from those of conventional markets.[50]

Thus, a legal analysis of alleged monopoly practices in PMSE through TikTok reveals that indications of market dominance, data control, algorithmic control, and potential predatory pricing have begun to emerge in TikTok Shop business practices. Although there is no legal decision stating that TikTok Shop violates Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, the gap between legal norms and the reality of business practices has become a strong signal of the need for regulatory renewal and enforcement methods that better fit the dynamics of the digital economy. Technological innovations such as TikTok Shop do bring benefits to consumers. However, they also carry the risk of concentrating market power in a global entity that can harm local enterprises and create inequality in the national market structure.

These structural distortions have a disproportionate impact on micro, small, and medium enterprises (MSMEs), which lack the capital, technological capacity, and data resources necessary to compete within algorithm-driven ecosystems. The resulting exclusion of MSMEs reflects not only market failure but also regulatory inadequacy, as existing competition law frameworks remain primarily oriented toward conventional monopolistic conduct. The inability of current legal instruments to effectively address algorithmic dominance and ecosystem closure underscores a systemic gap in competition law enforcement, necessitating a recalibration of regulatory approaches to platform-based markets.

From a contemporary competition law perspective, assessing monopoly practices in digital markets requires an analytical framework that goes beyond conventional indicators such as market share or price controls. The Data-Driven Market Power Theory explains that the competitive advantage of digital platforms increasingly derives from the accumulation of large-scale user data, the ability to process such data through advanced algorithms, and the reinforcement of network effects that strengthen platform dependency. In the context of TikTok Shop, the platform’s ability to collect extensive behavioral data—including viewing patterns, interaction history, and consumer purchasing preferences—allows it to optimize product recommendations and shape consumer demand through algorithmic curation. This mechanism creates a structural advantage that may gradually concentrate market power within the platform, even in the absence of direct price manipulation. Consequently, market dominance in digital ecosystems should not be evaluated solely through quantitative market share thresholds under Law No. 5 of 1999, but also through qualitative indicators such as data concentration, algorithmic control, and platform dependency that influence competitive dynamics in digital markets.

To address these structural challenges, regulatory reform in Indonesia’s competition law framework should incorporate more specific governance mechanisms for digital platforms. One possible approach is the adoption of the platform neutrality principle, which requires digital platforms to treat all business users fairly and prohibits discriminatory algorithmic practices that prioritize certain sellers or affiliated services. In addition, regulatory authorities such as the Business Competition Supervisory Commission (KPPU) should be equipped with technical oversight tools to assess algorithmic transparency, data utilization practices, and platform integration strategies. Establishing regulatory guidelines on algorithm accountability, data access fairness, and platform interoperability could help prevent exclusionary conduct and reduce structural barriers for smaller enterprises, particularly MSMEs. By integrating these regulatory mechanisms into the national competition law framework—either through amendments to Law No. 5 of 1999 or through specific implementing regulations—Indonesia can develop a more adaptive legal regime capable of addressing data-driven market power and ensuring fair competition within the rapidly evolving digital economy.

[50] S. Mahmudah N. Goufe, P. Prananingtyas, “Perlindungan Hukum Terhadap Investor Akibat Informasi Menyesatkan Di Dalam Prospektus Pada Transaksi Efek Di Pasar Modal,” *Diponegoro Law Review* 5, no. 3 (2016).

4. Conclusion

The rapid development of Trade Through Electronic Systems (PMSE) in Indonesia reflects a significant transformation in digital market structures, particularly with the emergence of social commerce platforms such as TikTok Shop. Unlike conventional e-commerce platforms, TikTok integrates social media interaction, algorithmic content distribution, and commercial transactions within a single digital ecosystem. This integration enables the platform to influence consumer purchasing behavior through personalized recommendations, live-streaming sales, and algorithmic visibility mechanisms. While such innovations contribute to the expansion of the digital economy, they also raise important competition law concerns when the platform simultaneously controls market access, data flows, and promotional mechanisms that shape market outcomes.[51]

