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FOREWORD

We are pleased to present Issue No. 1-2024 of Legal Horizons, a scientific journal dedicated to exploring contemporary legal developments and fostering academic discussions on pressing issues in the legal field. This issue presents a diverse range of articles addressing complex challenges and offering insightful analyses across different aspects of law, regulation, and human rights.

We open with an examination by **Oleksandr Babikov “SAFEGUARDING HUMAN RIGHTS DURING JUDICIAL REVIEW OF COVERT INVESTIGATIVE ACTIONS”,** an area of growing importance as technology and privacy concerns intersect with security demands. Babikov’s article highlights the critical balance required in ensuring both effective investigation processes and the protection of individual rights.

The issue continues with a joint analysis by **Imam Tanthowi, Herlindah, and Supriyadi “LEGAL CERTAINTY FOR THE INCREASE OF HGB TO RIGHT OF OWNERSHIP OF SHOPS/OFFICE HOUSES”**, exploring the impact of regulatory frameworks on property stability and ownership transitions. Their work is complemented by **Kateryna Tiazhkorob’s article “LEGAL REGULATION OF ONLINE PUBLICATIONS IN UKRAINE: CHALLENGES AND DEVELOPMENT PROSPECTS”** on the legal regulation of online publications in Ukraine, a timely exploration of the challenges and development prospects that digital publication brings to the forefront in today’s information society.

Another noteworthy article “**ANALYSIS OF THE ARRANGEMENT OF INTELLECTUAL PROPERTY-BASED FINANCING SCHEMES WITH COPYRIGHT COLLATERAL FOR BANK FINANCIAL INSTITUTIONS” by Chendie Eka Putri, Sihabudin, and Dyah Widhiawati** provides a comprehensive analysis of intellectual property-based financing schemes, focusing on copyright as collateral for bank financial institutions—a novel approach with significant implications for intellectual property law and financial practices.

Further broadening our scope, **Marcheliani Dita Susanto, Budi Santoso, and Ngesti Dwi Prasetyo** offer a juridical review of transforming single-owner corporations into limited liability partnerships. Their research **“THE JURIDICAL REVIEW OF THE TRANSFORMATION OF SINGLE-OWNER CORPORATIONS INTO LIMITED LIABILITY PARTNERSHIPS: LEGAL IMPACTS AND BUSINESS PRACTICES”** delves into the legal impacts and practical business outcomes of such transformations, reflecting the evolving nature of corporate structures in modern economies.

This issue also includes an insightful article **“FEATURES OF INTERNATIONAL PRACTICE OF INTERACTION BETWEEN POLITICAL AUTHORITY AND CIVIL SOCIETY” by Inna V. Sylantieva** provides a comparative analysis of international practices in the interaction between political authority and civil society, contributing a global perspective to the complex relationship between governance and citizen participation.

Finally, in article **“THE LEGAL RATIONALE BEHIND THE DETERMINATION OF MINIMUM CAPITAL REQUIREMENTS FOR LIMITED LIABILITY COMPANIES BY FOUNDERS IN INDONESIA” Didha Narin Aiza, Budi Santoso, and R. Imam Rahmat Syafi’i** on the rationale behind minimum capital requirements for limited liability companies in Indonesia. Their study presents a nuanced perspective on capital regulations, which are central to corporate stability and investor protection.

Each article in this issue offers valuable perspectives and fosters a deeper understanding of the evolving legal landscape. We are confident that the diverse topics and analyses presented will engage our readers and inspire further research and dialogue within the legal community.

On behalf of the editorial team, we extend our sincere gratitude to the authors and readers of "Legal Horizons."

Yurii Harust,
Editor-in-Chief

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Babikov, O. (2024). Safeguarding human rights during judicial review of covert investigative actions.
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SAFEGUARDING HUMAN RIGHTS DURING JUDICIAL REVIEW OF COVERT INVESTIGATIVE ACTIONS

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Abstract

This article examines the protection of human rights and freedoms within the context of an investigating judge's review of applications for covert investigative actions. As judicial oversight becomes increasingly critical in balancing state security interests with individual rights, this study delves into the procedural safeguards and judicial standards that ensure human rights are upheld during the approval process for covert searches and surveillance. Through a detailed analysis of legal frameworks and case studies, the article identifies key areas where the guarantees of privacy, due process, and legal representation must be fortified. It also explores the role of the investigating judge in mitigating potential abuses of power and maintaining transparency. The findings highlight best practices for judicial review, offering recommendations for enhancing the protection of constitutional rights in the realm of covert operations. This research contributes to the ongoing discourse on judicial accountability and the ethical dimensions of investigative practices, advocating for a balanced approach that respects both security needs and fundamental freedoms.

Key words: covert investigative (search) actions, petition, permission to conduct an emergency (P), judicial control, interference in private communication.

1. Introduction

Judicial control over the observance of human and civil rights and freedoms, and, above all, in such a sensitive area as conducting covert investigative (investigative) actions related to interference in private communication, is extremely important in today's conditions, especially given the significant increase efficiency of technical means of removing and fixing information, digitalization of public relations and informatization of information exchange processes, performance of managerial functions, etc.

The scope of judicial control over the emergency (S)A includes:

- control at the stage of consideration by the investigating judge of the application for permission to conduct an emergency (S)A;

- control during the consideration of applications for permission to conduct an emergency (S) A initiated before obtaining the permission of the investigating judge, on the basis of Art. 250 of the Criminal Procedure Code of Ukraine;

- control during the consideration of applications for extension of the term of the

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emergency (S)A, granting permission for the emergency (S) A after the expiration of the previous emergency (S)A;

- control during the consideration of the prosecutor's motions in accordance with Art. 257 of the CPC of Ukraine on permission to use the results of the NA (S) A in other criminal proceedings.

The court oversees the review of applications for authorization to conduct emergency (S)A measures by investigating judges from appellate courts and the High Anti-Corruption Court. These applications, requested by an investigator and approved by the prosecutor, involve decisions on whether to grant or deny permission for:

• audio and video surveillance of individuals;

• seizure, inspection, and confiscation of correspondence;

• extraction of information from telecommunications networks;

• removal of data from electronic information systems without the owner's or possessor's knowledge, or overcoming logical protection systems if necessary;

• inspection of inaccessible public places, private residences, or other personal property;

• determination of the location of electronic devices;

• surveillance of individuals;

• monitoring of bank accounts;

• audio and video surveillance of specific locations.

• secret receipt of samples required for comparative research) (Mykhaylenko, 2020).

At the same time, the vast majority of requests from the authorized entities contain requests for permission to conduct a complex of emergency (S)A, which includes various combinations of these measures. Typically, emergency (S)A measures encompass the following actions: extraction of information from telecommunications networks, retrieval of data from electronic information systems, surveillance of individuals, audio and video monitoring of individuals and locations, and tracking of electronic devices. Less frequently, requests are made for the inspection of inaccessible locations, private residences, or other personal property. It is also common for an authorized entity to seek an investigating judge's approval for emergency (S)A as part of another covert investigative action, such as crime control or a special operation aimed at uncovering criminal activities of organized crime groups or criminal organizations. There are applications for permission to carry out CI(S)A within the framework of international legal assistance (Supreme Anti-Corruption Court, 2021).

Consideration of applications for a permit to conduct an emergency (S)A as a form of judicial control is carried out in the following stages:

-Determining the jurisdiction of petitions. The powers of investigative judges to consider petitions are delimited taking into account territorial, substantive features and depending on the subject of the CI(S)A.

- Investigative judges of appellate courts are authorized to consider petitions within the territorial jurisdiction of which the pre-trial investigation body is located.

- investigative judges of the High Anti-Corruption Court - in criminal proceedings under investigation by NABU. It should be noted that this definition of the High Anti-Corruption Court jurisdiction is perceived ambiguously (Zhuk, 2020).

This is not about criminal proceedings investigated by NABU detectives, but about proceedings under their jurisdiction, in accordance with the criteria set out in Part 5 of Art. 216 of the Criminal Procedure Code of Ukraine. It should be borne in mind that in accordance with Part 5 of Art. 36 of the CPC of Ukraine, the prosecutor is prohibited from entrusting the pre-trial investigation of a criminal offense within the NABU's jurisdiction to another pre-trial investigation body. Investigation by other law enforcement agencies of criminal offenses under investigation by NABU is carried out in cases when it is initiated by such a body, and in accordance with Part 2 of Art. 218 of the CPC of Ukraine, is conducted until the prosecutor determines another jurisdiction. It should also be borne in mind that the prosecutor of the Specialized Anti-Corruption Prosecutor's Office (hereinafter – SAP) on the basis of para. 3 item 3 part 5 of Art. 216 of the CPC of Ukraine has the right to include in the jurisdiction of NABU and other criminal offenses that meet certain criteria, prominent in Part 5 of Art. 216 of the CPC.

Thus, High Anti-Corruption Court investigative judges exercise judicial control over the observance of human and civil rights and freedoms in the field of CI(S)A depending on the category of crimes, their recognition by NABU investigators and may extend to criminal proceedings investigated by other law enforcement agencies.

Requests for authorization to carry out covert investigative (search) actions targeting judges, court and law enforcement officers, or their premises are handled on a case-by-case basis. To reduce the risk of information leaks and prevent conflicts of interest, such requests are reviewed by an investigating judge from the relevant appellate court outside the jurisdiction of the pre-trial investigation body conducting the investigation. The petitions are submitted to the appellate court located as close as possible to the site of the pre-trial investigation.

In comparable cases involving criminal offenses under the jurisdiction of the High Anti-Corruption Court, petitions are reviewed by an investigating judge from the High Anti-Corruption Court. However, if it is necessary to obtain permission to conduct an emergency (S) a against a judge or an employee of the High Anti-Corruption Court staff, such a decision is made by the investigating judge of the Court of Appeal, whose jurisdiction extends to the city of Kyiv.

The purpose of the article is to determine the general principles of guaranteeing human rights and freedoms during the examination by the investigating judge of motions of pre-trial investigation bodies and prosecutors for permission to conduct covert investigative (investigative) actions.

Based on the analysis of the practice of consideration by investigative judges of motions in the field of covert receipt and recording of evidence in criminal proceedings, the grounds for granting such permission and the reasons why investigative judges refused to conduct covert measures to outline general conditions and requirements for such motions cooperation of investigators, prosecutors and investigating judges, to suggest ways to improve criminal procedural legislation in this area.

2. Materials and Methods

In general, the initial stage, stage or step in any study is the development of methodological tools in the context of such a study, as it depends on the strategy of the basic concept of ensuring human rights and freedoms during the investigating judge's applications for permission to conduct covert investigative (search) actions, and hence the effectiveness of scientific achievements, the formulation of theoretical and applied conclusions and recommendations. Since the problem of methodology in any science, including and in the criminal procedure, is one of the most important, complex and relevant, then in its selection should take into account the specifics of the object and subject of research, discussed above. At the same time, it should be noted that in modern science there is an insufficient level of mastery by researchers of the system of methodological

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and methodological knowledge, which can lead to errors. In addition, the success of scientific research depends on the availability and degree of development of certain methodological prerequisites, in the absence of which the applied action is useless or even dangerous, generating results that do not meet certain goals and objectives.

Thus, in the process of scientific research of guarantees of human rights and freedoms during the examination of applications for permission to conduct covert investigative (investigative) actions, we have chosen the following methods:

1) dialectical (this method is central among philosophical methods of scientific knowledge, since it allows us to consider the relevant criminal procedure phenomenon in the development and taking into account the basic laws of dialectics);

2) comparative law. This method involves identifying the unknown by comparing it with the known; clarifying the characteristics (properties) of a phenomenon through comparison with its other characteristics or with those of a different phenomenon; and establishing patterns by comparing objects across different times, examining how their characteristics have changed from the past to the present to identify trends. This approach will assist in understanding the content and essence of legislative and theoretical provisions related to the protection of human rights and freedoms during the examination of applications for covert investigative (search) actions by an investigating judge.

3) dogmatic (alternative titles: formal-dogmatic, formal-logical, logical-legal, legal, etc.). This method establishes the content of the studied legal norms and regulations, reveals the laws of law through the rules of legal logic. Thus both external, and internal forms of the legal phenomenon (or its «dogma») are investigated. It is based on the laws of logic and syntax, providing commentary on the provisions on guarantees of human rights and freedoms during the examination of the investigating judge's applications for permission to conduct covert investigative (search) actions and practices, as well as serving to systematize criminal procedure, setting deadlines. disclosure of concepts, construction of legal constructions, clarification of the true content of certain norms through their interpretation. With the help of this method, it is also possible to analyze the norm of the criminal procedure law in view of the observance of the rules of legislative technique of constructing articles in the CPC. Thus, as a result, it is possible to identify shortcomings and gaps in the norms of the CPC of Ukraine, which regulate our criminal procedure;

4) systemic. This method focuses research on the disclosure of the integrity of the object and the mechanisms that provide it, to identify different types of relationships of a complex object and bring them into a single theoretical picture. Using a systems approach, complex dynamic entities are investigated, the internal mechanism of action of its individual components is clarified, their interaction at different levels is traced, and so on.

The study draws upon a diverse range of materials, including international treaties, national legislation from various countries (such as Ukraine, the United Kingdom, Italy, Germany, and Finland), scholarly works, court decision registries, and records from Ukraine's pre-trial investigation bodies and criminal proceedings. The research employs both general scientific and specialized methods to facilitate a comprehensive scientific inquiry. Notably, it utilizes comparative law methods to analyze the substantive and procedural aspects of international and Ukrainian legislation, as well as that of other jurisdictions, and to examine scientific categories, definitions, and approaches. Additionally, formal-dogmatic (legal) methods are used to elucidate the legislative provisions of Ukraine's Criminal Code regarding the confidentiality of telephone communications and to propose improvements to both the Criminal Code and the Criminal Procedure Code.

3. Results and Discussion

The study of the legal nature and importance of the judicial control function of investigative judges authorized to consider motions of the prosecution for permission to conduct covert investigative (investigative) actions provides an opportunity to determine the main directions and ways to improve criminal procedure law, ensure the legal regime bring as close as possible to the standards set out in international acts ratified by Ukraine. The issues of the effectiveness of judicial control over the results of covert investigative (investigative) measures, the effectiveness of their application and the justification of restrictions on human and civil rights and freedoms during the pre-trial investigation were considered and assessed separately.

Simplified procedure of judicial control proceedings during the consideration of applications for permission to conduct CI(S)A the request or another person who took part in the consideration of the request, information on the existence of reasons and grounds for granting permission to conduct an emergency (S)A indicate the formality of this procedure and the urgent need to improve it. The activities of investigators and prosecutors who take part in the examination of the petition or prepare a procedural document to substantiate his arguments (analytical, report notes, reports), in particular, the fact that they are not responsible for providing inaccurate information and explanations to the investigating judge. concealment of circumstances that are essential for making a lawful decision.

3.1. Consideration of the petition and attached materials

Investigating judge, in accordance with Part 1 of Art. 248 of the CPC of Ukraine, is obliged to consider the application for permission to conduct a covert investigative (search) action within six hours from the date of its receipt. Such consideration is carried out with the participation of the person who submitted the application.

During the examination, the existence of grounds for an emergency (S)A is clarified: 1) whether a criminal offense of appropriate gravity has been committed; 2) whether evidence can be obtained during the CI(S)A, which alone or in combination with other evidence may be essential to clarify the circumstances of the criminal offense or to establish the perpetrators of the criminal offense.

The investigating judge, who received the petition, may get acquainted with the materials of the criminal proceedings, get acquainted with the evidence obtained as a result of investigative and covert investigative (investigative) actions. Prior to the examination of the merits of the petition, the investigating judge shall determine compliance with the requirements of the jurisdiction of the petition and the existence of the authority of the subject of the application. The powers of the investigator and prosecutor are confirmed by an extract from the Unified register of pre-trial investigations, which is an appendix to the petition and contains up-to-date information on investigators and prosecutors authorized to conduct pre-trial investigations and conduct procedural guidance. In addition, in cases where the application raises the issue of granting permission to conduct an emergency (S) A for a special entity: a lawyer, judge, MP, the authority to submit such a request must be confirmed by relevant additional documents.

The investigating judge, carrying out on the basis of item 18 h. 1 Art. 3 of the CPC of Ukraine, judicial control over the observance of the rights and freedoms and interests of persons in criminal proceedings, assessing the materials provided to him criminal proceedings and explanations of the petitioner, must take into account a number of key

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circumstances, justice and human rights and freedoms, correspondence of qualification of the act of gravity to the crime and the circumstances of the proceedings. Since the emergency (S) (except for the location of electronic means and removal of information from electronic information systems, access to which is not limited by logical protection, as well as with the permission of the owner, owner or user of such electronic information system or part thereof) criminal proceedings on the commission of serious and especially serious crimes, the correctness of the qualification is decisive during the consideration and decision on the application for permission to conduct an emergency (S)A.

According to paragraphs 3-7 of Article 12 of the Criminal Code of Ukraine, a felony is defined as an offense specified by this Code, where the primary penalty is either a fine of up to twenty-five thousand non-taxable minimum incomes or imprisonment for a term not exceeding ten years. An especially serious crime, on the other hand, is an offense for which the primary penalty involves a fine exceeding twenty-five thousand non-taxable minimum incomes, imprisonment for more than ten years, or life imprisonment. The classification of the crime's severity, which determines the type of punishment—whether a fine or imprisonment—is based on the length of the imprisonment term stipulated for the offense.

In this regard, the investigating judge is obliged to check, and the investigator, the prosecutor to prove that the crime was committed of appropriate gravity, the facts established during the pre-trial investigation correspond to the legal qualification. Otherwise - refusal to satisfy the petition on the basis of Part 2 of Art. 246, part 3 of Art. 248 of the Criminal Procedure Code of Ukraine.

In 2021, the Supreme Anti-Corruption Court summarized the state of judicial control during the consideration of the prosecution's applications for permission to conduct an emergency (S)A and identified the typical and most common grounds for refusal to grant a permit (Supreme Anti-Corruption Court, 2021):

- the provided materials of criminal proceedings do not confirm especially big size of the stolen property, as a qualifying sign of h. 5 Art. 191 of the Criminal Code of Ukraine;

- the materials of the proceedings do not contain accurate information about the qualification of the criminal offense, the content of the petition does not correspond to the explanations of the detective provided in court, not submitted for review of suspicion, which according to the detective presented to the person;

- a reference to obtaining information from intelligence sources on the artificial delay of a judge in considering cases of administrative offenses, in the absence of information on the artificial nature of such actions, can not be considered a proper justification for preparing to commit a crime under Part 3 of Art. 368 of the Criminal Code of Ukraine;

-The CPC does not provide for the issuance of a permit to conduct an emergency (R) D to clarify the circumstances of a possible criminal offense or to identify persons who may have committed a criminal offense;

- the lack of calculations of the waste, the inability to establish the amount of such waste, which deprives the investigating judge of the opportunity to verify the gravity of the crime for which the pre-trial investigation is carried out;

-Lack of sufficient grounds to believe that a criminal offense has actually been committed or is being prepared to be committed.

3.2. Duration of pre-trial investigation of criminal proceedings

1) If the investigation lasts several years, its effectiveness, completeness and focus, the seriousness of the reasons for the lengthy investigation and the observance of reasonable

time shall be taken into account. After all, if within a few years no evidence of guilt or the fact of committing a crime has been collected in the proceedings, further restriction of human and civil rights will not be justified. Prolonged investigations can be justified when it comes to documenting the activities of an organized group or branched criminal organization, persons with professional skills of conspiracy, the activities of transnational corporations, which necessitates requests for international legal assistance.

2) Taking measures by the prosecution to obtain evidence of the circumstances of the criminal offense and the guilt of certain persons by investigation, the impossibility of obtaining such evidence without conducting an emergency (S)A.

3)The investigating judge must assess: what investigative actions have been carried out and what can be found out without conducting an emergency (S)A. The completeness of such investigative actions is evaluative, however, in some cases investigators and prosecutors apply for permission to conduct CI(S)A in criminal proceedings in which investigative actions were not conducted at all, or limited to interrogation of the applicant and information obtained from electronic information systems. on the address, position, means of communication used by the person in respect of whom the application for a permit to conduct an emergency (S)A was submitted. In each case, the investigating judge must weigh all the circumstances and make a decision that takes into account the urgent need to conduct an emergency, the sufficiency of information about the illegal activities of such a person, the impossibility or inexpediency due to the risk of information leakage by others to obtain evidence. Interference with human rights and freedoms must be justified in accordance with the purpose of the CI(S)A and the tasks of criminal proceedings, which include the impossibility of unjustified procedural coercion and the application of proper legal procedure to each participant in criminal proceedings. Permission to conduct an emergency (S)A is not allowed if the prosecutor or investigator has not provided objective information about the fact of commission (preparation for the commission) of the crime and the purpose of the emergency (S) A is to "experiment", "activate", battle. In such circumstances, the restriction of the constitutional rights of citizens in the case of permission to conduct an emergency (S) A is unjustified, borders on provocation of the crime and further the results of such emergency (S)A may be declared inadmissible evidence by the court.

3.3. Terms of the emergency (S)A

When deciding on permission to conduct them, the investigating judge must take into account the general terms of pre-trial investigation in criminal proceedings. The term for which the authorization to conduct an emergency (S) A should be exceeded should not exceed the pre-trial investigation, but in any circumstances the validity of the decision in the criminal proceedings under investigation may not exceed 2 months.