These dynamics can be better understood through the perspective of Data-Driven Market Power Theory, which emphasizes that dominance in digital markets increasingly stems from control over user data, algorithmic recommendation systems, and platform infrastructure rather than from traditional indicators such as market share alone. Within integrated ecosystems such as TikTok Shop, the platform may potentially engage in practices such as algorithmic self-preferencing, preferential promotion of certain sellers, or indirect exclusion of competitors through data-driven visibility control. Such conditions challenge the conventional framework of competition law, which is often designed for traditional markets and may not fully capture the structural power exercised by digital platforms operating in multi-sided markets.[52]

Therefore, this study argues that Indonesia's regulatory framework must evolve to more explicitly address the risks of data-driven platform dominance within the PMSE ecosystem. Although Government Regulation No. 80 of 2019 and Minister of Trade Regulation No. 31 of 2023 represent important regulatory steps, further reforms are necessary to integrate competition law principles into digital platform governance. Future regulatory approaches should incorporate clearer standards related to platform neutrality, algorithmic transparency, and the use of consumer data as a source of market power, while also establishing mechanisms to identify self-preferencing practices and data-driven market foreclosure. Strengthening coordination between the Business Competition Supervisory Commission (KPPU) and other digital economy regulators will be essential to ensure that Indonesia's digital commerce ecosystem develops in a manner that promotes fair competition, protects MSMEs, and maintains sustainable digital market growth.

[51] Walid Abdulla Ali et al., "Validating the Factors Influencing Social Commerce Adoption in Small and Medium Enterprise in Malaysia," *Indonesian Journal of Electrical Engineering and Computer Science* 17, no. 1 (2019), https://doi.org/10.11591/ijeecs.v17.i1.pp440-447.

[52] Abu H. Ayob et al., "E-Commerce Adoption in ASEAN: Testing on Individual and Country-Level Drivers," *International Journal of Business Environment* 12, no. 1 (2021), https://doi.org/10.1504/IJBE.2021.112108.

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PETUNJUK BAGI PENULIS

Redaksi Jurnal menerima naskah karya tulis imiah berupa: Artikel hasil Penelitian; Artikel hasil Kajian; Artikel Konseptual (tulisan lepas/Karya tulis pendek). Naskah dapat ditulis dalam bahasa Indonesia maupun bahasa Inggris, serta belum pernah dimuat atau sedang diajukan untuk dimuat dalam media lain. Naskah dalam bahasa Inggris harus disertai dengan surat keterangan telah dilakukan proofread oleh penerjemah. Surat keterangan tersebut dapat diupload pada bagian Supplementary Files (Step keempat proses submission). Naskah dalam bentuk file Microsoft Word sesuai dengan Template Jurnal Balitbangkumham dikirimkan secara daring melalui http://ejournal.balitbangham.go.id/index.php/dejure. Redaksi tidak menerima naskah/tulisan yang dikirim melalui email.

Format Tulisan:

Panjang artikel antara 6000-8000 kata.

Sistematika tulisan terdiri dari abstrak, kata kunci, pendahuluan, metode (hanya untuk jenis artikel hasil penelitian), analisis dan pembahasan, penutup, dan daftar pustaka.

Pengutipan dituliskan menggunakan reference manager tools sesuai dengan Chicago Manual of Style 17th edition (full-note).

Sistematika Tulisan:

Judul

Untuk naskah yang dikirimkan dalam Bahasa Indonesia, judul ditulis dalam dua bahasa, yaitu Bahasa Indonesia dan Bahasa Inggris, maksimal 14 kata.

Untuk naskah yang dikirimkan dalam Bahasa Inggris, judul dituliskan dalam bahasa Inggris, maksimal 14 kata.

Identitas penulis

Meliputi nama penulis tanpa gelar, afiliasi, dan email resmi. Afiliasi dilengkapi dengan alamat instansi dengan menyebutkan setidaknya nama kota dan negara (termasuk menyebutkan Indonesia).

Abstrak

Untuk naskah yang dikirimkan dalam Bahasa Indonesia, abstrak ditulis dalam dua bahasa, Indonesia dan Inggris.

Untuk naskah yang dikirimkan dalam Bahasa Inggris, abstrak ditulis dalam bahasa Inggris.