1) Duration of a person's stay under the control of a law enforcement agency. «Factual» cases in which no person has been identified (no announcement or suspicion has been issued) can be investigated for years. In such circumstances, sometimes for a long time, six months, a year, or even more, an emergency (S)A can be conducted with the recording of his telephone conversations, correspondence, audio, video surveillance, etc. In such cases, after or before the expiration of the permit for the CI(S)A investigator, the prosecutor re-applies to the investigating judge for permission to «additional» CI(S)A for this person or group of persons. In such circumstances, the main condition for issuing a lawful decision to grant permission to conduct an emergency (S)A is to clarify the results of previous similar activities, information obtained during their implementation, the reasons for the absence of any information relevant to criminal proceedings . In some cases, it is the acquaintance with the results of the previous CI(S)A that provides grounds for establishing the fact of provocative actions by the prosecution, the inaccuracy of the

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information provided by the applicant, refutation of other data obtained during the pre-trial investigation. The study of preliminary results and evidence obtained during the previous CI(S)A, their analysis, gives the investigating judge the opportunity to assess the feasibility of further restriction of human rights and freedoms and the prospects of criminal proceedings. In addition, the circumstances of the proceedings and information about the person - the subject of development, group of persons or organization must be taken into account. If the issue concerns intelligence, counterintelligence, actions of a person professionally versed in the skills of conspiracy, who has a method of detecting and stopping crimes, has knowledge and experience in law enforcement or close ties in the law enforcement environment, the inability to obtain information in the first months. proceedings, may have its own objective explanation.

Granting permission to conduct an emergency (S)A in such cases may be justified. On the other hand, there is sufficient evidence in criminal proceedings to expose, detain and declare a person suspicious, and the prosecution intends to further establish certain circumstances or document several additional episodes of illegal activity. In such cases, the long-term development may be due to the need to identify the entire «chain» of relationships in the commission of criminal acts, identify supply channels or distribution networks, establish corruption links of a criminal group or organization in government or law enforcement agencies. However, the prolonged emergency (S)A may also be associated with abuse by law enforcement officials who are developing and aiming to «improve statistics» or to effectively cover up and control criminal activity under the guise of developing and investigating criminal proceedings. In this case, the refusal to grant permission to continue the emergency (S)A will force the law enforcement agency to "implement" the proceedings and move to an active phase of exposing and bringing the perpetrators to justice.

The availability of information about a person's involvement in the commission of a criminal offense is one of the key issues when deciding on an emergency (S)A against a person. One of the features of the CI(S)A, which distinguishes them from operational and technical measures in operational and investigative cases, is that HTAs are conducted exclusively for persons who are registered and developed within the OSC (operational search case). CI(S)A an allows the law to be conducted against any person, regardless of the availability of a procedural decision on his possible involvement in the commission of a criminal offense. Although paragraph 5 of Part 2 of Art. 248 of the CPC of Ukraine stipulates that the application for a permit to conduct an emergency (S) A, among other things, states the circumstances that give grounds to suspect a person of committing a crime, such «suspicion» does not give a person the status of a suspect in criminal proceedings. procedural decision on the emergence of such a suspicion. Therefore, any person, including a suspect, witness, victim, etc., is a person against whom it is possible to submit a request to conduct an emergency. The wording in paragraph 5 of Part 2 of Art. 248 of the CPC of Ukraine, according to which "circumstances that give grounds to suspect a person of committing a criminal offense" taking into account the definition in paragraph 2 of Part 1 of Art. 276 of the CPC of Ukraine, according to which the notification of suspicion is carried out in cases of «sufficient evidence to suspect a person of committing a criminal offense», is only a failure of the legislator and is not grounds for concluding that in such cases in respect of a person who has acquired the status of a suspect in criminal proceedings. Therefore, the grounds for suspecting a person of committing a criminal offense can be any information, but they must also be assessed for appropriateness and admissibility, reliability. Such information can be contained in various sources, but it is important first of all its accuracy and reliability, especially when it comes to identifying the subscriber, terminal equipment - means of communication, personal data about the person subject to emergency (S A, the exact address residence or stay, etc.

At the same time, in practice, especially when it is related to counterintelligence and anti-terrorist measures, there are facts of conducting an emergency (S)A on impersonal entities. However, the ECtHR found this practice to be contrary to Art. 8 of the Convention. Thus, the judgment in Azer Ahmadov v. Azerbaijan (application no. 3409/10) stated that the observation permit did not contain information about him as a specific person to whom such an event was to take place, but only information about his colleague. In the case of Big Brother Watch and Others v. The United Kingdom (applications 158170/13, 62322/14, and 24960/15), the court examined various aspects of surveillance and determined that the national legislation failed to meet the standards of «quality of law.» Specifically, the court found that certain stages of surveillance, including the mass interception of communications through telecommunications channels, the use of real-time filters to assess the relevance of intercepted data, and the subsequent analysis of selected and stored material by analysts, did not comply with legal requirements.

From the above decisions of the ECtHR it can be concluded that the monitoring of telecommunications (mass interception of communication data of citizens), when information (calls, SMS and e-mail, billing communication) in real time on certain filters (keywords) is selected from telecommunications networks for further analysis (The case law of the European Court of Human Rights: Ukrainian aspect, 2018), as well as failure to reflect in the decision to conduct an emergency (S) A personal data of the person in respect of whom they are conducted (The case law of the European Court of Human Rights: Ukrainian aspect, 2021) – does not meet the requirements of Art. Art. 8, 10 of the Convention

Peculiarities of consideration of the issue of granting a permit to conduct an emergency (S)A in relation to the applicant. In most cases, the reliability of the information and the applicant's participation are crucial for the formation of the evidence base. As the applicant has information, has certain relations, contacts with persons whose illegal activities are investigated, his involvement in the CI (S) A will facilitate faster and more effective documentation of illegal activities. Procedural registration of the applicant's involvement, as well as that of another person, including on the terms of confidential cooperation, formalization of his participation in criminal proceedings must meet the requirements of the CPC of Ukraine and other legislation of Ukraine.

The investigating judge must pay attention to the observance by the pre-trial investigation body, the prosecutor of the requirements during the acceptance of the application, the notification of the commission of a crime. The documents must contain information about the warning of the applicant about criminal liability for knowingly false reporting of a crime. Information about such an explanation, warning, can be contained both in the statement (message) and in the transcript of the interrogation of a witness or victim. The main thing is that their content provides an opportunity to conclude that the applicant is aware of the essence and content of the information provided by him, and detail and specification exclude the possibility of double interpretation and avoidance of liability in case of knowingly false information about the crime. In addition, the voluntary consent of such a person to participate in the CI(S)A must be confirmed by written consent to such participation and / or confidential cooperation, explaining his rights and responsibilities, including the inadmissibility of actions aimed at to provoke a crime. These circumstances may also be recorded in the relevant protocol. It is allowed when the consent to confidential cooperation, participation in the CI(S)A, clarification of the rights and obligations of the confidant and warning about non-disclosure of information constituting the secret of the pre-trial investigation and other data that will become known to him during such cooperation one protocol.

There are grounds to claim that it is impossible to otherwise obtain information about the crime and the person who committed it or is preparing to commit it. Given the exclusivity, exclusivity of the CI(S)A, due to restrictions on constitutional human

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rights and freedoms during their conduct, this necessitates the investigation by the investigating judge when considering the request of the circumstances and conditions of the crime, person, etc., to come to the inner conviction it is impossible to obtain relevant evidence in criminal proceedings. In itself, the presence of objective evidence of the fact of committing or preparing to commit a crime, the involvement of a person in it, is insufficient to consent to an emergency (S)A and, in the absence of grounds, to consider otherwise than conducting an emergency CI(S)A, it is impossible to obtain relevant evidence, there are no grounds for granting permission. The inability to gather evidence other than in the event of an emergency CI(S)A may be associated with the risk of leakage and disclosure of information in the event of a public investigation, the ability of those involved to conceal evidence or hide from the pre-trial investigation and court, distortion and concealment of information, pressure on witnesses, victims or other participants in the process, including accomplices. In addition to the above circumstances, during the consideration of each application for a permit to conduct an emergency (S)A, the investigative judge must also check the compliance of the content of the application with the plot of the criminal offense and the correctness of the qualification. requirements of jurisdiction and requirements of jurisdiction, depending on whether the investigated crime falls under the jurisdiction of NABU, and in cases of appeal to another court closest to the location of the pre-trial investigation body – the correctness of the election of the appellate court.

Thus, the Supreme Anti-Corruption Court of Ukraine among the grounds for refusing to grant permission to conduct an emergency (S)A stated: «Detectives' arguments that the commission of a criminal offense under Part 5 of Art. 191 of the Criminal Code of Ukraine, confirmed by the results of the CI(S)A in the form of printouts, have the character of assumptions. In addition, the detective did not prove in court that the request for permission to conduct an emergency (S) A in the criminal proceedings are subject to the Supreme Anti-Corruption Court of Ukraine, given the existence of statutory conditions under paragraphs 1-3 of Art. 216 of the CPC of Ukraine, in particular on the amount of damage caused by the crime of five hundred times or more than the subsistence level for able-bodied persons, established at the time of the crime» (Ability to uniquely identify the person in question for permission to conduct covert activities: generalization of the WACS, 2021).

In summary, conducted by the Supreme Anti-Corruption Court of Ukraine (The need for covert measures in conjunction with the impossibility of obtaining information in another way: generalization of WACS, 2021), the most typical cases of declaring petitions unfounded and refusal to grant permission to investigators to conduct CI(S)A are as follows:

1) Emergencies have already been conducted against the defendant, but no information about his involvement has been received. This decision of the investigating judge is justified by the fact that "in circumstances where the CI(S)A is provided for a person in relation to events that took place six years ago, in criminal proceedings lasting five and a half years, and it conducted the whole complex Investigative (investigative) actions, which according to the pre-trial investigation give grounds to suspect a person of committing a crime, there is no objective need for covert measures, so their conduct is an excessive interference with human rights and freedoms.

2) CI(S)A may not be used to update criminal proceedings. The investigating judge concluded that " CI(S)A as a means of obtaining evidence in criminal proceedings is associated with a high degree of interference with human rights and freedoms. Such interference must be justified in accordance with the purpose of the CI(S)A and the tasks of criminal proceedings, which include, in particular, the impossibility of unjustified procedural coercion and the application of due process to each participant

in criminal proceedings. In turn, the intensification of the pre-trial investigation, as a result of which the participants in the criminal proceedings will negotiate the events of concluding and implementing the agreement, are not good and sufficient grounds for granting permission to conduct an emergency (S) A. After all, in such circumstances, the prosecution forms the evidence base, not receives it. « In such circumstances, the investigating judge came to the conclusion that the conduct of the CI(S)A did not meet their purpose and did not contribute to the implementation of tasks in criminal proceedings.

3) Conducting an emergency (S) A in order to simplify procedural activities will not meet the requirements of Art. 8 of the Convention. Refusing to grant permission for the CI(S)A, the investigating judge noted: "The very idea, procedure and grounds for the CI(S)A indicate that they are an extreme measure of interference with human rights and only in cases where it is impossible to obtain information that has probative value in criminal proceedings. Given the nature of the CI(S)A, it is not allowed to use the CI(S)A as the original or only procedural action aimed at obtaining evidence. Of course, conducting an emergency (S)A on a person, although it requires significant technical resources, is simpler and more effective in terms of the content and accuracy of the information received.»

4) Attempts to «legalize» previous actions to obtain information in criminal proceedings - does not comply with the principles of criminal proceedings. Based on the results of the application for permission to conduct an emergency (R) D, the investigating judge found that in a criminal case in which the investigation lasted more than four years during a laptop search (conducted three years after its seizure), the detective found information about e-mail boxes and telephone numbers not previously known to the pre-trial investigation. In justification of the need to access these boxes, the detective said that the presence of information in these e-mail boxes, which is important for criminal proceedings, was promptly established. Considering this position of the detective unconvincing, the investigating judge noted: «The person has already been suspected of committing a crime (which in procedural terms indicates the sufficiency of data on involvement in a criminal offense). In addition, the detective's allegation that the fact that information is available in cloud storage services is operative is a matter of concern. As the only criminal way to obtain relevant information is to withdraw information from transport telecommunication networks and, in some cases, electronic information systems, apply to the investigating judge for permission to conduct an emergency (S) A to obtain information on the availability and content of which is already known to the pre-trial investigation body, suggests «attempts to» legalize «previous actions to obtain information in criminal proceedings.»

The lack of information on the conduct of effective public events and the lack of proper justification for the possibility of obtaining it during the CI(S)A became the basis for refusing to grant permission to hold them. Substantiating the decision, the investigating judge stated: "The prosecutor did not specify what set of evidence is available in the pre-trial investigation body, which became the basis for a single conclusion on the need for such types of emergency (R) trying to reach an investigation. «

5) Inadequate justification of the purpose of the emergency (S)A and the ability to achieve results. Refusing to grant permission to conduct an emergency (S)A, the investigating judge stated: The petition does not contain a convincing substantiation of the possibility of obtaining evidence during the CI(S)A, which may be essential for clarifying the circumstances of the crime. «

6) Incomplete pre-trial investigation as a ground for refusing to issue a permit to conduct an emergency (S)A. The decision to refuse to grant permission to conduct an emergency (S)A by the investigating judge is justified by the fact that the application of

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the CI(S)A is provided for a person in relation to events that took place three years ago and in criminal proceedings in which the whole complex investigative (search) actions, which, according to the pre-trial investigation, give grounds to suspect that the person is involved in the commission of a crime. In such circumstances, holding an CI(S)A would be an excessive interference with human rights and freedoms.

3.4. Unreasonableness and formalism in filing a petition

The investigating judge noted that in the application for permission to conduct an emergency (S)A, the detective allowed standard legal wording, and did not provide any justification why, if there is already information received under covert activities, such measures should be continued. Neither the request nor the detective's examination provided sufficient and substantiated additional information that gives grounds for the continuation of the emergency (S)A, did not specify the circumstances that prevent the pre-trial investigation body to achieve the purpose of criminal proceedings with the information already obtained. In addition, the consideration of the petition did not provide a convincing justification for the possibility of obtaining evidence during the continuation of the CI(S)A, which may be essential for clarifying the circumstances of the crime. Motivation of the need to continue them by the fact that to date not found the full amount of money of illegal gain, and perhaps the suspect in telephone conversations with others will express this information, the investigating judge is not enough to conclude the need and expediency of emergency (S)A , which is under the jurisdiction of the state.

7) The lack of information about the direct or indirect participation of a person in the events referred to in the petition and providing data solely on the assumptions of the detective - excludes the possibility of granting permission to conduct an emergency (S)A. The investigating judge stated that «the investigated materials of the criminal proceedings in terms of evidence do not allow to establish a connection between the offense and the person.» It is also noted that holding a certain managerial position is not a sufficient justification for direct or indirect participation in the commission of a crime.

8) Failure to comply with the requirements of Art. 248 of the Criminal Procedure Code of Ukraine. The reason for the refusal to issue a permit to conduct an emergency (S) A was that "when asking about the permission to withdraw information from transport telecommunications networks, the prosecutor did not provide any data that persons, despite the long period of time crime, transmits or receives information about the crime. However, the prosecutor did not substantiate his conclusions that the suspect is still using a specific channel of communication and that through it a person can actually transmit information relevant to criminal proceedings «,» In addition, noting the systemic nature of criminal activity, the prosecutor does not provide any evidence to substantiate this circumstance.

In another decision, the investigating judge stated that although the detective proved the existence of an electronic information system at a certain e-mail address, which may be owned by a corporation and can be accessed using a login and password, the presence of information in such an electronic information system significance for the pre-trial investigation, the purpose for which such a system is conducted, the fact of its existence at the time of the crime, and whether such information is relevant to the pre-trial investigation.

Along with the typical, in the generalization of the High Anti-Corruption Court there are atypical grounds for refusal to grant permission to conduct an emergency (S)A:

- the subject applies for permission to continue the CI(S)A, which was denied by a previous decision;

- due to the detective's failure to appear in court, although he was duly notified, which deprived the court of the opportunity to investigate the circumstances of the case;

- due to the presence of a valid (valid) permit for emergency (S)A;

- in connection with the provision of information of incomprehensible procedural nature to the investigating judge (all information referred to by the detective was obtained in other criminal proceedings, without the appropriate permission of the investigating judge to use materials of the CI(S)A in other criminal proceedings).

Thus, the need and expediency of granting permission to conduct an emergency (S)Ais assessed by the investigating judge taking into account the circumstances of a particular criminal proceeding and must take into account the circumstances of the crime, duration and duration of pre-trial investigation, results of previous emergency jurisdiction and jurisdiction, completeness, objectivity of the statement in the petition of the essential circumstances of the crime and information about the involvement of a certain person or persons in the commission of the investigated crimes.

However, the limits of judicial control, objectivity and comprehensiveness of the circumstances of criminal proceedings and the availability of legal grounds for granting permission to conduct an emergency (S)A are limited by the impossibility of applying adversarial principles, as the investigating judge clarifies the legal position and analyzes arguments only of the prosecution represented by the investigator or prosecutor. It is the peculiarity of the CI(S)A, their secrecy (secret) excludes the possibility of participation of the defense in their consideration. Accordingly, the independence, impartiality and objectivity of investigative judges, whose powers include the consideration of applications for permission to conduct an emergency (S)A is a major factor in ensuring human and civil rights and freedoms in the consideration of such applications.

Accordingly, the issue of determining the limits of activity and initiative of investigative judges in the study of the evidence provided by the prosecution to substantiate the petition becomes relevant. The court's desire to establish objective truth, awareness of the importance of ensuring the adversarial cognitive activity makes it impossible to treat the investigating judge as an outside observer of the competition, because the investigating judge is responsible for the decision, including incomplete or biased trial. In the case of motions to conduct an emergency, the position of an outside observer for a judge does not guarantee protection of the rights and legitimate interests of victims of crime, as well as protection of a person from unjustified and illegal restriction of his rights and freedoms. In such cases, the transformation of an investigating judge into an outside observer should be considered a violation of the state-guaranteed right to judicial protection (Lisovy, 2021).

A number of scientists: A. Plashevska (2016), O. Piyuka (2014), L. Voskobitov (2014), researching this issue, expressed the opinion that it is necessary to clearly define in the legislation cases in which the court has the right to act on its own initiative and influence the collection of evidence, criteria , and establishing the grounds on which the court may perform on its own initiative a procedural action.

In the context of such scientific developments, it seems appropriate to establish in the criminal procedure law the investigating judge considering the application for permission to conduct an emergency (S)A, the right to initiate the provision of additional materials, conduct certain investigative and procedural actions, the results of which will help eliminate incompleteness. pre-trial investigation and will enable the investigating judge to form a complete and objective picture for a lawful decision.

Instead, the current CPC restricts the investigating judge from making one decision - to grant permission or to refuse to grant such permission. When deciding to refuse to grant a permit to conduct an emergency, the judge may point out deficiencies or incompleteness of the pre-trial investigation, which prevents the granting of permission to conduct covert activities, however, he is not obliged to do so and may limit himself to general wording, such as , «The prosecution did not provide sufficient objective data on the existence of grounds for an emergency (S)A».

In turn, the investigator and the prosecutor, even without taking measures to eliminate the shortcomings, have the right to re-submit a similar request, hoping that it will be considered by another investigating judge. This state of affairs indicates a certain formalism in the implementation of the function of judicial control and its lack of efficiency. As a result, the percentage of satisfied applications for permission to conduct an emergency (S)A is 80-90% (Supreme Anti-Corruption Court, 2021). The reason for this is that when deciding on such motions, the investigating judge first examines the petition, sometimes - the materials of the criminal proceedings and hears the arguments of the investigator, prosecutor on the circumstances of the criminal offense, evidence and other information relevant to clarify the circumstances of the crime or the identification of the perpetrators.

However, even such a simplified procedure of judicial control proceedings during the consideration of applications for permission to conduct an emergency (S)A is not regulated by law. The investigating judge is not obliged to investigate the materials of the criminal proceedings or to find out from the initiator of the petition or another person who took part in the consideration of the petition information about the reasons and grounds for granting permission to conduct an emergency. In turn, the investigator and prosecutor who participate in the consideration of the petition or prepare a procedural document to substantiate his arguments (analytical, report notes, reports), are not responsible for providing the investigating judge with inaccurate information and explanations or concealment of significant circumstances. importance for making a legitimate decision.

Thus, the investigating judge must «take on faith» any arguments of the prosecution or be guided by his own intuition, taking into account life experience and worldview, which, in our opinion, can not be considered a sufficiently effective basis for human and civil rights and freedoms, especially Considering that CI(S)A in criminal proceedings may be conducted not only against persons suspected of committing a crime, but also against witnesses, victims and other participants in criminal proceedings.

An additional factor that negatively affects the observance of human and civil rights and freedoms in the field of emergency (S)A is the lack of provisions in the CPC of Ukraine that would provide a legal assessment of the results of emergency (S)A. In essence, the function of the investigating judge is limited to deciding whether to grant or refuse a permit to conduct an emergency (S)A, and the consequences of this decision, actual implementation, results, their use in criminal proceedings or establishing the fact of unjustified restrictions on human rights and freedoms. citizen «remain behind the scenes» of the investigating judge, which in fact creates a sense of irresponsibility and impunity among law enforcement officers.

Conclusions

Recognition by the investigating judge of the status of a person who acts as a guarantor of human rights and freedoms during the pre-trial investigation, inability to ensure adversarial principles in the consideration of motions for emergency (R) D, indicates the urgent need for clearer regulation of such motions, and the responsibilities of the investigating judge in the performance of judicial control functions and, above all, in the field of judicial control over the legality of the CI(S)A.

Such measures may be:

1.Regulation of the procedure for consideration by investigative judges of applications for permission to conduct an emergency (S)A, exclusion of requirements for the obligation to consider the application within six hours.

2.Establishing the duty of the investigating judge to objectively and comprehensively investigate the grounds and grounds for conducting an emergency (S)A, giving him the right to request additional information from the investigator or prosecutor during the application, to give mandatory instructions to conduct certain investigative or procedural actions aimed at eliminating the incompleteness of the pre-trial investigation.

3.To envisage in the criminal procedure legislation requirements to warn the initiator of the petition or another representative of the prosecution party who takes part in the consideration of the petition for permission to conduct an emergency, responsibility for providing knowingly unreliable explanations (testimonies) to the investigating judge. providing inaccurate information in oral explanations (testimonies) or written documents.

4.Impose on the subjects authorized to submit a request for permission to conduct an emergency (S)A to inform the investigating judge (court) about the results of covert investigative (investigative) measures, permission for which they received, after their completion and in case of notification of the achievement of the purpose of their holding - additionally after the court has made a decision on the merits of the criminal proceedings.

The application of such measures can positively affect the objectivity of consideration of applications, reduce their number, bring law enforcement practice closer to meeting the requirements of the law on the exclusivity of the CI(S)A and contribute to the real protection of fundamental human and civil rights and freedoms.

References

Ability to uniquely identify the person in question for permission to conduct covert activities: generalization of the WACS. (2021). Advokat Post. https://advokatpost.com/mozhlyvist-unikalno-identyfikuvaty-osobu-shchodo-iakoi-stavytsia-pytannia-pro-nadannia-dozvolu-na-provedennia-nehlasnykh-zakhodiv-uzahalnennia-vaks/

Criminal Code of Ukraine https://zakon.rada.gov.ua/laws/show/2341-14#Text

Criminal Procedure Code of Ukraine https://zakon.rada.gov.ua/laws/show/4651-17#Text

Lisovy, O.O. (2021). Limits of judicial control during the NSDS. Related to the use of technical means. *Legal Scientific Electronic Journal, 3*, 323-328.

Mykhaylenko, V. (2020). Procedural algorithm of consideration by the investigating judge of the application for permission to conduct covert (investigative) search actions (part two). *LexInform* https://lexinform.com.ua/dumka-eksperta/protsesualnyj-algorytm-rozglyadu-slidchym-suddeyu-klopotannya-pro-dozvil-na-provedennya-neglasnyh-slidchyh-rozshukovyh-dij-chastyna-druga/

Peculiarities of WACS investigative judges' consideration of applications for permission to conduct NSDS and operational and investigative measures. (2021). *Advokat Post.* https://advokatpost.com/osoblyvosti-rozhliadu-slidchymy-suddiamy-vaks-klopotan-pro-nadannia-dozvolu-na-provedennia-nsrd-i-operatyvno-rozshukovykh-zakhodiv-uzahalnennia/

Supreme Anti-Corruption Court. (2021). Generalization of judicial practice "On consideration by investigative judges of the Supreme Anti-Corruption Court of petitions for permission to conduct covert investigative (search) actions and operational and investigative measures (for 2019, 2020)". https://hcac.court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/statistics/reviews/review_CIA_OSM.pdf

The case law of the European Court of Human Rights: Ukrainian aspect. (2018). The ECtHR has questioned the possibility of monitoring telecommunications. Access mode: https://www.echr.com.ua/yespl-postaviv-pid-sumniv-mozhlivist-monitoringu-telekomunikacij/

The case law of the European Court of Human Rights: Ukrainian aspect. (2021). The *case of Azer Ahmadov v. Azerbaijan*. https://www.echr.com.ua/translation/sprava-azer-axmadov-proti-azerbajdzhanu/

The need for covert measures in conjunction with the impossibility of obtaining information in another way: generalization of WACS. (2021). Advokat Post. https://advokatpost.com/neobkhidnist-provedennia-nehlasnykh-zakhodiv-u-sukupnosti-z-nemozhlyvistiu-otrymannia-informatsii-v-inshyj-sposib-uzahalnennia-vaks/?fbclid=IwAR07vGQYT61cLVzDm236XRkdG0yL-S43wWkW5eV-oj0S2cbkyS3qt7uIcss

The role of the investigative judge in criminal proceedings. (2020). https://www.irf.ua/wp-content/uploads/2020/05/rol_slsuddya_web-2.pdf?fbclid=iwar3r1_t9ii_8mumqkumorawbvapcrmyhihvfu3xrnnmoxfittz4ooyv7eli

Zhuk, A. (2020). Judicial control of observation of the suspect's rights, freedoms and legal interests in case of application maintenance as a precautionary measure. *Criminal Process, 11*. http://pgp-journal.kiev.ua/archive/2020/11/41.pdf

LEGAL CERTAINTY FOR THE INCREASE OF HGB TO RIGHT OF OWNERSHIP OF SHOPS/OFFICE HOUSES

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Abstract
Ownership of land and residential houses is a fundamental human need after clothing, food, education, and health. This research aims to analyze the urgency of regulating the requirements of Article 151 Letter (e) of the Ministerial Regulation ATR/BPN RI Number 18 of 2021 concerning Procedures for the Determination of Management Rights and Land Rights as an alternative requirement for upgrading Building Use Rights (HGB) for shop houses and office houses to Ownership Rights. The research method used is normative legal research with a statute approach. The results show that harmonizing the regulation of upgrading requirements between Article 151 Letter (e) of the Ministerial Regulation ATR/BPN RI Number 18 of 2021 and Law Number 28 of 2002 on Building Construction can be achieved through vertical and horizontal harmonization. Vertical harmonization is carried out by evaluating and revising conflicting regulations, while horizontal harmonization is conducted through mediation between institutions or ministries to align regulations related to upgrading HGB.

Keywords: Building use rights, building ownership rights, legal certainty.

1. Introduction

Law No. 5/1960 on Basic Agrarian Principles (UUPA) is the first milestone in the reform of the national land system in Indonesia, which is populist in nature and oriented towards equalizing land ownership and control. UUPA aims to end the dualism of land law that has prevailed since the colonial period, by prioritizing the principles of social justice. One important aspect of this reform is the restriction of excessive land tenure and the redistribution of land for the benefit of landless people, in accordance with Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (Herlindah et al., 2022, p. 226).

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Previous research by Kristiansen shows that the land redistribution policy through the UUPA has had a positive impact on reducing inequality in land ownership (Kristiansen & Sulistiawati, 2016, p. 213). However, some studies also indicate that there are challenges in implementing this policy, such as resistance from those who own large amounts of land and administrative problems that hinder the redistribution process (Dhiaulhaq & McCarthy, 2020, p. 42). In this context, this study fills the gap by analyzing a recent policy that allows for the upgrade of Hak Guna Bangunan (HGB) status to Hak Milik for shop houses and office houses, which is regulated in the Ministerial Regulation of ATR/BPN Number 18 of 2021.

The novelty of this scientific article lies in the in-depth analysis of the harmonization of the policy of increasing the status of HGB to Hak Milik with other laws and regulations, especially Law Number 28 of 2002 on Building. Previous studies have focused more on aspects of land redistribution and the elimination of legal dualism, while studies on the policy of increasing the status of building use rights specifically for shop houses and office houses are still limited.

The main research problem raised in this article is the potential legal uncertainty and conflict of norms arising from disharmony between Article 151 Letter (e) of Permen ATR/BPN Number 18 of 2021 and Law Number 28 of 2002 concerning Building. The provision that allows the use of a certificate from the village head or lurah as a substitute for Building Approval (PBG) is the main focus of this research, considering that it can lead to inconsistencies in the application of land policies. Law No. 28 of 2002 on Building (UUBG) requires every building to have a Building Approval (PBG). If not, the building can be demolished, and the owner faces administrative and criminal sanctions. Article 151 letter (e) of Permen ATR/BPN Number 18 of 2021 that allows village/lurah certificate to replace PBG creates a norm conflict with UUBG. In addition, this regulation does not refer to UUBG and PP No. 16/2021 as the legal basis, creating legal uncertainty and ignoring the principle of safety. It also eliminates potential state revenue from PBG retribution.

The hypothesis in this study is that the policy of increasing the status of HGB to Hak Milik regulated in Article 151 Letter (e) of Permen ATR/BPN Number 18 of 2021 has not been fully integrated with Law Number 28 of 2002 concerning Building, which results in legal uncertainty and potential norm conflicts. In addition, more flexible administrative requirements such as a certificate from the village head or lurah as a substitute for PBG can lead to inconsistencies in the implementation of land policies.

This research uses a normative juridical method with 2 (two) approaches: statute approach and conceptual approach. The sources of legal materials used include primary legal materials, such as regulations ranging from Laws to Ministerial Regulations that discuss Land Management and Rights, as well as secondary legal materials such as books, scientific journals, research reports, and other relevant legal sources. The legal materials collected were classified and screened to ensure there was no conflict between them. The analysis of legal materials was carried out using the content analysis technique, which facilitates the study of the content of the information obtained (Cheng et al., 2018, p. 104).

The purpose of writing this article is to analyze the urgency of regulating the requirements of Article 151 Letter (e) of Permen ATR / BPN Number 18 of 2021 as an alternative requirement in upgrading Building Use Rights for shop houses and office houses to Property Rights, and to evaluate the harmonization of the regulation of the upgrade requirements between Article 151 Letter (e) of Permen ATR / BPN Number 18 of 2021 with other laws and regulations. This research is expected to contribute to improving a fairer and more effective land policy in Indonesia.

2. The urgency of regulating Article 151 (e) of the 2021 ATR / BPN Ministerial Regulation in the Upgrade of HGB to Freehold

As the business development in the field of residential property and villa management is growing rapidly because it is influenced by the increase in population and population distribution every year, especially in areas that are centers of education, tourism and office centers such as Malang City, Malang Regency and Batu City. So that it is a special attraction for investors and entrepreneurs to develop their business more than just providing houses for permanent residence, but building and selling housing units that can function as a place to live as well as can function for business in the form of trade and / or office businesses. That way people who intend to build their own businesses, both trade and service businesses (such as offices), do not need to buy or rent special buildings located in trade areas, which in fact have very high rental values, and by themselves minimize the burden of public consumption every month.

This development is driven by business or commercial interests that make Rumah Toko (hereinafter referred to as Ruko) a form of investment (Bapedalitbang Probolinggo, 2016). Purwantias based on the results of her research stated that most of the Shophouses that were built were no longer just a necessity to increase the needs of life but to increase assets and personal assets (Khatimah, 2013, p. 273). Some of the reasons people prefer to build and sell Shophouses and Home Offices (hereinafter referred to as Rukan) are because it is one of the facilities that accommodate trade or office activities for the owner or other people in the form of leasing as a form of investment value. In addition, building a shophouse unit relatively does not require a large area of land and costs a lot like building a residential house. So that it provides benefits for the owner and encourages regional economic growth.

In principle, the purpose of building Shophouse and Rukan is not only to gain profit for those who utilize it, but also to provide satisfaction for those who live in the area and as a means of mulit-functional place of all activities in life and improve the quality of services to the community in creating business opportunities or doing business. It is also the reason why shophouse and shop-house buildings are growing rapidly without regard to their suitability to the spatial planning of the city and or their environmental impact on the surrounding community.

The terms Ruko and Rukan have not been officially regulated in the prevailing laws and regulations since the existence of the Basic Agrarian Law until now. Likewise, the status of the rights attached to the land on which the shop houses and or office houses are built can only be granted in the form of Building Use Rights and cannot be upgraded to Property Rights. For the owners of shophouses and office houses that have expired the period of granting the right to use the building or have reached 30 (thirty) years of control and utilization, they can apply for an extension, if they meet the requirements, it will be extended for a maximum period of 20 (twenty) years and if an extension has been granted and has expired, the building owner must apply for renewal on the condition that the land is still being used properly according to the circumstances and nature of the designation and the land is still in accordance with the policies of the Regional Spatial Plan applicable in the local area. The process and procedure is quite complicated and there are many requirements that must be met and must pay attention to the productive aspects of managing and using the building.

Government Regulation No. 40/1996, which previously regulated Hak Guna Bangunan (HGB), Hak Guna Usaha (HGU), and Hak Pakai (HP), has been replaced by Government Regulation No. 18/2021. This new regulation regulates Management Rights, Property Rights, Building Rights, Flat Units, and Land Registration. Article 86 paragraph (1) of this updated regulation stipulates that Hak Guna Bangunan is reserved exclusively for non-agricultural business activities. These activities include housing, office buildings, industrial facilities, warehouses, retail shops, hotels, apartment buildings, power plants, ports, and other uses involving construction. Therefore, any land use involving buildings such as residences, retail outlets, and office buildings must have a Hak Guna Bangunan (HGB). These rights can be granted directly to individual Indonesian citizens or legal entities established and operating in Indonesia, such as property development companies or real estate developers.

3. HGB as a type of property right

HGB is one type of property right, the difference is that HGB is obtained from a legal relationship between the right holder and the limited scope of the space above

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it, the space under the ground with the intention of being utilized (Republik Indonesia, 2021a) HGB is a type of property right, which is administratively granted by the Head of the Land Office individually or by granting rights collectively. Improvement of land rights is granted through a determination that includes granting, extending the period, and renewing rights, in accordance with the provisions of Article 1 point 11 of Permen ATR/BPN Number 18 of 2021. Included in the category of changes in rights is an increase in rights, which involves a determination by the government that land previously owned with the Right to Build or the Right to Use, at the request of the right holder, becomes state land and is then given back to the applicant with the Right of Ownership (Hak Milik) (Lubis & Lubis, 2008, p. 300). In practice, this change of right is carried out by crossing out the name of the old right and replacing it with the right of ownership, stating the legal basis that allows the increase in rights (Dalimunthe, 2000, p. 132).

The importance of a land right such as the Right to Build or the Right to Use must be upgraded to a property right is inseparable from strong protection efforts for the right holder and his descendants who become his heirs to be able to obtain and utilize the land for generations. This is because only property rights are attached as the strongest, fullest and hereditary rights. Land rights can be inherited from generation to generation (Gautama, 1991, p. 124), or as a right that not only lasts as long as the person is alive but can be inherited and inherited (Harsono, 2000, p. 166), or as a right that does not only last as long as the person is alive but can be inherited and inherited.

Land parcels that are eligible for land rights improvement for shophouses and shophouses are limited to land that has a Building Rights Title or Use Rights Title, either valid or expired. Especially for individual Indonesian citizens, these rights must have been owned for 30 years. In addition, the land must be used for shop houses or office houses, as stipulated in Article 149 paragraph (1) of Permen ATR/BPN Number 18 of 2021.

If the owner of the land has passed away, then the granting of his ownership rights can be directly transferred to his heirs and or reversed into the name of the heirs by completing the requirements or documents that show the applicant or individual who is given the right is an heir. In practice, to show that a person is an heir, it is sufficient to prove it with a Certificate of Heirs issued by the local Village Head and/or Lurah based on the Statement of Heirs made by the heirs and other supporting documents. If determined otherwise, it can also be proven by the Determination of the Expert from the judicial institution in accordance with the law that applies to him.

This is emphasized in the provisions of Article 150 paragraphs (1) and (2) of the Permen a quo which reads in full:

Article 150 (1) In the event that the right-holder or former right-holder as referred to in Article 149 dies, a Grant of Hak Milik may be given at the same time with a change of name to the heirs.

(2) The granting of a Hak Milik at the same time as a change of name to the heirs as referred to in paragraph (1) shall be subject to fees and/or taxes in accordance with the provisions of laws and regulations.

Referring to the above provisions, the subjects (right holders) who can be given the right to increase their land ownership rights are only individual Indonesian citizens and or their heirs if they have passed away as evidenced by a certificate of inheritance or determination of heirs from the court who own land with a right base in the form of Building Rights Title or Use Rights, both whose rights period has expired or is still running, can directly apply for an increase in rights if they have fulfilled the specified conditions, then the Head of the Land Office will issue a determination or decision letter granting ownership rights.

4. Requirements for granting rights to a plot of land to eligible parties through a determination of granting rights

The increase in rights for shop houses and office houses in Permen ATR/BPN Number 18 of 2021 is included in the category of «granting rights in general,» namely granting rights to a plot of land to eligible parties through a determination of granting rights. The requirements that must be met by the applicant to apply for an increase in Building Rights Title to Property Rights for shop houses or office houses are regulated in Article 151 of the Permen.

Applicants are required to provide their identity, or if applicable, the identity and power of attorney if another person is acting on their behalf. If the right holder has passed away, a death certificate and heir certificate must be provided. In addition, the relevant certificate of Hak Guna Bangunan or Hak Pakai must be attached, as well as proof of deposit of Fees for Acquisition of Land and Building Rights, especially if the application is submitted by the heirs. In addition, a Building Construction Permit or building construction approval, or a certificate from the village head/lurah, or a similar permit/confirmation letter is also required. Finally, the applicant must provide a statement letter stating that on the land applied for, a building has been erected that will be used as a residential house, shop house, or office house.

All of these requirements are cumulative, meaning that if one of the requirements is not met or is not in accordance with the provisions, the application cannot be processed further at the Land Office. Therefore, each requirement must be fulfilled and completed as a unit. The requirements include several types of documents, namely: documents proving the subject of the right (items a and b), documents proving the ownership of the land and building (item c), documents proving the tax obligation on the land and building (item d), documents on the building construction permit or the building standard (item e), and documents stating or acknowledging that the land concerned exists and will be used productively as a shophouse (item f).

The conditions mentioned above are important, especially the requirements regarding juridical data concerning the basis of rights, evidence of legal relations between the owner and the object as well as physical data concerning the location, place, area and boundaries and condition of the building as one aspect that must be considered for a building.

However, specifically the documents or requirements specified in Article 151 letter (e) are alternative documents because there are several documents, namely «Building Construction Permit/Building Approval or Village Head/Lurah Statement or similar Permit/Certificate». The applicant can choose which document to use in submitting an application for an increase in rights for shop houses and office houses. The conditions specified are alternative because there is the word «or» which shows a connecting word between other words or phrases, which in legal language the word «or» terminologically means telling to choose (Efendi & Susanti, 2020, p. 398). The improper use of the word «or» in laws and regulations can cause problems that not only bias or obscure the meaning of the article but can lead to conflicts of norms with norms in other laws and regulations.

The requirement to increase rights for shop houses and office houses in Article 151 letter (e) does not only contain obscurity of norm because it requires a «permit or similar certificate» which is not clear about the acquisition of the letter from the institution or agency and is not clearly described in the provision, so that it can simply be assessed that the permit or similar certificate referred to in the Article is not clear and has no value or importance (urgency) to be used as a condition in increasing land rights for shop houses and office houses, but only as a formality.

This contains a conflict of norms with several laws and regulations that have a higher position, namely contrary to the building law and its derivative regulations because it positions the licensing document in the form of Building Approval (PBG) as a document that does not seem to have an important meaning in increasing land rights, considering that the PBG licensing document can be replaced by another letter in the form of a Village Head / Village Head certificate or Permit Letter or similar certificate (Giltaij, 2022, p. 112).

The urgency of Building Approval as a condition that can be replaced with a Certificate of Village Head/Lurah or permit and the like:

To be able to determine the urgency value of PBG regulation as one of the requirements in applying for an increase in rights and or the urgency of PBG being

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established as an alternative licensing document that can be replaced with a certificate or permit and the like, it is necessary to thoroughly describe and analyze the laws and regulations governing PBG.

Since the enactment of the Job Creation Law, the nomenclature of Building Permit (IMB) which was previously regulated in Law Number 28 of 2002 on Building is changed to Building Approval (PBG). The change from IMB to PBG is not only limited to the name, but also reflects differences in meaning. According to Article 1 point 17 of Government Regulation Number 16 of 2021 on the Implementation of the Building Law, PBG is defined as «a license given to the owner of a Building to build new, change, expand, reduce, and or maintain the Building in accordance with the Building technical standards.» In contrast, IMB, based on Article 1 paragraph 6 of Government Regulation No. 36/2005 (which has been revoked by Government Regulation No. 16/2021), is «a license given to the owner of a Building to build new, change, expand, reduce, and or maintain the Building in accordance with applicable administrative requirements and technical requirements.» From the definition, it can be seen that PBG only requires the fulfillment of technical standards, while IMB requires the fulfillment of administrative and technical requirements. This shows that PBG is a form of simplification of licensing requirements to simplify the building licensing process, but still ensures public safety and security through consultation and inspection of technical standards.

When viewed in the perspective of Permen ATR / BPN Number 18 of 2021, the position and use of PBG documents as one in increasing rights is only as a supporting document not as the main document, because juridically the interests protected in increasing the rights referred to in Permen ATR / BPN Number 18 of 2021 are guaranteed clarity and certainty of rights or ownership status of land and buildings of shophouses and office houses which were previously owned with SHGB or SHP changing to SHM. So that it does not at all talk about the safety and feasibility of a building even though the object of increasing the rights is in the form of land and its buildings that function for shop houses and office houses, but only talks about the rights to land and buildings, therefore the applicant or owner even though he does not have a PBG document but is able to complete the documents of all other requirements in Article 151 letters a, b, c, d, and f, the PBG is simply replaced with a certificate.