Abstrak memuat latar belakang, tujuan, kegunaan, metode, hasil/temuan, kesimpulan, dan saran/implikasi tanpa. Penulis tidak diijinkan menampilkan gambar, tabel, atau referensi dalam abstrak. Abstrak ditulis dalam satu paragraf, maksimal 250 kata.

Kata Kunci

Menggambarkan ranah masalah yang diteliti dan istilah pokok yang mendasari pelaksanaan penelitian yang diindekskan. Jumlah kata kunci minimal tiga dan maksimal lima, kata kunci tidak diperkenankan dalam bentuk kalimat dan dipisahkan dengan tanda titik koma (;). Kata kunci diurutkan sesuai abjad.

Untuk naskah yang dikirimkan dalam Bahasa Indonesia, kata kunci ditulis dalam bahasa Indonesia dan bahasa Inggris.

Untuk naskah yang dikirimkan dalam Bahasa Inggris, kata kunci ditulis dalam bahasa Inggris.

Pendahuluan

Pendahuluan meliputi latar belakang masalah, rumusan masalah (kalimat tanya berbentuk narasi) serta tujuan dan manfaat penelitian, rangkuman kajian teoritik yang berkaitan dengan masalah yang diteliti.

Metode Penelitian

Metode menjelaskan jenis penelitian, sumber data yang digunakan, teknik dan prosedur pengumpulan data, serta analisis data yang dilakukan oleh penulis.

Pembahasan dan Analisis

Pembahasan dan analisis harus menjawab permasalahan dan tujuan penelitian, yang dibuat dalam subbahasan seperti dijelaskan pada sistematika tulisan pada bagian akhir pendahuluan.

Simpulan

Simpulan merupakan pernyataan yang menyatakan hubungan antara variable penelitian dan saran penelitian yang perlu dijelaskan sehubungan dengan tema penulisan yang dipilih.

Daftar Pustaka

Diinput dengan melakukan insert bibliography pada reference manager tools yang digunakan. Referensi utama adalah artikel jurnal, dan buku (terbitan 5 tahun terakhir). Referensi tambahan berupa peraturan perundang-undangan dan sumber lainnya. Tuliskan hanya referensi yang dikutip dalam footnote.

TEMPLATE (MODEL) NASKAH

Catatan:

Template ini juga tersedia di Open Journal System Jurnal Penelitian Hukum De Jure, pada link: https://ejournal.balitbangham.go.id/index.php/dejure/ di menu sebelah kanan.

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Penulis merupakan pihak-pihak yang memiliki kontribusi signifikan dalam proses penelitian dan penulisan. Kontribusi penulis dalam Jurnal Balitbang Hukum dan HAM merujuk pada ketentuan CRediT (Contributor Roles Taxonomy)

1. KEPENGARANGAN *(Diperlukan)*

Berisi nama lengkap[1], kontribusi[2], afiliasi[3], dan satu alamat email[4] penulis yang akan ditampilkan dalam artikel. Untuk penulis lebih dari 1, urutan penulis yang telah disepakati harus dicantumkan secara jelas. Kepengarangan yang dicantumkan dalam lembar ini bersifat final (tidak dapat diubah setelah diserahkan) dan akan digunakan sebagai dasar dalam penyesuaian data, baik dalam artikel yang akan dipublikasikan maupun dalam metadata terbitan.

2. UCAPAN TERIMA KASIH *(Diperlukan)*

Berisi ucapan terima kasih pada pihak-pihak yang membantu baik dalam proses penelitian maupun penulisan (contohnya pihak-pihak yang membantu dalam teknik penulisan, dan sebagainya). Ucapan terima kasih juga dapat disampaikan kepada pihak-pihak yang memberikan kontribusi penting baik dalam penelitian maupun penulisan namun tidak dituliskan sebagai penulis untuk berbagai alasan.

Bagian ini tidak dimaksudkan sebagai ucapan terima kasih bagi sumber-sumber yang dikutip. Bentuk ucapan terima kasih bagi karya-karya lain yang menjadi sumber dicantumkan dalam footnote sesuai dengan kaidah pengutipan.

3. SPONSORSHIP *(Pilihan – jika ada)*

Berisi informasi terkait sponsor yang mendanai penelitian (jika ada).

4. KONFLIK KEPENTINGAN *(Diperlukan)*

Perisi pengungkapan relasi yang berpotensi menjadi konflik kepentingan (jika ada) atau pernyataan bahwa tidak ada konflik kepentingan (jika tidak ada). Konflik kepentingan yang dimaksud merujuk pada ketentuan https://publicationethics.org/competinginterests.

5. BIOGRAFI SINGKAT *(Diperlukan)*

Berisi biografi singkat tiap penulis yang ditulis dalam bentuk narasi, tidak lebih dari 200 kata. Penulis dapat merujuk pada penulisan biografi dalam https://ejournal.balitbangham.go.id/index.php/ham/issue/viewIssue/73/pdf_44.

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1 Pengarang merupakan nama-nama yang memiliki kontribusi penting dalam pembuatan konsep, desain, pelaksanaan, maupun interpretasi dalam penelitian yang ditulis. Seluruh penulis diwajibkan untuk menuliskan nama lengkap sesuai dengan kebiasaan yang berlaku. Ketepatan penggunaan huruf kapital dan huruf kecil sesuai dengan ekspektasi penulis sangatlah penting.

2 Berisi deskripsi yang akurat dan detail terkait kontribusi penulis terhadap artikel. Penulis diharapkan merujuk pada CRedit (Contributor Roles Taxonomy) dalam mendeskripsikan kontribusinya.

3 Terdiri dari kualifikasi professional, afiliasi, kota, dan negara.

4 Setiap tulisan diharapkan mencantumkan satu alamat email. Alamat email lainnya dapat dituliskan dalam bagian biografi singkat.

6. KEASLIAN TULISAN *(Diperlukan)*

Berisi pernyataan tanggung jawab penulis terkait keaslian tulisan, yang meliputi: artikel merupakan karya asli penulis, artikel bebas dari plagiasi, menyertakan sumber kutipan sesuai kaidah pengutipan yang berlaku, serta artikel belum pernah dipublikasikan dan tidak sedang diproses dalam jurnal lain.

7. LAIN-LAIN *(Pilihan – jika ada)*

Berisi hal-hal lain (jika ada) terkait penelitian maupun artikel yang disubmit yang perlu diketahui oleh Dewan Editor.

Judul Artikel (Times New Roman, Ukuran 13, KAPITAL, Bold)

(Article Title (in English), Italic, Bold, First Word using Capital, 1 space after)

Full Paper

1. ABSTRAK

Ketik abstrak dalam bahasa Indonesia di sini. (Times New Roman, 11). Abstrak tidak lebih dari 200 kata, memberikan ringkasan singkat dari isi yang memuat latar belakang, tujuan, kegunaan, metode, analisis dan pembahasan, kesimpulan, dan saran. Jangan menyertakan gambar, tabel, atau referensi ke bagian lain dari kertas atau ke daftar referensi di akhir. Abstrak harus diketik dalam bahasa Indonesia dan bahasa Inggris.

Kata Kunci: template artikel; pedoman penulisan; jurnal hukum - Menggambarkan ranah masalah yang diteliti dan istilah pokok yang mendasari pelaksanaan penelitian, mengandung yang diindekskan ditulis dalam bahasa Indonesia dan Inggris minimal tiga kata/frasa maksimal lima kata/frasa.

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Pendahuluan meliputi latar belakang masalah, rumusan masalah serta tujuan penelitian, rangkuman kajian teoritik yang berkaitan dengan masalah yang diteliti, dan terkadang dicantumkan harapan akan hasil dan manfaat penelitian. Pendahuluan diharapkan dapat menunjukkan penelitian terdahulu, batasan penelitian terdahulu, tujuan untuk menyelesaikan keterbatasan penelitian yang telah dilakukan, manfaat ilmiah, serta keterbaruan dari artikel yang disubmit.

Template ini dirancang untuk membantu para penulis dalam menyiapkan manuskrip. Ini merupakan format tampilan yang persis diharapkan oleh editor jurnal. Untuk menggunakan template ini, cukup Save As ke dokumen Anda, kemudian copy dan paste dokumen Anda di sini. Tidak ada subbab dalam pendahuluan.