Therefore, there are at least two reasons and objectives for the provisions of Article 151 letter (e) of Permen ATR / BPN Number 18 of 2021 to position the PBG licensing document as an alternative requirement, namely, first, only to make it easier for applicants or owners to apply for an increase in land rights for shop houses and office houses by simply requesting a certificate from the local village or kelurahan which is a fast process and minimal cost, while the PBG processing is quite difficult and takes a long time. Then the second is to allow owners or applicants who own Rukan and Ruko but do not yet have PBG to still be able to apply for an increase in land rights from SHGB or SHP to SHM by simply attaching a certificate from the village head or lurah or a permit and the like. However, it eliminates the source of local revenue from each PBG management retribution because with a certificate there is no need to pay tax and other fees for issuing PBG so that it has a negative impact on taxation policy.

In our opinion , the existence of PBG documents as a condition in increasing land rights is actually very important and in accordance with the legal objectives of the candy a quo itself, especially the requirements for increasing land rights for Rukan and Ruko which clearly have buildings standing on them, especially if the buildings are used for commercial businesses, so before being given the right base, it should be tested first whether the Rukan and Ruko buildings that have been utilized and or will be utilized have met the proper technical building standards or not. So that it does not only provide juridical certainty and legal force through the increase in rights but also guarantees that the building (object) that is given an increase in rights has met building standards as evidenced by the existence of PBG and Certificate of Functioning (SLF). Even in PBG, it also provides certainty regarding the clarity of the ownership status of the building through the Building Ownership Letter (SKBG) and provides legal certainty that the building that was erected has received approval from the local government in the form of a building (Republik Indonesia, 2021b).

It should be seen that this is the urgency of the existence of PBG in the requirements for increasing land rights for Rukan and Ruko. considering that buildings that function for residential homes as well as shops and offices usually do not only consist of 2 floors that are used continuously and within a certain period of time the security of the building will continue to decrease which can be a risk for residents and other communities.

5. Harmonization of Terms for Improving Building Rights Title (HGB) to Shophouse and Shophouse Property Rights: Permen ATR/BPN vs UUBG:

Ministerial Regulations are laws and regulations made based on the authority possessed by a Minister to organize government affairs. In addition, these regulations can be formed on the basis of orders from higher laws and regulations or through delegation of authority. The regulations are also tailored to the needs of related institutions or agencies.

In practice, ministerial regulations that have been formed often contain norms or content that contradict the norms of other laws and regulations, both higher and at the same level. This can trigger confusion or conflicts of authority between ministries or institutions, and potentially cause injustice to the community. In addition, this conflict of norms can hamper national and regional businesses and economic activities, both in the taxation and non-taxation sectors.

As previously described, there is content material in the Regulation of the Minister of Agrarian Affairs and Spatial Planning / National Land Agency Number 18 of 2021 concerning Procedures for Determining Management Rights and Land Rights, especially the content material formulated in the third part concerning the granting of property rights to land for residential houses, shop houses and office houses regulated in the provisions of Article 149 to Article 153 which contain conflicts or contradictions in legal norms with other laws and regulations. The provisions of these articles essentially regulate the increase in land rights, whose buildings function doubly in the form of business activities for shops (Ruko) and business activities for offices (Rukan) for individuals owning land and buildings with rights in the form of HGB and HP. The increase in land rights is from HGB and HP to Property Rights, so every community or individual who has land owned with Building Rights or Use Rights can apply for an increase in rights to the local land office.

The conflict or contradiction of legal norms relates to the requirements for increasing land rights for shop houses and office houses which are regulated in the provisions of Article 151 letter (e), namely «Building Building Approval (formerly IMB) or Village Head/ Lurah Certificate or Permit Letter or similar Letter». This requirement is alternative because it contains the conjunction «or» to indicate a choice between several things. In legal language, the word or is a conjunction or relates to alternatives or choices, or in other terminology, the word or means to tell to choose (Efendi & Susanti, 2020, p. 398). The improper use of the word or in laws and regulations can cause problems that not only bias the meaning of the article, but can also cause conflicts of norms with norms in other laws and regulations.

The requirement in the provisions of Article 151 letter (e) implies that people who apply for an increase in land rights from SHBG or SHP to SHM are not required to attach PBG/IMB licensing documents, in other words, positioning PBG licensing documents as documents that can be replaced with just a permit or certificate from the Kelurahan, thus contradicting the provisions of Article 253 paragraph (3) and paragraph (4), Article 262 of PP No. 16 of 2021 concerning the implementation of Law No. 28 of 2008 concerning Land Rights.

The existence of laws and regulations that contain norms that contradict the norms in other laws and regulations is actually inseparable from the influence and consequences of not fulfilling completely and comprehensively the entire series of stages of making laws and regulations, one of which is to harmonize the content material or substance formed with the content material of laws and regulations that are higher or at the relevant level.

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In essence, regulatory harmonization is closely related to the hierarchy of laws and regulations, as well as a consequence of the application of the theory of tiered legal norms (stufentheori) adopted in the Indonesian legislative system. There are layers of laws and regulations from fundamental norms that are general, abstract and basic to implementation, technical and autonomous (verordnung and autonoming satzung) (Astawa, 2008, p. 37). As a result of the structural or hierarchical position of legal norms, the validity of a lower legal norm is highly dependent on the one above it, which is the basis and source of the validity of the norm which must not deviate from the provisions above it, so it is important that harmonization efforts are made before promulgation. harmonization of laws and regulations to realize the creation of harmonious norms between laws and regulations.

According to Jimly Asshiddiqie, the hierarchy of legal norms serves to create order in the legal system. «This hierarchy ensures that every legislation has a clear foundation and does not contradict each other, thus creating legal certainty for the community,» said Prof. Jimly. In his view, non-compliance with the hierarchy of norms can result in harmful legal uncertainty (Jimly Asshiddiqie, 2021, p. 41). This regularity is important to guard against overlaps or contradictions between regulations of different levels, which can cause confusion and injustice in the application of the law.

Maria Farida Indrati, an expert in the field of legislation formation, stated that the process of regulatory harmonization is very important to maintain consistency in the legal system. Vertical and horizontal harmonization must be carried out to ensure that lower regulations are in accordance with higher regulations, and that regulations at the same level do not contradict each other. She emphasized the importance of ministerial regulations to be subject to the laws and government regulations that are the legal basis (Soeprapto, 2018, p. 63). This harmonization serves to ensure that all regulations can be applied effectively without causing conflict, and assists in the creation of a cohesive and efficient legal system.

6. Recommendations on harmonization of legislation

If a lower norm contradicts a higher norm, then the norm can be considered invalid. In legal practice, this means that Article 151 letter (e) of Permen ATR/BPN Number 18 of 2021 can be annulled or not recognized as valid because it does not comply with higher provisions. This non-compliance also has the potential to cause harm to the community, hamper economic activities, and reduce the effectiveness of land administration. This shows the importance of vertical harmonization in ensuring that lower legal norms are in accordance with higher norms.

There are two types of regulatory harmonization, according to doctrine and theory: vertical and horizontal. Horizontal harmonization is applied to regulations in the same hierarchy, while vertical harmonization is applied to laws and regulations in different hierarchies (Budoyo, 2014, p. 615). The idea of lex superiori derogat legi inferiori-that is, higher regulations replace lower regulations-should be considered by legislative drafters when conducting vertical harmonization. The drafter should use the principle of lex posteriori derogat legi priori when drafting horizontal harmonization, which states that newer regulations take precedence over older regulations (Shearmur, 2022, p. 612).

Harmonization of laws and regulations aims to ensure consistency and harmony between different levels of regulations. There are two types of harmonization: vertical and horizontal. Vertical harmonization is done to ensure that lower regulations are consistent with higher regulations in the legal hierarchy. In this case, vertical harmonization requires that Permen ATR/BPN Number 18 of 2021 must be consistent with UUBG and PP Number 16 of 2021. Horizontal harmonization is done to ensure that regulations at the same level do not contradict each other. In the context of Permen ATR/BPN, it is important to ensure that the provisions therein do not conflict with other ministerial regulations at the same level.

As is the case during the preparation and discussion of the draft ministerial regulation in the ministry of agrarian and spatial planning, it must first harmonize the substance of legal norms with higher laws and regulations that are directly or indirectly related to the content material in the ministerial regulation so that the norms or content material in the ministerial regulation and the norms and content material of the laws and regulations above it have regular harmony and connection. In other words, it can become a whole unit as a legal system framework that is harmonious and not contradictory in terms of norms and content material.

Against Article 151 letter (e) of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Number 18 of 2021 concerning Procedures for Determining Management Rights and Land Rights that contradict higher regulations, namely the provisions of Article 253 paragraph (3) and paragraph (4), Article 262 of Government Regulation No. 16 of 2021 concerning the implementation of Law No. 28 of 2008 concerning Building, in conjunction with Article 7, Article 8, Article 39, Article 40 paragraph (2) of Law No. 28 of 2008 concerning Building. 28 of 2008 concerning Building Buildings, then against the conflict of norms that arise there are two relevant assumptions, first, the existence of conflicts / conflicts of norms shows the inattention of the government in this case the Ministry of ATR / BPN to form laws and regulations, then second, during the preparation and discussion of the draft Ministerial regulation the norms in the regulation were not carefully and comprehensively synchronized and harmonized with other laws and regulations at the same level or higher.

This is shown by the fact that the preamble of the Minister of Agrarian Affairs and Spatial Planning Regulation No. 18 of 2021 on Procedures for Determining Management Rights and Land Rights does not cite or use laws and regulations governing Building Construction Approval (PMB), previously known as IMB, as a source of law. The Ministerial Regulation does not cite or use laws and regulations governing the Building Construction Approval (PMB) as a source of law, even though the requirements for increasing land rights for shophouses and shophouses stipulated in the Ministerial Regulation include a permit document in the form of PMB as one of the requirements. However, this document can be replaced with a certificate or authorization letter from the village head, but this is not sufficient to ensure environmental safety and end the source of state or local tax money. Meanwhile, the Building Construction Approval (PMBG), which is a licensing document, is positioned as an important document that must be owned by every person who owns or uses a building for residential or commercial purposes (residential houses and offices), as stated in Article 7, Article 8, Article 39, and Article 40 paragraph (2) of Law No. 28 of 2008 concerning Building Buildings in conjunction with Government Regulation No. 16 of 2021 concerning the implementation of Law No. 28 of 2008 concerning Building Buildings.

If the Ministry of Agrarian Affairs views the Building Approval (PBG) licensing document as a document that does not have an important role and or has no relevance (legal relationship) to the improvement of land rights, then it is appropriate that the Building Approval licensing document (formerly known as IMB) does not need to be included as one of the requirements in the application for improvement of land rights for shop houses and office houses, so that it is sufficient to require a certificate or permit from the local village or village head, so as not to cause ambiguity or confusion of norms.

If interpreted a contrario, the PBG licensing document as a requirement in the application for an increase in land rights for shop houses and office houses is very closely related and has an important role in addition to supporting the legal certainty of land rights for owners because land that can be upgraded to property rights is land originating from Building Rights and Use Rights, but also because it is related to the function of the building, namely the building is functioned doubly in the form of housing or residence as well as for business activities of shops and offices, so that every landowner who functions his building for commercial activities must have a licensing document in the form of PBG which is required by the building law and its implementing regulations.

Against the Regulation of the Minister of Agrarian Affairs and Spatial Planning / National Land Agency Number 18 of 2021 concerning Procedures for Determining Management Rights and Land Rights, especially Article 151 letter (e) which contains norms that conflict with building laws and regulations, an evaluation can be carried out, which then based on the results of the evaluation the evaluation team can provide

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recommendations for changes to the laws and regulations of the Ministry of ATR / BPN Law Bureau, as specified in Article 12 paragraph (3) which reads «the results of the evaluation of the laws and regulations referred to in paragraph (1) contain: suitability of the process of forming laws and regulations, or recommendations to determine changes/replacement or maintenance of laws and regulations.

Permen ATR/BPN Number 18 of 2021, especially related to Article 151 letter (e) which allows the use of «Village/Lurah Head Certificate or Permit Letter or similar Letter» as an alternative to Building Approval (PBG), requires comprehensive harmonization efforts to resolve existing norm conflicts. Vertical harmonization needs to be done to ensure conformity with higher regulations. The provisions of Article 151 letter (e) must be revised to be in accordance with Law Number 28 of 2002 on Building (UUBG) and Government Regulation Number 16 of 2021. This revision should emphasize that the PBG remains a mandatory document that cannot be replaced by a certificate from the village/lurah head. In-depth analysis and consultation with constitutional and statutory law experts should be conducted to ensure all provisions in this Permen do not conflict with higher regulations. In addition, horizontal harmonization is also required to ensure consistency with higher-level regulations. Coordination between the Ministry of Agrarian Affairs and Spatial Planning with the Ministry of Public Works and Housing and other relevant agencies should be improved. The establishment of a harmonization team consisting of representatives of various relevant ministries and agencies is essential to review, adjust, and ensure the alignment of laws and regulations.

The application of the principle of lex superior derogat legi inferiori and the principle of lex posterior derogat legi priori must be done to ensure that lower regulations do not conflict with higher ones and new regulations do not conflict with old ones. Improving the legislative process through public consultation and transparency of the process is also important. Involving the community, academics, and legal practitioners in the process of revising regulations through public consultations can ensure that regulations are drafted in accordance with the needs and realities on the ground. In addition, increasing legislative capacity through training and education for officials involved in the formation of laws and regulations as well as strengthening the capacity of legal bureaus in each ministry and institution is also needed. Thus, this vertical and horizontal harmonization will create legal certainty, improve administrative efficiency, and ensure that the policies implemented can run effectively without causing norm conflicts or losses to the community. The implementation of this harmonization requires commitment from various stakeholders and a transparent and inclusive legislative process.

7. Conclusions

The existence of PBG documents in Article 151 letter (e) of Permen ATR / BPN Number 18 of 2021 as an alternative requirement in increasing rights for Rukan and Ruko originating from Building Use Rights to Property Rights is first to provide an opportunity for Rukan and Ruko owners who do not have PBG documents to still be able to apply for an increase in rights through a village or kelurahan certificate but is weak in aspects of security, feasibility and reliability of buildings for residents and the surrounding environment and eliminates sources of regional retribution tax, The second is to provide convenience for the owner or applicant to apply for an increase in rights for Rukan and Ruko only with a village or kelurahan certificate, and the third is that the processing process and costs are cheaper than the costs, processes and timeframes for PBG processing are longer and larger but provide guarantees of security, feasibility and reliability of Rukan and Ruko buildings and eliminate regional retribution taxes.

Then, harmonization of the regulation of the improvement requirements between Article 151 Letter (e) of Permen ATR / BPN Number 18 of 2021 which contradicts the norms governing PBG in UUBG number 28 of 2002 can be carried out through vertical harmonization by examining and reviewing higher level regulatory material which is the juridical basis for the emergence of rules regarding the conditions for increasing rights for Rukan and Ruko in the candy a quo and examining and reviewing lower level regulatory material or implementing examining and reviewing higher level regulatory material, so as not to contradict technically and not cause differences in perception between the formulator of the rules and the technical implementer by examining and evaluating the content material of the regulations within the ministry periodically and outlined in recommendations to be submitted to the regulatory drafting official. Then harmonize horizontally with parallel regulations that place PBG as one of the improvement requirements in the candy in the form of building laws and government regulations down through mediation mechanisms between institutions or ministries.

References

Astawa, I. G. P. (2008). *Dinamika Hukum dan Ilmu Perundang-undangan di Indonesia*. PT. Alumni.

Bapedalitbang Probolinggo. (2016). Pertumbuhan Ruko (Rumah Toko) Di Kota Probolinggo. https://bappedalitbang.probolinggokota.go.id/2016/03/pertumbuhan-ruko-rumah-toko-di-kota-probolinggo/

Budoyo, S. (2014). Konsep Langkah Sistemik Harmonisasi Hukum Dalam Pembentukan Peraturan Perundang-Undangan. CIVIS: Jurnal Ilmiah Ilmu Sosial Dan Pendidikan Kewarganegaraan, 4(2), article number 2. https://doi.org/10.26877/civis.v4i2/Juli.613

Cheng, M., Edwards, D., Darcy, S., & Redfern, K. (2018). A tri-method approach to a review of adventure tourism literature: Bibliometric analysis, content analysis, and a quantitative systematic literature review. Journal of Hospitality & Tourism Research, 42(6), 997–1020. https://doi.org/10.1177/1096348016640588

Dalimunthe, C. (2000). Pelaksanaan Landreform di Indonesia dan Permasalahanya. Fakultas Hukum USU Press.

Dhiaulhaq, A., & McCarthy, J. F. (2020). Indigenous Rights and Agrarian Justice Framings in Forest Land Conflicts in Indonesia. The Asia Pacific Journal of Anthropology, 21(1), 34–54. https://doi.org/10.1080/14442213.2019.1670243

Efendi, A., & Susanti, D. O. (2020). Makna dan Problematika Penggunaan Term "Dan", "Atau", "Dan/Atau", "Kecuali", dan "Selain" dalam Undang-Undang. Jurnal Legislasi Indonesia, 17(4). https://repository.unej.ac.id/xmlui/handle/123456789/103174

Gautama, S. (1991). Tafsir Undang-Undang Pokok Agraria (Cetakan VIII). Aditya Bahkti.

Giltaij, J. (2022). Hermann Kantorowicz and Hans Kelsen: From debating legal sociology to constructing an international legal order. History of European Ideas, 48(1), 112–128. https://doi.org/10.1080/01916599.2021.1898438

Harsono, B. (Ed.). (2000). Hukum agraria Indonesia: Himpunan peraturan-peraturan hukum tanah (Cet. 14., ed. rev). Djambatan.

Herlindah, H., Kholish, M. A., & Galib, A. M. (2022). Suing the Oligarchy of Ownership and Control of Agricultural Land in Indonesia: A Maqashid Sharia Review of the Land of Agrarian Reform Objects (TORA) Exceeding the Maximum Boundary. Media Syari'ah : Wahana Kajian Hukum Islam Dan Pranata Sosial, 24(2), 222. https://doi.org/10.22373/jms.v24i2.12960

Jimly Asshiddiqie, S. (2021). Konstitusi dan konstitusionalisme Indonesia. Sinar Grafika.

Khatimah, H. (2013). Kajian Kesesuaian Pembangunan Ruko terhadap Kebutuhan Pasar di Kota Mataram. Jurnal Pembangunan Wilayah Dan Kota, 9(3), 271. https://doi.org/10.14710/pwk.v9i3.6539

Kristiansen, S., & Sulistiawati, L. (2016). Traditions, Land Rights, and Local Welfare Creation: Studies from Eastern Indonesia. Bulletin of Indonesian Economic Studies, 52(2), 209–227. https://doi.org/10.1080/00074918.2015.1129049

Lubis, M. Y., & Lubis, A. R. (2008). Hukum pendaftaran tanah (Cet. 1). Mandar Maju.

Republik Indonesia. (2021a). Pasal 1 Angka 3 Peraturan Menteri Agraria dan Tata Ruang/Badan Pertanahan Nasinal Nomor 18 Tahun 2021 tentang Tata Cara Penetapan

DOI: https://doi.org/10.54477/LH.25192353.2024.1.pp.25-36

Hak Pengelolaan dan Hak Atas Tanah. Berita Negara Republik Indonesia Tahun 2021 Nomor 1202.

Republik Indonesia. (2021b). Penjelasan Umum Peraturan Pemerintah Republik Indonesia Nomor 16 Tahun 2021 tentang Pelaksanaan Undang-Undang Nomor 28 Tahun 2008 tentang Bangunan Gedung. Berita Negara Republik Indonesia Nomor 26 Tahun 2021. Tambahan Lembaran Negara Republik Indonesia Nomor 6628 Tahun 2021.

Shearmur, J. (2022). Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy (1st ed.). Routledge. https://doi.org/10.4324/9781003320777

Soeprapto, M. F. I. (2018). Ilmu Perundang-undangan 2: Proses dan Teknik Penyusunan. PT Kanisius.

LEGAL REGULATION OF ONLINE PUBLICATIONS IN UKRAINE: CHALLENGES AND DEVELOPMENT PROSPECTS

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Abstract

This article is dedicated to examining the legal regulation of online publications in Ukraine. With the rapid advancement of digital technologies and the growing role of online media, there is a pressing need to enhance the legislative framework governing their activities. The paper analyses the normative and legal framework in Ukraine concerning the regulation of online publications, identifies the main challenges faced by Ukrainian online media, such as issues related to copyright protection, liability for the dissemination of false information, and the safeguarding of freedom of speech. Additionally, it explores the prospects for the development of legal regulation in this sphere, including potential legislative changes and the impact of international experience on shaping national norms.

Keywords: legal regulation; online publications; online journalism; normative-legal framework

1. Introduction

Online publications, as a part of the contemporary media landscape, have become an integral component of the rapidly evolving information society in Ukraine. The increase in the number of internet users and the impact of digital technologies on communication processes are significantly altering the traditional media landscape, creating new challenges for the legal regulation of this sector. Currently, nearly 4.1 billion people worldwide use the Internet. According to a Factum Group (2019) study conducted for the Internet Association of Ukraine for the third quarter of 2019, the number of internet users in Ukraine stands at 22.9 million, with this figure increasing daily by 4–5% (notably, this is the highest growth rate globally) (Kotsarev, 2006). Since the early 1990s, the Ukrainian segment of the global network has been developing. In December 1992, the domain UA was registered.