Pendahuluan ditulis menggunakan format paragraf special first line 1 cm. Jenis huruf yang digunakan adalah Times New Roman dengan ukuran 11pt, spasi 1.

3. METODE PENELITIAN

Metode berisi macam atau sifat penelitian, sumber data, teknik dan prosedur pengumpulan data, dan analisis data. Pencantuman metode bersifat wajib bagi tulisan hasil penelitian, sedangkan tulisan review tidak.

Metode penelitian ditulis menggunakan format paragraf special first line 1 cm. Jenis huruf yang digunakan adalah Times New Roman dengan ukuran 11pt, spasi 1.

4. PEMBAHASAN

Pembahasan dalam artikel bertujuan untuk menjawab rumusan masalah dan pertanyaan-pertanyaan penelitian, menunjukkan bagaimana temuan-temuan itu diperoleh, menerangkan arti hasil penelitian, bagaimana hasil penelitian dapat memecahkan masalah serta kemungkinan pengembangannya. Pembahasan harus menjawab permasalahan dan tujuan penelitian.

Pembahasan ditulis menggunakan format paragraf special first line 1 cm. Jenis huruf yang digunakan adalah Times New Roman dengan ukuran 11pt, spasi 1.

5. Sub Judul

Dalam pembahasan diperkenankan mencantumkan sub judul sesuai keperluan. Subjudul diberi nomor dalam format bertingkat seperti yang ditampilkan dalam template ini.

Paragraf menggunakan format paragraf special first line 1 cm. Jenis huruf yang digunakan adalah Times New Roman dengan ukuran 11pt, spasi 1.

6. Sub Judul Tingkat 2

Dalam pembahasan diperkenankan mencantumkan sub judul tingkat 2 sesuai keperluan. Subjudul Tingkat 2 diberi nomor dalam format bertingkat seperti yang ditampilkan dalam template ini.

7. Penomoran Sub Judul

Sub judul tingkat 1 dan tingkat 2 diberi nomor. Penomoran Subjudul menggunakan format bertingkat seperti yang ditampilkan dalam template ini.

8. Ilustrasi

Ilustrasi dapat berupa tabel maupun gambar. Ilustrasi digunakan untuk memperjelas penyajian hasil penelitian secara verbal. Seluruh ilustrasi harus diberi komentar atau dibahas dalam teks.

9. Tabel

Untuk kepentingan editing, setiap tabel harus diketik ulang dalam format ms. Word yang dapat diedit, bukan merupakan hasil tangkapan layar. Setiap tabel harus dilengkapi dengan Judul, disebutkan sumbernya, serta dibahas dalam teks. Berikut adalah contoh penggunaan tabel

Tabel 1. Jumlah Pengutipan Jurnal Balitbang Hukum dan HAM

	All	Since 2017
Quotation	1306	1294
H-index	20	20
i10-index	43	43

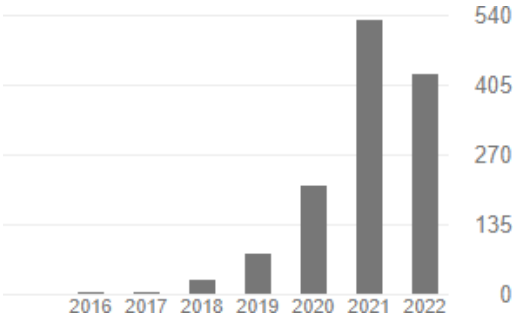
Source: https://scholar.google.co.id/citations?user=NPbkyZ0AAAAJ&hl=id&authuser=5, 31 Augustus 2022

Tabel 1 menunjukkan jumlah pengutipan Jurnal Balitbang Hukum dan HAM. Berdasarkan tabel tersebut, tampak jelas bahwa jumlah pengutipan dari Jurnal Balitbang Hukum dan HAM meningkat secara tajam dalam lima tahun terakhir.

10. Gambar

Setiap gambar harus diberi judul, disebutkan sumbernya, serta dibahas dalam teks. Berikut adalah contoh penggunaan gambar

Gambar 1. Jumlah Pengutipan Jurnal Balitbang Hukum dan HAM Tahun 2016-2022



Source: https://scholar.google.co.id/citations?user=NPbkyZ0AAAAJ&hl=id&authuser=5, 31 Augustus 2022

Gambar 1 menunjukkan jumlah pengutipan artikel yang dipublikasikan dalam Jurnal Balitbang Hukum dan HAM setiap tahun. Pengutipan terbanyak tercatat pada tahun 2021. Meskipun demikian, tahun 2022 masih terus berjalan dan memiliki peluang lebih tinggi.

11. Pengutipan

Sumber kutipan harus dicantumkan dalam bentuk footnote dalam format Chicago Manual of Style 17th edition (full note) dengan menggunakan aplikasi pengutipan. Penulis dipersilakan untuk menggunakan aplikasi pengutipan apapun. Berikut adalah contoh pengutipan dari sumber buku[5], artikel jurnal[6], skripsi/tesis/disertasi[7], dan website[8].

Jumlah minimal referensi adalah 15 (lima belas). Jumlah minimal referensi yang berasal dari sumber primer (buku/proseding/jurnal) adalah 80% dari total referensi. Jumlah minimal referensi yang dipublikasikan dalam 5 (lima) tahun terakhir adalah 80% dari total referensi.

Daftar Pustaka harus diurutkan sesuai alfabet dan tahun terbit. Berikut adalah contoh pengutipan dari Dokumen Hukum Internasional[9], Konstitusi Indonesia[10], Undang-Undang[11], Peraturan Pemerintah[12], dan Keputusan Presiden[13].

12. Kesimpulan

Berisi hal yang menyatakan hubungan antarvariabel yang diteliti. Selain itu, bagian ini juga berisi saran-saran yang perlu disampaikan terkait tema penulisan yang diangkat.

Kesimpulan ditulis menggunakan format paragraf special first line 1 cm. Jenis huruf yang digunakan adalah Times New Roman dengan ukuran 11pt, spasi 1.

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5 Donny Michael, *Menggapai Harapan Penyandang Disabilitas Menjadi Calon Pegawai Negeri Sipil* (Jakarta: Balitbangkumham Press, 2020), 105.

6 Rodes Ober Adi Guna Pardosi and Yuliana Primawardani, "Perlindungan Hak Pengguna Layanan Pinjaman Online Dalam Perspektif Hak Asasi Manusia," *Jurnal HAM* 11, no. 3 (2020): 353–68.

7 Zainal Abidin, "Perspektif Hak Asasi Manusia Terhadap Perawat Tenaga Kesehatan Sukarela Yang Bekerja Di Instansi Pemerintah" (Tesis, Unika Soegijapranata, 2019), 131–36.

8 Penulis, "Data Lokasi Kasus/Provinsi," Badan Penelitian dan Pengembangan Hukum dan Hak Asasi Manusia, 2018, http://sipkumham.balitbangham.go.id/petalitkumham/grafik.

9 "Universal Declaration of Human Rights" (1948), art. 4.

10 "Undang-Undang Dasar Republik Indonesia" (1945), art. 28J.

11 "Undang-Undang Republik Indonesia No. 39 Tahun 1999 Tentang Hak Asasi Manusia," § Lembaran Negara Republik Indonesia Tahun 1999 Nomor 165 (1999), art. 15.

12 "Peraturan Pemerintah Nomor 48 Tahun 2021 Tentang Perubahan Ketiga Atas Peraturan Pemerintah Nomor 31 Tahun 2013 Tentang Peraturan Pelaksanaan Undang-Undang Nomor 6 Tahun 2011 Tentang Keimigrasian," § Lembaran Negara Republik Indonesia Tahun 2021 Nomor 58 (2021), art. 1.

13 "Peraturan Presiden Nomor 62 Tahun 2022 Tentang Otorita Ibu Kota Nusantara," § Lembaran Negara Republik Indonesia Tahun 2022 Nomor 102 (2022), art. 1.

13. DAFTAR PUSTAKA

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