Today, the unprecedented opportunities of the internet—such as rapid access to information and exchange across space and time, as well as the capacity for instant publication of various texts beyond governmental control and censorship—have led to the emergence of online journalism and online publications as a new media variant. At present, online publications play a crucial role in disseminating information, providing society with broad access to current news and analysis. Concurrently, there is an increasing need for legal regulation of online media, necessitating a new interpretation of the emergence and key milestones of online journalism in Ukraine.

Moreover, the shift in Ukraine's socio-political direction heightens the focus on addressing previously unresolved aspects of the general issue of legal regulation and the development prospects of online journalism in Ukraine (Getman et al., 2016). Despite

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significant research into online journalism, the legal aspects of online publications remain underexplored, highlighting the relevance of this article.

Research indicates that societal needs for up-to-date information are effectively met by internet media resources. According to a study by the sociological company InMind commissioned by the international public organisation Internews, television media remain the primary source of media consumption in Ukraine. However, the audience of online media has significantly increased recently: 61% of respondents trust television, and 58% trust online media (the study was conducted from June to September 2019 and covered 4,000 respondents across 12 regions of Ukraine). This trend towards growing internet audience reach and the influence of online media is also evident in other countries.

Therefore, the socio-cultural significance of internet media, the need for systematic study in the context of their establishment and development in Ukraine, the need for scientific generalisation of operational specifics, and the relevance of analysing the dynamics of development and impact on Ukrainian society necessitate an examination of the main challenges faced by Ukrainian online publications concerning legal regulation, as well as the prospects for developing the normative-legal framework that governs their activities. Particular attention is given to the influence of international experience on shaping national norms regulating online media and potential legislative changes in Ukraine in this field.

The research aims to achieve the following objectives:

To identify and characterise the main normative-legal acts in Ukraine regulating online publications, including laws, subordinate legislation, and regulatory documents. To assess their adequacy to the current needs of the digital media space.

To identify the main legal challenges and issues faced by online publications in Ukraine.

To conduct a comparative analysis of the legal regulation of online publications in Ukraine with relevant international practices and standards. To identify successful practices from other countries that could be adapted to improve the national legal system.

To develop recommendations for improving the legal regulation of online publications in Ukraine. To propose potential legislative changes that could enhance the legal environment for the functioning of online media.

The scientific novelty of the article lies in its comprehensive analysis of the legal regulation of online publications in Ukraine, considering contemporary challenges and trends in the digital media environment. The work systematically addresses issues arising in the legal provision of Ukrainian online publications and proposes solutions based on comparative analysis with international practices. The research also contributes to understanding the prospects for developing the national normative-legal framework regulating online media, considering the growing role of digital media in society and their impact on Ukraine's information security.

2. Materials and Methods

To achieve the goal of the research and to solve the outlined tasks, a set of methods was used: theoretical: analysis of scientific sources to clarify the state of development of the problem; comparison, generalization in order to systematize the conceptual field of research; descriptive to find out the characteristic features of the Internet media; structural and component analysis for researching the specifics of Internet media within the communicative act; a method of comparative analysis to compare the dynamics of Ukrainian and foreign media; statistical: quantitative analysis to determine the frequency of use of Ukrainian and foreign online media by Ukrainians. The study involves a detailed analysis of the current legal framework of Ukraine, which regulates the activities of online publications. This block includes laws, by-laws, regulatory documents related to information activity, copyright, personal data protection, freedom of speech and responsibility for information dissemination.

Comparative legal analysis was used to compare the Ukrainian legal regulation of online publications with relevant international norms and practices. This makes it possible to identify the strengths and weaknesses of national legislation, as well as to suggest possible ways to improve it based on successful examples from other countries.

The historical-legal method is used to analyze the evolution of the legal regulation of online publications in Ukraine, which allows us to trace the development trends of this sphere from the beginning of the 1990s to the present day. This helps to better understand the reasons and prerequisites for the emergence of modern challenges.

The research was carried out on the basis of an integrated approach combining theoretical analysis, empirical data and comparative jurisprudence. This allows for a comprehensive assessment of the current state of legal regulation of online publications in Ukraine and to offer recommendations for its improvement.

3. Results and Discussion

3.1. Transformation of the media environment in Ukraine: Challenges and development of online publications

In the contemporary mass media landscape, there is an intense transformation of Ukrainian media, driven by the advancement of computer and IT technologies that are reshaping media activities in terms of content creation and dissemination, and enhancing their influence across all areas of life (Atamanova, 2014). The digitisation of information and communication processes has catalysed the emergence of the online network as not only a source of information but also a leading medium for the dissemination and professional communication of journalists.

Modern journalists face an expanded range of requirements. They are now expected to possess not only the knowledge and skills for preparing, processing, and disseminating information but also the proficiency to operate within the online environment. Consequently, the training of professional staff, especially skilled journalists for new convergent media, is both justified and necessary. These phenomena are primarily associated with the formation and development of an information-based internet society in Ukraine. This term is predominantly used to describe the current state of societal development, first mentioned in the works of Western scholars and actively used worldwide today (Gol, 2005).

Most researchers note that new types of media are emerging within the information space, influencing changes in the mass communication sector. It is believed that these changes profoundly impact the transformation of contemporary mass communications. The causes of transformations in the media system within the information society are often attributed to various information and communication processes.

Legislation frequently fails to differentiate between traditional media and online resources. Terms such as «internet media,» «online publications,» and «online media» are well-known in society. While these terms are generally understood in social norms, they lack stable definitions in scholarly discourse, and their usage varies significantly across different scientific sources. It is also worth noting that Ukrainian scholarly research on internet media (online publications, online mass media) does not provide a clear definition of these terms—they are used as self-evident concepts. All three terms are used synonymously by authors (Denisenko, 2005).

It should be noted that print media, since the advent of online versions, have copied content from traditional media into the online sphere. Therefore, this group of terms does not entirely reflect the characteristics of publications. For instance, a single page may combine an online newspaper with online television, online radio, and new formats that do not belong to any traditional media category. Thus, it would be prudent to introduce broader terms such as «internet media» and «online publications.»

Scholar O. Kolisnyk, having reviewed definitions provided by various researchers, offers his own definition of an online newspaper: «a type of network publication

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distributed in digital format via the Internet, characterised by a high level of interactivity, multimedia, and hypertextuality» (Kolisnyk, 2010).

However, it should be noted that this definition is too broad, encompassing virtually any modern internet resource. In contrast, scholar L. Horodenko proposed her own interpretation of the term «online publication»: it is «a type of mass communication medium that combines characteristics of all traditional media and has specific features—hypertext, multimedia, interactivity; its environment is the global network» (Horodenko, 2004).

According to this interpretation, the term «online publication» refers to media on the internet with a wide and varied set of characteristics compared to traditional media. Despite its age, this definition remains relevant as it fully describes the mentioned type of mass media. In Ukraine, there has been ongoing discussion at the legislative level for several years about regulating the operation of online media. It is expected that criteria may be established to distinguish online media from other types of electronic media at the document level (Kashuba, 2004).

In Ukrainian normative acts, terms such as «electronic publication» and «network electronic publication» are used, particularly in DSTU standards. Upon detailed examination, it becomes evident that terms like «electronic publication» or «network electronic publication,» as found in the State Standard of Ukraine 7157:2010, do not pertain to our case, as they are primarily used to refer to book publications (DSTU No ISO 7157:2010.., 2011).

Attempts to define criteria for distinguishing journalistic publications on the internet from other resources have been made by scholars O. Husak and M. Chabanenko. In turn, scholar M. Chabanenko does not consider «online publication» and «internet mass media» as synonyms.

Discussions on the definitions and characteristics of terms such as «internet media» or «online publications» continue in journalism studies and at the legislative level. Normative-legal acts in Ukraine do not provide characteristics or definitions of these terms, as media activity online is not regulated by legislation. However, the Independent Media Trade Union of Ukraine (IMTU) in 2012 highlighted the need for a register of internet media and approached leading editorial offices and media organisations with a proposal for voluntary inclusion in such a list. The IMTU provides a list of necessary criteria for internet media (The position of NMPU regarding the registration of Internet media, 2024):

1) A unique network address;

2) Founders of the internet media (full name, legal entity, and code in the Unified State Register of Enterprises and Organisations of Ukraine);

3) Contact details (address, phone numbers, and email addresses of the founders);

4) Owners of all types of rights to commercial names and trademarks of the internet media, including logos;

5) The full name of the authorised representative of the internet publication (individual or organisation) who has the right to enter into employment contracts and perform organisational and managerial duties for the media's employees.

Considering the above analysis and revision of criteria proposed by M. Chabanenko, we define «internet media» (also used synonymously as «internet mass media» and «online publications») as websites with the primary aim of regularly publishing news content. In other words, these are «mass media on the internet,» regardless of their legal status. For example, the website «Ukrainska Pravda» serves as an online publication with a dedicated discussion page and its primary goal is news publication.

Therefore, in the information society, new types of media are emerging, leading to significant changes in mass communication, often referred to as «internet media,» «online publications,» «online media,» or «internet mass media.» Historically, the first closely related terms were «online newspaper» and «internet newspaper.» There is no consensus among scholars regarding the definition of «internet media,» but they identify a set of criteria that allow for the identification of an online resource as media, including: virtual nature, openness, decentralisation, accessibility, speed, convenience, measurability, personalisation, interactivity, hypertextuality, multimedia, non-fixed volume, and relative cost-effectiveness. Journalists and media scholars highlight several advantages and disadvantages of internet media. The primary advantages of internet media include unique features such as hypertextuality and multimedia.

3.2. Analysis of Ukrainian legislation regulating online publications

Online publications in Ukraine are currently governed by a range of normative legal acts, which, while covering certain aspects of their operations, do not provide comprehensive legal regulation. The main normative legal acts regulating the activities of online publications include the Law of Ukraine on Information, the Law of Ukraine on Personal Data Protection, the Law of Ukraine on Copyright and Related Rights, as well as the Code of Ukraine on Administrative Offenses and the Criminal Code of Ukraine.

The Law of Ukraine on Information (Law of Ukraine No 2657-XII, 1992). This law defines the general principles of information activity, the rights and obligations of information agencies, and the rules for disseminating information. However, it does not provide specific regulation for online publications and often fails to address the particularities of the online environment.

The Law of Ukraine on Print Media (Press) in Ukraine (Law of Ukraine No 2782-XII, 1992). This law regulates issues related to print media, but its provisions are partially applicable to online publications. However, the specifics of online publications are often not considered, leading to gaps in legal regulation.

The Law of Ukraine on Personal Data Protection (Law of Ukraine No 2297-VI, 2010). This law regulates the processing of personal data, which is a crucial aspect of the activities of online publications that collect and process information about their users. The Law on Copyright and Related Rights provides protection for authors' rights, but its provisions often do not align with the rapid changes in digital technology.

The Law of Ukraine on Electronic Commerce (Law of Ukraine No 675-VIII, 2015). This law sets out the rules for electronic commerce, which partially concerns online publications, particularly regarding online advertising and commercial agreements.

The Law of Ukraine on Electronic Communications (Law of Ukraine No 1089-IX, 2024) regulates issues related to information security in IT systems, which is pertinent for ensuring the security of data processed by online publications and lays the foundation for the development of electronic communications in Ukraine. However, it does not address all the legal challenges faced by online media. The lack of clear mechanisms for regulating content, as well as insufficient coordination with other laws, creates a certain degree of legal uncertainty that could negatively impact the development and operation of online publications in Ukraine.

The Law of Ukraine on Information Agencies (2019) introduces new rules for providing information services, which include online resources. This law attempts to align the rules for providing services in the online environment with the requirements of traditional information legislation.

The Law of Ukraine on Media (Law of Ukraine No 2849-IX, 2023) represents one of the most significant updates, establishing new rules for media activities in Ukraine, including online publications. The first online media outlets registered at the end of June 2023, and there are currently around 200 online media outlets in the register (Dankova, 2023). For example, «Ukrainian Pravda», «Interfax», NV, IMI, «Zaborona», «Comments», Ukrinform, «Bukvy», «Glavred», and «Espreso» have been registered. Among media groups, the «Inter» group («Podrobnosti») and StarLight Media («Facts») registered their informational sites as separate online publications, as did Suspilne. The National Council for Television and Radio Broadcasting also registered «Detector Media». Currently, the regulator is registering a diverse range of entities: besides traditional websites, this includes video hosting platforms, Facebook and Instagram pages, YouTube and Telegram

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channels, TikTok, WhatsApp, and Viber accounts. However, criteria for classifying online resources as media are still to be defined, which is a task for the regulator and co-regulatory bodies in 2024. The law establishes new requirements for transparency, registration, content regulation, and combating misinformation.

The Law of Ukraine on the National Council of Ukraine for Television and Radio Broadcasting (Law of Ukraine No 2849-IX, 2023) designates the National Council of Ukraine for Television and Radio Broadcasting as the state body responsible for regulation and oversight in the field of broadcasting. Although the law primarily focuses on television and radio broadcasting, in the context of media convergence, this body may also impact the regulation of online publications, particularly those with audiovisual elements or that disseminate multimedia content. However, the legislative role of the National Council in relation to online media remains inadequately defined, creating a legal gap in regulating this segment. The law grants the National Council the authority to monitor compliance with broadcasting legislation and impose sanctions for violations. In the case of online publications, this issue remains unregulated, complicating the enforcement of accountability for the dissemination of inappropriate content in the online space.

The Law of Ukraine on the Procedure for Coverage of Activities of State Authorities and Local Self-Government Bodies in Ukraine by Media (Law of Ukraine No 539/97-VR, 2023) regulates the procedures and principles for covering the activities of state authorities and local self-government in the media, including both traditional media and online publications. The importance of this law lies in ensuring transparency and accessibility of information about the activities of government bodies. However, the lack of clear norms regarding online media may complicate their obligation to adhere to standards of objectivity and completeness in reporting. The law imposes a duty on the media to cover the activities of government bodies according to established standards, but its application to online publications is not always clearly defined. This may create a situation where online media, by avoiding these requirements, could provide poor-quality or biased information, which in turn affects the information environment in Ukraine. The law also provides for mechanisms of cooperation between government bodies and the media, including the organisation of press conferences, provision of information, and other forms of interaction. Online publications, as part of the modern media environment, should actively participate in these processes, although deficiencies in legislative regulation may limit their participation or place them at a disadvantage compared to traditional media.

The legislation regulating online publications, including the Law of Ukraine on Information and the Law of Ukraine on the Press, does not always meet the contemporary challenges of the information space. In particular, the absence of clear norms regulating the specifics of online media leads to legal gaps and ambiguities in practice.

The main issue is the lack of specialised legislation that fully addresses the activities of online publications. As noted, online publications are currently regulated mainly by norms developed for print media or general information activity rules, creating legal uncertainty and practical difficulties in applying the laws.

3.3. Challenges in the legal regulation of online publications in Ukraine

Online publications in Ukraine face a range of legal challenges and issues that complicate their operations and effective functioning, highlighting the need for the adaptation of the legal system to new conditions within the information environment.

In the context of the rapid advancement of digital technologies and the growing popularity of online resources, the issue of defining the legal status of online publications has become increasingly relevant. In Ukraine, the legislative framework governing media activities has largely remained unchanged since the era when the primary media were traditional forms such as television, radio, and print publications. However, with the emergence and development of online publications, there has arisen a pressing need to adapt legislation to these new realities. Many normative documents fail to clearly distinguish between traditional media and online resources, leading to various difficulties in legal regulation. In particular, the lack of a clear definition of «online publication» complicates the identification of such resources as legal entities, which has important legal consequences, including issues of copyright, content responsibility, and other aspects.

This legal uncertainty creates a legal vacuum that complicates the work of both online publications and regulatory bodies. For example, with traditional media, there is a clear understanding of the legal status, which allows for effective monitoring of compliance with legislation and protection of journalists' and editorial rights. In contrast, the absence of specialized norms for online publications leads to legal ambiguity that can be exploited both to evade responsibility for violations and to exert pressure on publications from state bodies or other entities.

The ambiguity of the «online publication» category also affects self-regulation within the industry. The lack of clear criteria to differentiate online publications from other online resources complicates the work of professional journalists' associations that aim to establish standards of professional ethics and ensure accountability for content quality.

Thus, insufficient legal clarity regarding the «online publication» category is a significant obstacle to effective regulation in this area. Addressing this issue requires updating the legislative framework by developing clear definitions and specific normative acts that account for the unique characteristics of online publications. This would not only contribute to legal clarity but also enhance the protection of the rights of both publications and their audiences.

One of the main problems is the absence of specialized legislation regulating online publications. Existing normative acts, such as the Law of Ukraine «On Information» and the Law of Ukraine «On Printed Mass Media (Press) in Ukraine,» were designed for traditional media and do not fully correspond to the specifics of the online environment. This results in legal uncertainties and gaps that complicate the operations of online publications.

Legislative contradictions create additional complications. For example, there are certain conflicts between the norms of the Law of Ukraine «On Information» and the Law of Ukraine «On Personal Data Protection.» These concerns the regulation of personal data processing and publication, where legal norms are not always harmonized, complicating legal application and potentially creating legal risks for online publications.

The rapid development of technologies such as artificial intelligence, blockchain, and content automation creates new legal challenges. Legislation often fails to keep pace with technological changes, complicating the regulation of aspects related to automated content creation, the use of algorithms for moderation, and other innovations. For example, issues related to content monetization, blogging, the use of artificial intelligence in journalism, and other innovations lack clear legal regulations.

In the current information environment, where social networks and digital platforms play a key role in content distribution, the regulation of such content becomes increasingly complex. Traditional media, which were previously the main channels for mass communication, are gradually losing their monopoly status, giving way to new forms of communication that provide faster access to a broad audience. However, despite their numerous advantages, these new forms also present new challenges for legislators.

One of the main issues in regulating content on digital platforms is the lack of clear mechanisms for controlling information disseminated through social networks and other digital media. Legislation designed with traditional media in mind does not always keep up with the development of new technologies. This leads to situations where harmful or false content can spread freely, causing harm to society and individuals.

This issue becomes particularly pertinent in the context of combating disinformation. Social networks and digital platforms, on one hand, are important tools for freedom of expression and democratizing access to information, but on the other hand, they are often used to spread false or manipulative information. The lack of clear legislative norms

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regulating responsibility for content disseminated through these platforms complicates the fight against such phenomena. Legislation aimed at combating disinformation can negatively impact freedom of speech and media if its application is excessive or unjustified. This creates risks for democratic principles and human rights.

Additionally, social networks and other online platforms provide users with the ability to create and distribute their own content, often without adherence to professional journalism standards. This results in an increasingly saturated information space with content of varying quality, making it difficult for users to distinguish reliable sources from unreliable ones. In an open information space and a pluralistic environment, platforms become venues for active social and political discussions, where readers can express their own positions and publish their materials (Afanasyeva (Gorska), 2014). For instance, «Ukrainska Pravda» (2024) notes that it does not interfere with the content of blogs and is not responsible for opinions expressed by authors on its portal. However, according to the practice of the European Court of Human Rights (Delphi AS v. Estonia, June 16, 2015 (Decision Council of Europe/European Court of Human Rights No 64569/09..., 2015)), the internet portal, despite its terms of public offer, is responsible for the content published on its pages. Proper editorial work with original content is constrained by professional ethical norms, violations of which can lead to reputational losses for online publications and even initiate legal proceedings against media.

Despite these challenges, effective regulation of content on digital platforms remains essential. Lack of control can lead to situations where harmful content, including violence, hate speech, or disinformation, spreads unchecked. In such conditions, there is a need to develop new legal mechanisms that ensure adequate content control while maintaining a balance between freedom of speech and public safety.

Legislators need to consider the specifics of digital platforms and social networks when developing new normative acts. This may include establishing clear criteria for content responsibility, developing effective moderation and control mechanisms, and creating conditions for self-regulation within the platforms themselves. An important aspect is also international cooperation, as the internet space has no borders, and content regulation requires coordinated global actions.

Ensuring a balance between content control and freedom of speech is indeed one of the key issues in the contemporary legal regulation of online publications. The «Gongadze Case» serves as a stark example of the tragic consequences that can arise from confrontations with power and criticism of state authorities. The murder of journalist Georgiy Gongadze in 2000 not only highlighted the dangers journalists can face but also exposed the weaknesses of the legal system in safeguarding their safety and freedom of speech.

This situation underscores that journalism, especially that which operates in the online space, must exercise maximum caution in presenting material. However, excessive control or self-censorship can threaten freedom of speech and undermine fundamental principles of journalism, such as objectivity and independence. It is important to remember that freedom of speech and the right to practice the profession are fundamental rights protected by international conventions and national legislation.

At the same time, objectivity in presenting material should be a priority for every journalist, regardless of political context or pressure from authorities. This entails careful fact-checking, presenting multiple viewpoints, and avoiding manipulation. It is also crucial for journalists to be able to perform their work without fear of reprisals or persecution, which, in turn, requires adequate legal protection and support from the state.

Thus, ensuring a balance between content control and freedom of speech not only contributes to the development of a democratic society but also guarantees that the voices of independent journalists are heard and their work protected. It is important that, in the process of regulating online publications, this balance remains a constant priority, ensuring both public safety and freedom of information. Ukraine currently lacks clear and comprehensive norms regarding content moderation and combating disinformation. Legislation does not provide effective mechanisms for verifying information accuracy and combating fake news, which creates additional challenges for online publications in maintaining information quality and accountability.

It is noteworthy that the question of actions violating intellectual property rights on the internet almost never arises. Today, the majority of Ukrainian publications have their own blog platforms where experts from various fields and «opinion leaders» post their contributions: economists, investment analysts, diplomats, public figures, party leaders, and writers. Due to the absence of effective and clear mechanisms for handling user-generated content, internet media encounter numerous unresolved issues, including problems with copyright adherence, content verification, and ethical aspects of editing user-generated material. The current state of legal culture in society and active anti-plagiarism campaigns have led to a clear understanding that posting copyrighted material on a website without the author's consent and/or without acknowledging their name constitutes a copyright violation.

However, another related question, which lacks unanimous resolution in various countries and does not have a clear, unequivocal answer in Ukraine, is who is responsible for third-party rights violations on the internet; who should rectify and compensate for the resulting damage. Ensuring compliance with the Law of Ukraine «On Personal Data Protection» is a critical task for online publications. Rules for processing and storing personal data are often complex and demanding, which can lead to legal risks in the event of violations.

Online publications face cybersecurity issues such as protection from cyberattacks and ensuring the security of information systems. Cybersecurity legislation in Ukraine is still underdeveloped, complicating the provision of reliable data and information resource protection.

Adapting Ukrainian legislation to international standards is an important task. Euro-integration processes require harmonization of media legislation with European norms, which can be challenging due to differences in legal systems and political contexts.

Online publications in Ukraine encounter various legal challenges, including deficiencies in legislation, difficulties adapting to new technologies, content regulation, personal data protection, cybersecurity, and bureaucratic obstacles. Overcoming these challenges requires comprehensive legislative changes, procedural improvements

3.4. Recommendations for improving the legal regulation of internet publications in Ukraine

Currently, Ukraine lacks a unified legal act that comprehensively regulates the activities of internet publications. Given the specifics of digital media and the rapid advancement of technology, there is a need to develop specialised legislation that addresses all aspects of internet publications. This should include clear definitions of terms. Establishing precise definitions for terms such as «internet publication», «online media», and «digital media» is essential to avoid legal ambiguity and uncertainty.

Regulation of content in internet publications remains problematic. At present, internet publications are primarily regulated by norms designed for print media or general information activity rules, leading to legal uncertainty and difficulties in the practical application of laws.

Disinformation and fake news pose significant challenges for internet media. Existing laws often fail to provide clear guidelines for combating disinformation, fake news, and other forms of false information. Mechanisms for controlling and holding accountable violations are still underdeveloped. Regulatory acts should detail rules for content moderation, responsibility for disinformation, and copyright infringements. Supporting independent organisations and platforms that engage in fact-checking and fighting disinformation is recommended.

Although Ukraine has a system for registering internet publications, it is not always clear or practical. The registration process often lacks clarity and may be associated with various bureaucratic hurdles. Establishing registration procedures for internet

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publications would ensure transparency of ownership and accountability.

One of the main issues for internet publications is the protection of copyright. To enhance legal protection for authors and content, it is advisable to review and update the provisions of the Law of Ukraine «On Copyright and Related Rights» to better align with the requirements of the digital environment.

Given that internet publications handle large volumes of personal data, it is crucial to ensure their proper protection. This requires updating the norms of the Law of Ukraine «On Protection of Personal Data» in accordance with the latest standards and digital environment requirements. Developing detailed guidelines for internet publications on the processing and storage of personal data is necessary.

In addition to state regulation, implementing self-regulation systems in the sphere of internet publications is important. Establishing professional associations for internet publications that set ethical standards and ensure compliance is essential.

Improving the legal regulation of internet publications in Ukraine requires a comprehensive approach that considers the specifics of the digital environment, technological developments, and changes in the information society. Developing specialised legislation, enhancing mechanisms for copyright and personal data protection, combating disinformation, implementing self-regulation systems, and increasing legal awareness are key areas that will help ensure the effective functioning of internet publications and support their development in the modern information environment.

Judicial practice in the legal regulation of internet publications is still underdeveloped. The lack of precedents and clear judicial decisions in this area creates legal uncertainty and may impact the quality of law enforcement.

Moreover, there is a need for specialised regulatory acts that comprehensively cover issues specific to internet publications, such as content moderation, responsibility for spreading false information, and technical aspects of managing internet resources. The absence of detailed legal regulation leads to legal uncertainty and creates difficulties for media companies in ensuring compliance with the law.

4. Conclusions

The analysis of current legislation and its application to internet publications reveals that there is currently no specialised legal regulation for this category of media. General norms governing traditional media do not fully address the specific needs and challenges of internet publications. Existing models of civil and commercial legal relations do not fully reflect the legal nature of the relationships established within the Internet. Therefore, applying classical legal regulatory mechanisms to these relationships is not feasible. The development of specialised legislation that takes into account the characteristics of digital media is necessary to establish clear legal frameworks that will help avoid legal conflicts and ensure effective oversight of online resources.

The growing popularity of internet publications is accompanied by the issue of disinformation and fake news. The current legal framework does not always effectively address this challenge. Amendments to the legislation are needed to regulate responsibility for disseminating false information. Supporting independent organisations engaged in fact-checking, as well as educational programmes for journalists, can aid in tackling this issue.

Implementing the aforementioned recommendations could significantly improve the legal regulation of internet publications in Ukraine. The development of specialised legislation, enhancement of copyright protection, combating disinformation, protection of personal data, self-regulation systems, and increasing legal awareness will create the necessary conditions for the stable and effective functioning of internet media. Successful implementation of these measures will contribute to the development of a healthy information environment in Ukraine, increase trust in media, and ensure the rights and freedoms of all participants in the media process.

References

Afanasyeva (Gorska), K. O. (2014). User content: area of responsibility of the media or the audience? *State and regions. Humanities, 1-2,* 74-79.

Atamanova, Yu. (2014). The protection of intellectual property right on the internet: the world experience and the national perspectives. *Law and Innovations, 3*(7), 7-14

Dankova, N. (2023). Who owns the registered online media. *Detector Media*. Retrieved from: https://detector.media/infospace/article/218974/2023-11-06-komu-nalezhat-zareiestrovani-onlayn-media/

Decision Council of Europe/European Court of Human Rights No *64569/09 "DELFI AS v. ESTONIA"*. (2015). https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163044%22]}

Denisenko, V. (2005). The future of mass media is based on multimedia: Why newspapers should not be afraid of the Internet. *Day. Kyiv*, *70*, 8-9.

Directive (EU) of the European Parliament and of the Council No 2016/680 "On the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data and repealing". (2016). https://eur-lex.europa.eu/legalcont ent/en/TXT/%3Furi%3DCELEX%253A32016L0680 &p rev=search

Directive (EU) of the European Parliament and of the Council No 2016/681 "On the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime". (2016). https://eur-lex.europa.eu/eli/dir/2016/681/oj

DSTU No ISO 7157:2010 "Electronic edition. Main types and source information". (2011). Retrieved from: https://ntb.pstu.edu/images/N/ rabotniku/DSTU_7157_2010.pdf

FactumGroup. (2019). Internet penetration in Ukraine: research methodology. https://inau.ua/sites/default/files/file/1910/dani_ustanovchyh_doslidzhen_iii_kvartal_2019_roku.pdf

Getman, A. P., Atamanova, Yu. E., & Milash, V. S. (2016). *Legal regulation of relations on the Internet*. Kharkiv: Pravo, 360 p.

Gol, D. (2005). *Online Journalism*. Kyiv: K.I.C, 344 p.

Horodenko, L. (2004). Typology of Internet publications. *Drukarstvo, 5*, 25–28.

Kashuba, G. (2004). Ukrainian Internet publications: communicative, linguistic and legal aspects. *Bulletin of Lviv University, 25*, 474–480.

Kolisnyk, O. (2010). Internet newspaper as a type of network publication. *Herald of the KhDAK, 31*, 138–144.

Kotsarev, O. O. (2006). Typology of Internet media. *Scholarly notes of the Tavrichesky National University named after YOU. Vernadsky. Ser. Philology, 5*, 321–324.

Law of Ukraine No 1089-IX "On electronic communications". (2024). https://zakon.rada.gov.ua/laws/show/1089-20#n2339

Law of Ukraine No 2297-VI "On protection of personal data". (2010). https://zakon.rada.gov.ua/laws/show/2297-17#Text

Law of Ukraine No 2657-XII "About information". (1992). https://zakon.rada.gov.ua/laws/show/2657-12#Text

Law of Ukraine No 2782-XII Закон України "About printed mass media (press) in Ukraine". (1992). https://zakon.rada.gov.ua/laws/show/2782-12#Text

Law of Ukraine No 2849-IX "About the National Council of Ukraine on Television and Radio Broadcasting" (2023). https://zakon.rada.gov.ua/laws/show/2849-20#n2352

Law of Ukraine No 539/97-BP "On the procedure for covering the activities of state authorities and local self-government bodies in Ukraine by means of mass information". (2023). Retrieved from: https://zakon.rada.gov.ua/laws/show/539/97-%D0%B2%D1%80#Text

Law of Ukraine No 675-VIII "On electronic commerce". (2015). Retrieved from: https://zakon.rada.gov.ua/laws/show/675-19#Text

The Directive on security of network and information systems (NIS Directive). (2020). Retrieved from: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)654198

The position of NMPU regarding the registration of Internet media. (2024). The official website of the NMPU. Retrieved from: http://nmpu.org.ua/2012/08/pozytsiya-nmpu-schodo/ rejestratsiji-internet

Ukrainian Pravda. (2024). Retrieved from: https://www.pravda.com.ua

ANALYSIS OF THE ARRANGEMENT OF INTELLECTUAL PROPERTY-BASED FINANCING SCHEMES WITH COPYRIGHT COLLATERAL FOR BANK FINANCIAL INSTITUTIONS

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Abstract

Intellectual property can be used as collateral for credit at banks through Government Regulation Number 24 of 2022 concerning Implementing Regulations of Law Number 24 of 2019 concerning the Creative Economy with fiduciary institutions. However, the assessment of intellectual property by the Appraisal Panel has not been explicitly regulated and the use of copyright as collateral is not supported by Financial Services Authority Regulation Number 40/POJK.03/2019 concerning Assessment of Commercial Bank Asset Quality. This is different from the United States which benefits from the Uniform Commercial Code (UCC). The aim of this research is to analyze the incompleteness of norms in Intellectual Property Based Financing Schemes with guarantees in the form of copyright. This type of research is normative with a statutory, conceptual and comparative approach. The research results show that copyright meets the requirements as credit collateral. Registration of copyright when pledged and commercialization are necessary to generate economic benefits. The form of copyright can be in the form of fiduciary guarantees for intellectual property and contracts in creative economic activities. The assessment panel provisions require Financial Services Authority Regulations regarding Appraisers in the field of intellectual property as well as the assessment and presentation of assessment reports in the context of intellectual property-based financing. Legal construction is carried out by including intellectual property as a deduction in the PPKA calculation in Article 45, the aim of which is to provide legal certainty for banks so that they comply with the precautionary principle.

Keywords: corporate transformation, legal implications, business practices

1. Introduction

The creative economy represents a transformative shift in the global economic structure,

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where economic growth is transitioning from a reliance on natural resources to a focus on human resources. According to Article 1 point 1 of Law Number 24 of 2019 on Creative Economy (referred to as the «Creative Economy Law»), the Creative Economy is defined as «the realization of added value from intellectual property derived from human creativity, which is based on cultural heritage, science, and/or technology.» This law reflects the increasing recognition of intellectual property (IP) as a valuable asset in the modern economy.

To support the growth of the creative economy, the Indonesian government has taken significant steps to allow IP products, including copyrights, from creative economy actors to be used as collateral for credit in both bank and non-bank financial institutions. This provision is specifically regulated in Government Regulation Number 24 of 2022 on the Implementation of the Creative Economy Law (hereinafter referred to as «PP Creative Economy»). Before the enactment of these regulations, intellectual property, particularly copyright, could already serve as debt collateral through fiduciary arrangements based on Article 16 of Law Number 28 of 2014 on Copyright (hereinafter referred to as the «Copyright Law»), which states that «Copyright can be used as an object of Fiduciary Guarantee.» Fiduciary guarantees themselves are governed by Law Number 42 of 1999 on Fiduciary Guarantee (the «Fiduciary Law»).

Despite these legal provisions, the practical application of intellectual property as collateral remains challenging. The requirements for accessing IP-based financing include having a creative economy business, a proposal for financing, engagement with IP related to creative economy products, and proof of IP registration or certification, as stated in Article 10 of PP Creative Economy. This requirement for IP registration differs from the Copyright Law, which operates on a declarative protection system where copyrights are granted automatically upon the work's creation or publication without needing prior registration, as per Article 64 paragraph (2) of the Copyright Law (Redaksi Harian Aceh Indonesia, 2023). This difference in regulatory approach creates barriers for creative economy actors seeking to use their copyrights as collateral, as the automatic and non-registrational nature of copyright contrasts with the formal requirements set by PP Creative Economy. Additionally, the banking sector has not yet fully integrated or accepted IP-based collateral due to the sector's traditional preference for conventional forms of collateral, such as land, buildings, and other tangible assets.

Article 8 letter c of the PP on Creative Economy requires that bank or non-bank The acceptance of IP-based collateral by financial institutions is further hampered by the fluctuating and volatile nature of IP's economic value, which is influenced by consumer trends and widespread IP violations. As per Article 8(c) of PP Creative Economy, financial institutions are required to conduct an assessment of IP collateral to determine its value. However, the regulations regarding this assessment process, including the roles of IP appraisers and appraisal panels, remain incomplete, contributing to the reluctance of banks to embrace IP as collateral.(CNN Indonesia, 2022).

Moreover, current regulations, such as the Regulation of the Financial Services Authority Number 40/POJK.03/2019 on Asset Quality Assessment of Commercial Banks, have not yet provided sufficient juridical support for the use of IP assets as collateral in banking, leaving financial institutions with limited guidance on managing the risks associated with such collateral. (Tampubolon, 2022). Given these regulatory and practical challenges, there is an urgent need to analyze the legal protection mechanisms available to financial institutions when accepting copyrights as collateral in IP-based financing schemes. This research focuses specifically on copyright as collateral due to its unique characteristics compared to other IP rights, particularly its non-registrational nature that complicates its integration into conventional financing models. Understanding and addressing these challenges is crucial for aligning IP-based collateral with the prudential principles mandated by the Banking Law, which emphasizes economic democracy and the principle of prudence in banking operations.

This research adopts a normative legal research approach, which is primarily aimed at providing juridical arguments regarding the incompleteness of norms, particularly within the Government Regulation on Creative Economy (PP Creative Economy), as it pertains to bank financial institutions receiving collateral in the form of copyrights under intellectual property-based financing schemes (Djulaeka & Rahayu, 2020, p. 20). Normative legal research is fundamentally concerned with examining legal principles, doctrines, and existing regulations to assess their adequacy and propose necessary improvements.

The study analyzes the legal framework established by the Creative Economy Law and its implementing regulations, focusing specifically on the PP Creative Economy. This analysis is contextualized by examining related legal provisions from other statutes, including the Copyright Law, Fiduciary Law, Banking Law, and the principles of prudential banking. The objective is to explore the legal protection available to bank financial institutions accepting IP-based collateral and to provide legal certainty for debtors within the creative economy who seek to obtain credit through these financing schemes.

Simanjuntak in his article entitled Overview of Legal Protection and Franchise Contracts (Rahardjo, 2000, p. 61) defines legal protection as all government efforts to ensure legal certainty and provide protection to its citizens so that their rights as citizens are not violated, and those who violate them will be subject to sanctions in accordance with applicable regulations (JDIH Kabupaten Sukoharjo, 2022).

Legal Norm Analysis: The research systematically examines legal norms found in relevant legislation to identify any gaps, inconsistencies, or ambiguities that affect the implementation of intellectual property-based financing schemes. The analysis focuses on the provisions within the Creative Economy Law and PP Creative Economy, assessing how these regulations interact with other relevant laws such as the Copyright Law, which governs the use of copyrights as collateral, and the Fiduciary Law, which outlines the framework for fiduciary guarantees.

Comparative Legal Analysis: To provide a comprehensive understanding, the research also incorporates a comparative analysis with banking regulations and principles, especially focusing on how other jurisdictions handle IP as collateral. This approach helps identify best practices and offers insights into potential regulatory reforms needed in Indonesia.

Juridical Argumentation: The study employs juridical argumentation to propose solutions to identified regulatory shortcomings. This involves constructing legal arguments based on established principles and precedents to support the need for clearer and more comprehensive regulations that safeguard the interests of financial institutions while also providing accessible credit opportunities for creative economy actors.

Integration with Prudential Banking Principles: The research links the analysis of IP-based collateral with the prudential principles outlined in the Banking Law, emphasizing the importance of aligning credit and guarantee agreements involving IP with the principles of prudence and economic democracy. This ensures that proposed regulatory enhancements do not compromise the stability and integrity of the banking sector.

2. Intellectual Property-Based Financing with Copyright Collateral for Banks under Creative Economy Law

The arrangement of intellectual property-based financing schemes with debt collateral in the form of copyright for bank financial institutions, as regulated by the Creative Economy Law and its implementing regulations, represents a critical shift towards recognizing intellectual property (IP) as valuable collateral in the creative economy sector. The creative economy is a transformative force that has redefined the global economic structure, shifting from traditional natural resource-based growth to a human resource-based model centered on creativity and intellectual capital (Howkins, 2001, p. 1) According to Article 1 point 1 of the Creative Economy Law, the creative economy is defined as «the realization of added value from intellectual property sourced from human creativity based on cultural heritage, science, and/or technology.» This definition underscores the importance of creativity, which, as described by Christ Bilton, involves

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two key aspects: (1) the introduction of new or different perspectives that deviate from conventional tools and methods, and (2) the necessity for individuals to have the freedom to express their talents and vision, contributing both management and psychological benefits to society (Galloway & Dunlop, 2007, p. 21).

The creative economy focuses on the creation of goods and services by relying on skills, talents, and creativity as intellectual capital (United Nation Conference on Trade and Development (UNCTAD), 2022) Generally, the characteristics of creative economy products are goods and services produced from intellectual activities that have creative value and have economic value (economic value/economic viability) and also a clear market share. The creative economy emphasizes the production of goods and services that are derived from intellectual activities, skills, and talents, forming the basis of intellectual capital (UNCTAD, 2022). These products typically have distinctive characteristics, including creative and economic value, as well as identifiable market share potential. The legal framework supporting the creative economy, particularly as outlined in the Creative Economy Law, aims to maximize the potential of creative economy actors, protect their creative endeavors, and elevate the creative economy's role in national development planning. despite the strategic importance of the creative economy, its development has been hindered by significant obstacles, particularly in accessing financial resources from banking institutions. One of the primary challenges is the lack of comprehensive and practical regulations that specifically address the use of intellectual property as collateral in lending. Although the Creative Economy Law and its implementing regulations provide a foundation, they fall short of offering clear guidelines and protections for financial institutions when accepting IP as collateral, especially copyrights.

Copyright is an exclusive right held by the creator or copyright holder over their intellectual work, including the right to reproduce, publish, and authorize the use of the work. In Indonesia, copyright is recognized as a form of property right protected by law, specifically under Law Number 28 of 2014 concerning Copyright. Within the legal context of property rights, copyright is classified as intangible property, which provides economic value and ownership rights to its holder (Darusman, 2016, p. 204) The protection of copyright is intended to encourage creativity and innovation, as well as to provide legal certainty for copyright holders in managing and utilizing their works.

Copyright as intangible property possesses characteristics that distinguish it from tangible properties, such as land or buildings. Copyright does not have a physical form but grants economic and moral rights to the holder for the use and exploitation of the work. Unlike tangible properties, which have a visible and touchable form with clear physical boundaries, such as land or buildings, copyright exists as an idea, expression, or creative result that is valued primarily for its economic and social benefits (Nainggolan & SH, 2023, p. 12) The intangible nature of copyright makes it more susceptible to infringement due to the ease of unauthorized duplication and distribution. However, as an intangible property, copyright still holds significant economic value and can be used as collateral or in other commercial transactions.

In Indonesia, copyright protection is comprehensively regulated under Law Number 28 of 2014 concerning Copyright. This law grants exclusive rights to creators or copyright holders over their intellectual works, including the rights to publish, reproduce, and authorize the use of their works. These rights encompass economic rights, which allow copyright holders to derive financial benefits from their works, as well as moral rights, which protect the integrity and reputation of the creator as the original owner of the work (Nugroho & Utama, 2020, p. 11). The law also provides legal protection against copyright infringement by imposing criminal and civil sanctions on violators. This protection aims to encourage innovation and creativity by providing legal certainty for creators and copyright holders.

Copyright can be used as collateral in the context of security law in Indonesia, particularly through fiduciary arrangements. Under Law Number 28 of 2014 concerning Copyright, it is stipulated that copyright can be used as an object of fiduciary guarantee, a type of security interest that provides priority rights to the creditor without transferring physical possession from the debtor to the creditor. The more detailed regulations on fiduciary are outlined in Law Number 42 of 1999 concerning Fiduciary Guarantee, which allows intangible property rights, such as copyright, to be used as collateral in credit agreements (Fadli et al., 2023, p. 482) The use of copyright as collateral opens opportunities for creative economy actors to access financing without resorting to tangible assets like land or buildings. However, the success of using copyright as fiduciary collateral also depends on the economic valuation of the copyright, often requiring an independent appraiser to objectively assess its economic value.

The use of copyright as collateral in banking or financing transactions faces several significant legal and practical challenges. First, one of the main challenges is the uncertainty in valuing the economic value of copyright. Copyright value is often volatile and difficult to predict due to factors such as market trends, the age of the work, and demand levels (Crews, 2020, p. 12). Second, the lack of understanding and readiness of financial institutions towards intangible assets like copyright often results in low acceptance of copyright as collateral. Additionally, existing regulations do not fully provide clear guidelines on procedures and legal protections in the execution of copyright collateral, which can increase risks for creditors. Third, the enforcement process against copyright infringement is often time-consuming and costly, making copyright less attractive as collateral compared to traditional security interests.

In the context of Indonesian law, copyright is recognized as a form of intangible property that grants exclusive rights to its creator over their intellectual creations. The principles of property law applied to copyright include the recognition of the economic value inherent in the work, where the copyright holder has the right to commercially exploit the work, such as through licensing, sale, or use as fiduciary collateral (Fitzpatrick & Compton, 2021, p. 23) The transfer of copyright can occur in various ways, including sale or licensing, allowing copyright to be a subject of business transactions. In the context of security law, copyright can be used as fiduciary collateral, where ownership rights remain with the copyright holder, but temporary control rights are granted to the creditor as security for debt repayment. This principle ensures that even when copyright is used as collateral, the copyright holder can continue to economically benefit from their work, as long as it does not violate the fiduciary agreement.

In security law, the use of copyright as fiduciary collateral provides flexibility for copyright owners to continue benefiting from their works. Fiduciary security allows ownership to remain with the copyright holder, while temporary control rights are granted to the creditor as security for debt repayment. This contrasts with traditional securities, such as land or vehicles, where physical control is often transferred to the creditor. With copyright, the transfer is temporary and limited only to the right to secure, not to alter or exploit the work without the permission of the copyright holder.

The transfer of copyright in the context of fiduciary security also introduces the concept of economic valuation of the work. This valuation is crucial because the value of copyright depends significantly on the popularity of the work, its age, and market demand. Therefore, the assessment of copyright as collateral often requires an independent third party to ensure that the set value is objective and reflects the actual market value. This is regulated within fiduciary regulations in Indonesia, which require the registration of fiduciary agreements with the Fiduciary Registration Office to ensure legal certainty over the given collateral.

Additionally, in the context of transfer of rights, licensing becomes an essential instrument for copyright holders. Licensing allows the owner to maintain copyright ownership while granting others the right to use the work for a specified period and purpose. This is one way in which copyright can generate sustainable income for its creator while still allowing the work to serve as fiduciary collateral without losing its fundamental rights.

However, the use of copyright as fiduciary collateral faces challenges. One major obstacle is the lack of understanding and acceptance by financial institutions of intangible assets like copyright. This often makes copyright less attractive as collateral compared to tangible assets such as real estate or vehicles. Therefore, education and capacity building of financial institutions are needed to better understand the economic

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potential of copyright as collateral. The main principle in security law is the protection of the rights of both creditors and copyright holders. Even when copyright is used as collateral, creditors do not have the right to exploit the work unless specifically agreed upon in the fiduciary agreement. Copyright holders retain the right to use and profit from their work as long as they fulfill their obligations to the creditor. This shows that fiduciary law in Indonesia strives to balance the protection of the economic rights of copyright holders with the interests of creditors providing financing.

3. The Use of Copyright as a Collateral Object in Intellectual Property-Based Financing

Copyright can be considered as collateral in intellectual property-based financing because it holds significant economic value. As a form of intellectual property, copyright grants its holder exclusive rights to commercially exploit the work, such as through sales, licensing, and distribution, all of which have the potential to generate sustainable income (Nguyen et al., 2020, p. 8830) In the context of financing, using copyright as collateral allows creative economy actors to access capital without resorting to tangible assets like property or vehicles. This offers a flexible alternative for creators and copyright holders, particularly in the creative industry where their primary assets are often intangible intellectual works. Additionally, the use of copyright as collateral reflects a broader recognition of the economic potential of intellectual property, which can drive innovation and economic growth in the creative sector.

The use of copyright as collateral provides various benefits for both copyright holders and financial institutions. For copyright holders, one of the primary advantages is improved access to financing. By using copyright as collateral, holders can secure capital without having to sacrifice physical assets or other properties that may not be available or needed for their business operations. This is particularly relevant for creative economy actors, whose most valuable assets are often intangible intellectual works (Haryono & Nugroho, 2023). Moreover, using copyright as collateral encourages asset diversification, allowing holders to optimize the economic value of their intellectual property while maintaining ownership and control over their work.

For financial institutions, accepting copyright as collateral opens opportunities to reach new market segments previously underserved, such as the creative and technology industries. It also allows financial institutions to expand their collateral portfolio beyond traditional assets like land and buildings, thus reducing portfolio concentration risk (Upadhyay, 2024, p. 12). Additionally, with professional valuation of copyrights, financial institutions can obtain more accurate information regarding the value of these intangible assets, which can be leveraged in financing decisions. The use of copyright as collateral also reflects the commitment of financial institutions to support innovation and growth in the creative economy sector.

Valuing copyright as collateral faces several significant challenges, particularly related to value uncertainty, market volatility, and difficulties in determining the appropriate collateral value. First, the value of copyright is often subjective and dependent on various factors, such as the popularity of the work, its age, demand level, and constantly changing industry trends (Haspada, 2024, p. 1037). These factors can lead to sharp fluctuations in value, posing risks for financial institutions that accept copyright as collateral. Additionally, there is no uniform standard for valuing copyrights, making the valuation process complex and sometimes inconsistent.

Market volatility is another major challenge. Copyrights are highly influenced by shifts in consumer trends, technological innovations, and intense market competition. For example, a work that is highly popular today may lose its value within a few years if trends change or if widespread copyright infringement occurs. This makes the value of copyrights unstable and difficult to predict, posing a major challenge in their use as collateral (Parr, 2018, p. 21). Furthermore, the difficulty in determining collateral value is compounded by the lack of professional appraisers with specialized expertise in valuing intangible assets like copyrights. This often results in significant discrepancies in value estimates, which can affect financing decisions.

In Indonesia, the use of copyright as collateral is supported by key regulations, including Law Number 28 of 2014 concerning Copyright and Law Number 42 of 1999 concerning Fiduciary Guarantee. The Copyright Law states that copyright can be used as a collateral object, allowing rights holders to leverage the economic value of their works as a financing tool. Meanwhile, the Fiduciary Law provides the legal framework for the use of intangible assets, including copyrights, as collateral. Through the fiduciary mechanism, ownership of the copyright remains with the rights holder, but temporary control rights can be granted to the creditor as security for debt (Mashdurohatun et al., 2023, p. 43)

In practice, to legitimize copyright as fiduciary collateral, the fiduciary agreement must be registered with the Fiduciary Registration Office to have binding legal force and provide protection to creditors. This process ensures that creditors have priority in the event of debtor default. Although these regulations provide a legal basis for the use of copyright as collateral, challenges remain, particularly regarding valuation and enforcement of creditor rights in cases of fiduciary breach. Therefore, there is a need for further development in regulatory and implementation aspects to enhance the acceptance and recognition of copyright as collateral within the financial system.

Empirical studies and real-world cases demonstrate the application of copyright as collateral, highlighting both opportunities and challenges in its implementation. One notable example is the case of music copyrights being used as collateral in the United States, where artists and music publishers have secured loans by pledging their music catalogs. This approach was successfully used by David Bowie in the 1990s when he issued «Bowie Bonds,» a type of asset-backed security collateralized by future royalties from his music. This innovative financial strategy allowed Bowie to raise $55 million without selling his copyrights, showcasing the potential of intellectual property as a financial asset (Singh, n.d., p. 175). Similar strategies have been employed in Indonesia, albeit on a smaller scale, where creative entrepreneurs have used their copyrighted works, such as films and literary works, as collateral to secure funding for future projects.

The economic impact of using copyrights as collateral is significant, with the potential to stimulate the growth of the creative economy by providing greater access to financing for creative entrepreneurs. By unlocking the economic value of intangible assets, such as copyrights, businesses can secure necessary funding without traditional physical collateral, which is often out of reach for many in the creative industries. This democratization of access to capital can empower creators to invest in new projects, scale their businesses, and generate more revenue, thus contributing to broader economic growth (Bae & Yoo, 2015, p. 102). Moreover, the ability to use copyrights as collateral can drive innovation by encouraging creators to produce new works, knowing that their intellectual property holds tangible financial value. This can lead to increased investment in creative sectors such as music, film, literature, and software development.

4. Analysis of Norm Incompleteness in Intellectual Property-Based Financing Schemes

Norm incompleteness refers to the gaps, ambiguities, or inadequacies in legal regulations that fail to comprehensively address specific situations, leaving stakeholders without clear guidance. In the context of intellectual property (IP)-based financing, norm incompleteness significantly impacts the effectiveness and reliability of using IP assets, such as copyrights, patents, and trademarks, as collateral in financial transactions. These gaps create uncertainty for both financial institutions and IP holders, hindering the broader adoption of IP-based financing schemes. Without clear regulations on the valuation, registration, and enforcement of IP collateral, financial institutions may be reluctant to accept these assets due to perceived risks, such as unpredictable market value and difficulty in securing creditor rights (Ghosh & Calboli, 2018, p. 221)

This regulatory shortfall affects the availability of credit for creative economy actors who often rely on intangible assets as their primary source of value. The lack of comprehensive norms leaves critical aspects such as IP valuation standards, fiduciary registration procedures, and enforcement mechanisms underdeveloped or inconsistent.

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As a result, IP holders face challenges in leveraging their assets to access capital, and financial institutions face increased legal and financial risks, limiting the potential for IP-based financing to drive innovation and economic growth (Rahmah, 2017, p. 91). Addressing norm incompleteness is crucial for creating a more robust legal framework that supports the integration of intellectual property into mainstream financial systems.

Incomplete regulations concerning the use of intellectual property (IP) as collateral present significant challenges, particularly in areas such as valuation standards, legal recognition, and technical guidelines. One of the critical gaps is the absence of standardized valuation methods for IP assets, which leads to inconsistent and unreliable assessments of collateral value. Without clear guidelines, financial institutions struggle to determine the accurate market value of IP, leading to a lack of confidence in accepting these assets as security for loans. Additionally, legal recognition of IP as a viable form of collateral is often limited or ambiguous, with many jurisdictions lacking clear legal provisions that define the enforceability of IP-based collateral agreements. This uncertainty can discourage lenders from engaging in IP-based financing due to the perceived legal and financial risks.

Furthermore, technical guidelines for registering and perfecting security interests in IP are often underdeveloped. For example, the lack of clear procedures for registering IP collateral in fiduciary registries or equivalent systems complicates the process of securing creditor rights. This regulatory ambiguity undermines the protection of lenders in the event of borrower default, making IP assets less attractive compared to traditional forms of collateral such as real estate or machinery. These regulatory shortcomings highlight the need for comprehensive reforms to establish clear, consistent, and enforceable norms that can support the growth of IP-based financing.

The incompleteness of regulations in IP-based financing schemes adversely affects both financial institutions and rights holders. For financial institutions, the lack of clear guidelines creates uncertainty and increases perceived risks, making them hesitant to accept IP as collateral. Without standardized valuation methods and legal recognition, banks and other lenders face challenges in assessing the creditworthiness of borrowers who offer IP as security. This uncertainty often results in higher transaction costs, increased due diligence requirements, and a reluctance to offer favorable loan terms, ultimately limiting access to finance for creative economy actors.

For rights holders, the incomplete regulatory framework restricts their ability to leverage IP assets to access financing. Many creators, artists, and inventors, whose primary assets are intangible, find themselves excluded from traditional financial markets due to the perceived high-risk nature of their collateral. This exclusion can stifle innovation and growth, as the lack of access to capital constrains their ability to invest in new projects, expand their businesses, and compete effectively. Furthermore, the absence of clear legal protections for IP collateral exposes rights holders to additional risks, including the possibility of losing control over their assets in poorly structured agreements

A notable example of norm incompleteness affecting IP-based financing in Indonesia can be seen in the limited application of copyrights as collateral in the banking sector. Despite regulatory frameworks such as the Copyright Law and Fiduciary Law, financial institutions remain hesitant to accept copyrights due to unclear valuation methods and enforcement mechanisms.

One high-profile case involved a local film producer who attempted to secure financing using his copyrighted films as collateral. The bank's refusal, citing concerns over the fluctuating value of the films and potential legal disputes over ownership rights, highlighted the regulatory gaps and the lack of clarity on how such assets should be valued and secured. This case illustrates the broader challenges faced by creative economy actors in Indonesia, where the regulatory framework does not yet fully support the use of IP as a reliable form of collateral, thereby limiting their access to necessary capital.

Several countries have taken proactive steps to address norm incompleteness in their regulations concerning the use of intellectual property (IP) as collateral, providing valuable lessons that can be compared to the situation in Indonesia. For instance, the United States has developed a relatively robust legal framework for IP collateralization, particularly through the Uniform Commercial Code (UCC). The UCC provides clear guidelines for the registration, valuation, and enforcement of security interests in IP, making it easier for financial institutions to accept IP as collateral. The presence of standardized valuation practices and established legal precedents enhances the confidence of lenders, reducing the perceived risks associated with IP-based financing (Lemley, 1999, p. 111)

In contrast, the European Union has also advanced IP collateral regulations, emphasizing harmonization across member states. The European Intellectual Property Office (EUIPO) has developed specific guidelines for valuing IP assets and assessing their viability as collateral. These efforts aim to standardize the process and mitigate the risks associated with divergent national regulations. The EU's approach demonstrates the importance of creating a consistent legal environment that facilitates cross-border IP transactions, which is crucial for fostering a thriving creative economy (Gill & Heller, 2024, p. 107169)

Compared to these jurisdictions, Indonesia's regulatory framework remains underdeveloped and lacks the specificity needed to support IP as collateral effectively. While Indonesia has enacted laws such as the Copyright Law and Fiduciary Law, these regulations fall short of providing clear procedures for IP valuation, registration, and enforcement. The absence of standardized guidelines and the lack of specialized institutions for IP appraisal create significant barriers for IP holders seeking to leverage their assets. This comparison highlights the urgent need for Indonesia to refine its legal framework to align with international best practices, thereby enhancing the utility of IP as a financial tool (Umamaheswari & Prabu, 2023)

The current regulatory framework in Indonesia exhibits significant shortcomings in adequately supporting the use of intellectual property as collateral, necessitating a thorough legal reform. One of the critical missing elements is the lack of standardized valuation protocols for IP assets, which creates inconsistencies and uncertainty in the lending process. Without clear criteria for determining the economic value of IP, lenders face substantial risks, as the value of these assets can be highly volatile and subjective. This absence of standardized valuation methods not only undermines the confidence of financial institutions but also limits the ability of IP holders to leverage their assets effectively.

Furthermore, Indonesia's current regulations do not adequately address the registration and enforcement of IP collateral. While fiduciary agreements can theoretically cover IP assets, the lack of specific procedures for registering these agreements and protecting creditor rights in the event of default creates legal ambiguities. The existing system also lacks robust enforcement mechanisms to protect creditors' interests, making it difficult for financial institutions to recover value from IP collateral in case of borrower insolvency. These gaps in the regulatory framework hinder the broader adoption of IP-based financing and limit the economic potential of the creative economy.

To address these issues, legal reforms should focus on establishing clear guidelines for the valuation, registration, and enforcement of IP collateral. This could involve developing a centralized IP valuation and registration system, similar to those in more developed markets, which would provide transparency and consistency. Additionally, reforms should include the creation of legal standards for the appraisal of IP, possibly through the establishment of accredited IP appraisers who specialize in assessing the value of intangible assets. Enhancing enforcement mechanisms, such as providing clearer pathways for the recovery of collateralized IP assets, would further strengthen the regulatory environment, thereby encouraging financial institutions to engage more confidently in IP-based lending.

5. Conclusions

The analysis of norm incompleteness in intellectual property (IP)-based financing schemes highlights significant regulatory gaps that hinder the broader adoption of IP as collateral in Indonesia. The absence of standardized valuation methods, ambiguous legal recognition, and insufficient guidelines for the registration and enforcement of IP collateral create substantial barriers for both financial institutions and IP holders. Compared to international practices in countries like the United States and the European Union, Indonesia's regulatory framework lacks the specificity and robustness needed to support IP-based financing effectively. This regulatory shortfall limits access to capital for creative economy actors and reduces the willingness of financial institutions to engage in IP-backed lending due to perceived risks and uncertainties.

The impact of these incomplete norms is far-reaching, affecting the financial viability of creative businesses and constraining the growth of Indonesia's creative economy. Without clear and consistent legal standards, IP assets remain underutilized as financial tools, stifling innovation and economic potential. Empirical cases in Indonesia illustrate the practical challenges faced by IP holders, including difficulties in valuation, registration, and securing creditor rights, which further exacerbate the reluctance of lenders to accept IP as collateral.

To address these issues, comprehensive legal reform is essential. This should include the development of standardized valuation protocols, clear registration procedures, and enhanced enforcement mechanisms to protect both creditors and rights holders. Establishing accredited IP appraisers and a centralized IP registry could provide the consistency and transparency needed to build confidence in the use of IP as collateral. By aligning its regulatory framework with international best practices, Indonesia can unlock the economic potential of its creative industries, facilitate greater access to finance, and foster a more dynamic and innovative economy. In conclusion, addressing the current regulatory gaps through targeted reforms will be crucial in transforming IP assets into viable financial instruments, supporting the growth of the creative sector, and enhancing the overall economic landscape in Indonesia.

References

Bae, S. H., & Yoo, K. (2015). Economic modeling of innovation in the creative industries and its implications. *Technological Forecasting and Social Change, 96*, 101–110. https://doi.org/10.1016/j.techfore.2015.02.010

CNN Indonesia. (2022). BCA Kaji Sertifikat HAKI Jadi Tambahan Jaminan *Kredit. ekonomi*. https://www.cnnindonesia.com/ekonomi/20220727193502-78-827057/bca-kaji-sertifikat-haki-jadi-tambahan-jaminan-kredit

Crews, K. D. (2020). *Copyright law for librarians and educators: Creative strategies and practical solutions*. American Library Association.

Darusman, Y. M. (2016). Kedudukan Serta Perlindungan Hukum Bagi Pemegang Hak Paten dalam Kerangka Hukum Nasional Indonesia dan Hukum Internasional. *Yustisia Jurnal Hukum, 5*(1). https://doi.org/10.20961/yustisia.v5i1.8732

Djulaeka, D., & Rahayu, D. (2020). *Buku Ajar: Metode Penelitian Hukum*. Scopindo Media Pustaka.

Fadli, M. A., Muhammad Pravest Hamidi, Farhan Azzahra Edwin, & Rayyan Gustio Kevin Aritonang. (2023). Let's Play Content as a Fiduciary Collateral under Indonesian Law: Potential Challenges. *Yuridika, 38*(3), 481–498. https://doi.org/10.20473/ydk.v38i3.44756

Fitzpatrick, D., & Compton, C. (2021). *Law, Property and Disasters: Adaptive Perspectives from the Global South*. Routledge.

Galloway, S., & Dunlop, S. (2007). A Critique of Definitions of the Cultural and Creative Industries in Public Policy. *International Journal of Cultural Policy, 13*(1), 17–31. https://doi.org/10.1080/10286630701201657

Ghosh, S., & Calboli, I. (2018). *Exhausting intellectual property rights: A comparative law and policy analysis*. Cambridge University Press.

Gill, A., & Heller, D. (2024). Leveraging intellectual property: The value of harmonized enforcement regimes. *Journal of Banking & Finance, 163*, 107169.

Haspada, D. (2024). Digital Tranformation and Copyright As Fiduciary Security: Legal Economic and Technological Perspective. J*ournal of Social and Economics Research, 6*(1), 1037–1054.

Howkins, J. (2001). T*he Creative Economy: How People Make Money from Ideas. Allen Lane.*

JDIH Kabupaten Sukoharjo. (2022). Pengertian Perlindungan Hukum dan Cara Memperolehnya. https://jdih.sukoharjokab.go.id/berita/detail/pengertian-perlindungan-hukum-dan-cara-memperolehnya

Lemley, M. A. (1999). Beyond preemption: The law and policy of intellectual property licensing. *Cal L. Rev., 87*, 111.

Mashdurohatun, A., Gunarto, H., & Susilo, A. B. (2023). Assessment of Intellectual Property Rights as Credit Collateral. In M. Umiyati, I. N. P. Budiartha, A. Saptomo, P. Verhezen, S. H. Idris, C. A. Soares, E. Lisdiyono, F. Santiago, E. Pratomo, A. Sudiro, & A. F. Susanto (Eds.), *Proceedings of the International Conference on "Changing of Law: Business Law, Local Wisdom and Tourism Industry" (ICCLB 2023)* (219–226). Atlantis Press SARL. https://doi.org/10.2991/978-2-38476-180-7_24

Nainggolan, D. B., & SH, M. (2023). *Pemberdayaan Hukum Hak Cipta dan Lembaga Manajemen Kolektif.* Penerbit Alumni.

Nguyen, N. P. T., Hoang, T. D., Tran, V. T., Vu, C. T., Siewe Fodjo, J. N., Colebunders, R., Dunne, M. P., & Vo, T. V. (2020). Preventive behavior of Vietnamese people in response to the COVID-19 pandemic. *PloS One, 15*(9), article number e0238830.

Nugroho, B. S. F., & Utama, M. A. R. (2020). Legal Protection of Copyright in the Globalization Era: A Comparison of Indonesia and China. *Journal of Law and Legal Reform, 1*(4). https://doi.org/10.15294/jllr.v1i4.39424

Parr, R. L. (2018). *Intellectual property: Valuation, exploitation, and infringement damages.* John Wiley & Sons.

Rahardjo, S. (2000). *Ilmu hukum.* Citra Aditya Bakti.

Rahmah, M. (2017). Promoting intellectual property securitization for financing creative industry in Indonesia: Challenges and solutions. Journal of Intellectual Property Rights, 22(2), 90–103.

Redaksi Harian Aceh Indonesia. (2023). HKI Masih Sulit Jadi Agunan Perbankan. https://www.harianaceh.co.id/2023/03/21/hki-masih-sulit-jadi-agunan-perbankan/

Singh, R. (2022). IP Financing: Intellectual Property Used as Security to Raise Funds. In *Intellectual Property Rights and Competition Law in India* (pp. 174–192). Routledge.

Tampubolon, S. (2022). *Kekayaan Intelektual sebagai Jaminan* Utang. kompas.id. https://www.kompas.id/baca/opini/2022/08/03/kekayaan-intelektual-sebagai-jaminan-utang

Umamaheswari, A., & Prabu, S. L. (2023). Intellectual Property-Global Perspective Advances and Challenges. G*lobal Perspective Advances and Challenges, 5*, 12-25.

United Nation Conference on Trade and Development (UNCTAD). (2022, October 7). Creative economy offers countries path to development, says new UNCTAD report | UNCTAD. https://unctad.org/news/creative-economy-offers-countries-path-development-says-new-unctad-report

Upadhyay, D. (2024). Unleashing India's inventive capital: Intellectual property as loan collateral. *Law and Financial Markets Review*, 1–13. https://doi.org/10.1080/17521440.2024.2372099

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THE JURIDICAL REVIEW OF THE TRANSFORMATION OF SINGLE-OWNER CORPORATIONS INTO LIMITED LIABILITY PARTNERSHIPS: LEGAL IMPACTS AND BUSINESS PRACTICES

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Abstract

This study examines the transformation of single-owner corporations into limited liability partnerships within the context of Indonesian legal regulations, particularly following the implementation of the Job Creation Law and Ministry of Law and Human Rights Regulation No. 21 of 2021. The research aims to analyze the legal impacts and practical challenges encountered during the status change process. The research method used is normative, focusing on the analysis of legal documents and relevant regulations. The findings indicate that while the new regulations provide clearer legal foundations, various obstacles such as unclear technical guidelines and administrative barriers slow down the process. The conclusion highlights the need for regulatory improvements to facilitate more effective and efficient corporate status transitions.

Keywords: corporate transformation, legal implications, business practices

1. Introduction

The economy plays an important role in realizing the ultimate goal of the state, which is to provide welfare for society. In Indonesia, economic development plays a crucial role in improving the quality of life and achieving national prosperity. To support this goal, the government, as the highest authority, continues to seek various ways to improve economic performance, one of which is through regulatory changes. The state, through its legitimate government, can amend regulations and laws to create a conducive business climate, attract investment, and promote economic activities (Zhadira & Lukman, 2022, p. 17547). This approach is essential to ensure that Indonesia's economy continues to grow and adapt to global dynamics. A tangible example of the government's efforts to drive economic growth through regulatory reforms is the enactment of Law No. 6 of

2023 concerning the Ratification of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation. This law aims to simplify and integrate various regulatory frameworks, including those related to the establishment and operation of limited liability companies, which are the foundation of Indonesia's economy (Putri & Putra, 2022, p. 515).

Several previous studies have examined theimpact of regulatory changes on business development, particularly related to the establishment and transformation of business entities. For example, a study (Putra, 2020, p. 8) showed the positive impact of regulatory simplification on the growth of MSMEs. Meanwhile (Aji, 2022, p. 31) highlighted the challenges faced by single-owner corporations in Indonesia, particularly regarding legal uncertainties in the transformation into limited liability partnerships. However, existing literature often lacks a comprehensive discussion on the specific legal implications of the transition from single-owner corporations to limited liability partnerships, especially in the context of new regulations introduced by the Job Creation Law and its derivative regulations. The novelty of this research lies in its in-depth legal analysis of the transition process, highlighting both the regulatory framework and the practical challenges that arise.

The urgency of this research is driven by the increasing number of single-owner corporations seeking to transition into limited liability partnerships, encouraged by new legal opportunities brought by recent regulatory reforms. With government support for MSMEs through simplified business structures, there is an urgent need to understand the legal intricacies and potential challenges faced by these entities during structural transformation. This research is highly relevant given the increasing demands for legal compliance, corporate governance, and the role of notaries in validating the transition process. Furthermore, the legal community and policymakers need to address the gaps in existing regulations to ensure a smooth transition process that protects the rights of business owners and stakeholders.

This research focuses on the legal implications of changing the status of single-owner corporations to limited liability partnerships as regulated in Ministry of Law and Human Rights Regulation No. 21 of 2021. The main legal issues discussed include the adequacy and sufficiency of existing regulations, the role of notaries in the transition process, and challenges related to adjusting the company's articles of association, shareholder structure, and the legal standing of the transformed entity. Article 17 of the Ministry of Law and Human Rights Regulation No. 21 of 2021 is the main topic of this research because it regulates the procedure for changing the status of single-owner corporations to limited liability partnerships. Article 17 Paragraphs (2) and (3) stipulate that the status change must be based on a notarial deed and registered electronically. The requirement to use a notarial deed aims to provide formal legality and ensure that all changes occurring in the company's structure, such as amendments to the articles of association and the addition of shareholders, are recorded legitimately and can be legally accounted for. However, this provision also raises several issues, particularly related to the completeness of regulations guiding notaries and business actors regarding the correct procedures.

This study employs a normative legal research method, focusing on the analysis of relevant legal frameworks through the examination of regulatory documents, legal literature, and pertinent court decisions to provide a comprehensive understanding of the legal landscape governing the transformation of single-owner corporations. The research involves a doctrinal approach to assess the adequacy and effectiveness of existing laws and regulations. Data collection includes a detailed review of statutory provisions, legal commentaries, and official legal sources, aiming to critically evaluate the legal norms and principles that shape the corporate status transition process.

2. Regulatory Analysis of Article 17 Paragraph 3 of Permenkumham No. 21 of 2021

Article 17 Paragraph 3 of the Regulation of the Minister of Law and Human Rights (Permenkumham) No. 21 of 2021 concerning the Requirements and Procedures for the Registration of Establishment, Amendment, and Dissolution of Limited Liability Legal Entities regulates the process of changing the status of a single-owner corporation into

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a limited liability company with a structured capital system. This regulation was issued as a follow-up to the Job Creation Law aimed at facilitating business actors, especially Micro, Small, and Medium Enterprises (MSMEs), in establishing and managing their business entities more flexibly. This change allows single-owner corporations, which were initially established by one person without the need for a notarial deed, to evolve into limited liability companies with a larger and more complex capital structure.

Article 17 Paragraph 3 specifically states that the transformation from a single-owner corporation into a limited liability partnership must be supported by a notarial deed and registered electronically. This provision emphasizes the importance of involving a notary in the transformation process to ensure that the change in corporate status is conducted in compliance with applicable law and can be legally accounted for. This aligns with the role of notaries as public officials responsible for creating authentic deeds that carry high evidentiary power (Aisyah, 2021, p. 43)

Within the regulatory context, Article 17 Paragraph 3 is crucial as it fills the legal void related to the procedures for changing the status of single-owner corporations, which were not previously detailed in earlier laws. Before the implementation of this regulation, single-owner corporations and limited liability companies were governed by separate, often rigid regulations, posing administrative and legal challenges for business actors seeking to change their status (Sugianto et al., 2021, p. 448). The issuance of Permenkumham No. 21 of 2021 aims to make this transformation process more effective and efficient while providing legal certainty for business actors.

Furthermore, Article 17 Paragraph 3 also serves as a form of legal protection for new shareholders who will join the transformed corporation. By requiring the involvement of a notary and electronic registration, this regulation ensures that all changes, including amendments to the articles of association and share transfers, are legally documented and can be audited if necessary. This step is crucial to prevent potential disputes among shareholders that may arise from inconsistencies in the status change process.

However, the implementation of Article 17 Paragraph 3 also presents its own challenges, particularly in terms of socialization and the readiness of small business actors to understand and meet more complex legal requirements. Studies show that there is still a gap between existing regulations and business actors' understanding of the procedures for changing corporate status (Agustanti et al., 2024, p. 1828). It is important for the government not only to regulate but also to provide adequate guidance and socialization so that these regulations can be implemented optimally and truly support national economic development.

Overall, Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 is a step forward in simplifying legal procedures for business actors; however, its success heavily relies on effective implementation in the field. Consistent oversight and support from relevant authorities are essential to ensure that this regulation not only remains a written norm but also becomes a practical guide that benefits all business actors in Indonesia.

Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 stipulates that the change in status from a single-owner corporation to a limited liability company must be accompanied by a notarial deed and electronic registration. This rule aims to ensure that the status change is conducted in accordance with applicable legal standards and provides legal protection for the parties involved. The completeness of the provisions in this article includes several key aspects, such as the procedure for changes, documentation requirements, and the role of the notary as the authorized party to create authentic deeds. The regulation is considered sufficiently comprehensive as it covers the administrative and legal processes that must be followed by single-owner corporations seeking to change their status. However, there are some gaps that require further attention to ensure more effective implementation and prevent legal uncertainties.

First, this regulation explicitly emphasizes the importance of a notarial deed in changing corporate status, which provides legal validity and certainty for the changes made. This is crucial because notarial deeds have strong legal proof, which not only protects the owners of the corporation but also the new shareholders joining after the status change (Wahyuni et al., 2022, p. 53) However, the regulation does not fully cover more detailed provisions on what should be included in the notarial deed, such as specifics regarding amendments to the articles of association or share transfers. This is important because the lack of such details can lead to differences in interpretation in practice, potentially causing disputes between shareholders or third parties.

Second, although Article 17 Paragraph 3 includes electronic registration as part of the transformation procedure, it does not fully explain the technical mechanisms and detailed steps that business actors must take during the registration process. The lack of technical guidance can complicate the process for business actors, especially those unfamiliar with electronic registration procedures or who do not fully understand the required legal standards. Studies indicate that unclear technical guidance often becomes a barrier for small business actors in meeting regulatory requirements, which can hinder their business growth (Widya et al., 2019, p. 233) Therefore, additional guidelines or training modules are needed to help business actors better understand this process in more detail.

Third, while Article 17 Paragraph 3 already covers the basic requirements for status changes, it falls short in terms of legal protection for third parties who may be affected by the status change. For example, in cases involving debt or financial obligations, there are no clear provisions on how these debts are managed or transferred. This could trigger legal issues in the future, especially if disputes arise between creditors and corporation owners (Permatasari & Hanim, 2017, p. 402). Additionally, the regulation does not specifically address the impact of status changes on existing contracts, which could be a critical point in the transformation process.

Overall, although Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 provides a fairly adequate framework for changing the status of single-owner corporations to limited liability companies, there are still several aspects that need to be supplemented. The government should consider adding more detailed implementing regulations to address existing legal gaps. This aims to ensure that the regulation serves not only as a normative guide but can also be effectively applied in practice without creating legal uncertainties for business actors and related parties.

Evaluation of Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 shows that although this regulation provides a legal basis for changing the status of single-owner corporations to limited liability companies, several aspects need improvement to more effectively support the status change process. The regulation attempts to provide a more structured mechanism by requiring the use of notarial deeds and electronic registration. The involvement of notaries ensures the legal validity of the transformation process, while electronic registration is designed to expedite and simplify administrative processes. However, some gaps in this regulation need further attention to fully support business actors in changing their corporate status.

One of the main shortcomings of this regulation is the lack of comprehensive guidance on the technical steps that business actors must follow. This lack of clarity can make it difficult for single-owner corporation owners without legal backgrounds to understand the procedures they need to follow. Although the use of notaries can help, additional costs and the need to understand electronic registration requirements often become obstacles, especially for small business actors. A study shows that many business actors are confused by the requirements and procedures for electronic registration, which are often not accompanied by clear guidance and adequate technical support from authorities (Jumantoro, 2024, p. 12). This indicates that current regulations still lack technical support and socialization for business actors.

Moreover, although a notarial deed is required in the status change process, the regulation does not provide specific provisions on the content of the deed, such as necessary amendments to the articles of association. For example, when a single-owner corporation changes into a limited liability company, amendments to the articles of association related to capital structure, rights and obligations of new shareholders, and reorganization of company organs are crucial to be detailed in the deed. The lack of such regulations can lead to conflicts between shareholders in the future, as there are no clear guidelines on how the new rights and obligations should be managed.

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In many cases, improper amendments to the articles of association can result in legal uncertainty and potentially trigger legal disputes between the parties involved.

The regulation also falls short in providing legal protection for third parties, such as creditors or business partners, who may be impacted by the corporate status change. There are no clear provisions on how the legal status of existing contracts and financial obligations should be managed when a status change occurs. In practice, this could pose significant risks, particularly if the new corporation fails to acknowledge obligations incurred by the previous corporation. Without clear legal protection for third parties, the status change process could become a loophole exploited to avoid financial or legal responsibilities from previous obligations.

Overall, while Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 provides an important legal foundation, the regulation still needs improvements to truly support the process of changing single-owner corporations into limited liability companies. Refinements are needed, especially in the areas of technical guidance, third-party protection, and details regarding notarial deed requirements. These steps will ensure that the status change process is not only administratively simple but also legally sound and capable of protecting all involved parties.

The uncertainty caused by the lack of technical guidance in Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 not only complicates the business actors but also poses legal risks for the parties involved. Without clear rules and detailed procedures, the process of changing corporate status could become inconsistent and difficult to legally justify. This can lead to different interpretations by business actors, notaries, and relevant authorities, ultimately creating significant legal uncertainty (Sani, 2020, p. 83). This procedural ambiguity can result in delays in the status change process, negatively affecting business operations and stakeholder confidence.

The importance of legal certainty in this regulation is also closely related to protecting the rights of third parties, such as creditors or business partners. Without clear guidance, third parties may lack certainty on how their rights and obligations will be protected following the change in corporate status. This could trigger legal disputes that harm all parties and disrupt business stability. To ensure that the goal of legal certainty is achieved, the government needs to improve this regulation by drafting more detailed and specific implementation guidelines. These guidelines should include clearer procedures for electronic registration, required notarial deed contents, and the steps that all parties involved in the corporate status change must follow.

This approach will not only reduce uncertainty but also increase business actors' confidence in the existing legal system, thereby supporting the creation of a more stable and conducive business environment (Lu & Wang, 2021, p. 101264). Regulatory refinement is essential to ensure that legal certainty can be practically implemented in every corporate status change process.

Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 regulates the main aspects related to changing the status of single-owner corporations into limited liability companies with a more complex capital structure. One important aspect regulated is the requirement to make this status change through a notarial deed. Involving a notary is a required step to ensure that the change process is carried out in compliance with the applicable legal rules, thereby providing certainty and legal protection for all parties involved. This notarial deed serves as an authentic document with high evidentiary power, which can be used as a legal basis in any business transaction and changes occurring in the corporation.

This article also regulates that status changes must be registered electronically through a system established by the government. Electronic registration aims to simplify administrative processes, speed up completion times, and provide transparency in the status change of the corporation. The electronic registration system is designed to record all changes occurring in the corporation, including amendments to the articles of association, changes in share ownership structure, and other relevant adjustments. This ensures that all changes made are officially recorded and can be verified by authorities, minimizing potential conflicts that could arise from undocumented changes.

Article 17 Paragraph 3 also includes provisions regarding the necessary adjustments to the corporation's articles of association during the status change process. These adjustments are crucial because changing the status from a single-owner corporation to a limited liability company involves changes in the capital structure, number of shareholders, and rights and obligations of each party. Thus, Article 17 Paragraph 3 aims to provide a clear legal framework to support the status change process, although its implementation still requires more detailed technical guidance to make it easier to understand and apply by business actors.

The implementation of Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 in the field faces several significant obstacles that hinder the smooth process of changing the status of single-owner corporations to limited liability companies. One of the main challenges is the lack of understanding among business actors about the procedures that must be followed, especially for small businesses unfamiliar with legal formalities and digital technology. The lack of technical guidance and insufficient socialization from the government on how to conduct electronic registration causes many business actors to feel confused and reluctant to undergo the status change process. This situation is exacerbated by limited access to notaries in certain areas, making the process of creating authentic deeds a significant challenge, particularly in regions far from city centers or remote areas (Ariansyah et al., 2021, p. 102219)

In addition, administrative obstacles such as slow bureaucracy and uneven digital infrastructure also become hurdles in implementing this regulation. The electronic registration system, which is supposed to simplify the process, often faces technical disruptions, such as system errors, difficulty accessing, or slow processing of registrations. These issues lead to delays in the issuance of required documents, thereby hindering the overall status change process. The lack of stable internet access in several regions of Indonesia is also a major hindering factor, making it difficult for business actors to optimally access the electronic registration platform (Da Silva et al., 2020, p. 326)

The absence of detailed technical guidelines regarding the creation of notarial deeds and procedures for amending the articles of association adds to the complexity of the situation. Notaries often have to interpret the requirements that are not explicitly regulated, which can result in inconsistencies in the practice and standards of deed creation. This creates a risk of inconsistency in the application of the law, which can affect the legal validity of the status changes made.

An illustrative case of the challenges in implementing Article 17 Paragraph 3 is the case of PT XYZ, a micro-enterprise that initially operated as a single-owner corporation in Semarang. When the business owner decided to change the business status to a limited liability company in hopes of attracting new investors and increasing capital, he faced various obstacles. The status change process, which should have been completed in a short time, was delayed for months due to technical issues with the electronic registration system. The registration website often experienced disruptions that caused repeated registration failures without clear instructions regarding the errors. This situation caused the business owner to experience confusion and frustration, and he had to incur additional costs for consulting IT and legal experts to resolve the issues.

Furthermore, in the creation of the notarial deed, the appointed notary faced difficulties in determining the details of the amendments to the articles of association that suited the needs of the new company because the regulations did not provide clear guidelines. The notary had to seek references from various sources and make their interpretations, leading to differences of opinion between the notary and the business owner regarding the changes that should be included in the deed. This situation not only slowed down the process but also increased the risk of legal disputes arising in the future, especially if a party felt disadvantaged due to changes that were not properly regulated. The challenge of accessing notaries in remote areas, where small businesses often have to travel long distances to handle the creation of authentic deeds, also adds to the financial burden. The additional costs for transportation and accommodation make this process a significant financial burden for small business actors, ultimately causing them to hesitate to proceed with the status change process.

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3. Impact of Regulation on the Process of Status Change of Corporations and the Role of Notaries

Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 has a significant direct impact on the process of changing the status of single-owner corporations to limited liability companies. This regulation aims to provide legal certainty through the involvement of notaries in the creation of authentic deeds and the implementation of an electronic registration system. The primary impact of this regulation is the increased formality in the status change process, which on the one hand strengthens the legal validity of the change, but on the other hand, adds administrative complexity that business actors must go through. The requirement to use a notarial deed ensures that all changes that occur are well documented and have strong legal force. This helps reduce the risk of disputes among shareholders in the future, as all changes to the capital structure and the rights and obligations of new shareholders must be documented in a legally valid deed.

This regulation also results in increased costs and time required to complete the status change. The process of creating a notarial deed not only requires costs but also necessitates that business actors understand more complex legal requirements, which can be a particular challenge for micro and small businesses that often have limited resources. Additionally, the requirement to perform electronic registration, although aimed at expediting administrative processes, often encounters technical difficulties in practice, such as system disruptions or a lack of clear information on registration procedures (Contractor et al., 2020, p. 101640). Disruptions in the electronic registration system can cause delays that disrupt the smoothness of the status change process and even affect day-to-day business operations.

Furthermore, the impact of this regulation on business actors can also be seen from the increased need for legal assistance, both from notaries and other legal consultants. Although the involvement of notaries aims to provide legal guarantees, business actors often require additional explanations to understand the implications of the status change on the company's structure and their new legal obligations. For example, changing the status from a single-owner corporation to a limited liability company alters corporate governance, shareholders' voting rights, and reporting obligations, as well as stricter legal compliance compared to before (Rosenbloom et al., 2021, p. 660). Although this regulation provides a more formal legal structure, its impact in the field is the increased need for education and guidance for business actors to ensure compliance with all applicable provisions.

Another important impact is the increased legal protection for third parties, such as creditors and business partners, because all changes made are officially recorded through notarial deeds and electronic registration. With clear records accessible to authorities, the risk of disputes related to changes in corporate status can be minimized. This regulation helps create transparency in changes to the capital structure and share ownership, which is a crucial basis for third parties to assess the legal and financial condition of the corporation in question. However, while this regulation enhances legal protection, without adequate technical guidance and effective socialization, implementation in the field still faces various challenges that need to be addressed to maximize the benefits of this regulation.

Overall, Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 has a positive impact by increasing legal certainty and protection for business actors and third parties, but also poses challenges in the form of additional costs, time, and complexity in the status change process. To maximize the positive impact and reduce obstacles, improvements are needed in terms of technical, administrative, and educational aspects for business actors so that the goals of this regulation can be achieved more effectively and efficiently.

Notaries play an important role in the change of status from a single-owner corporation to a limited liability company as regulated in Article 17 Paragraph 3 of Permenkumham No. 21 of 2021. The main role of the notary in this process is to ensure that the status change is carried out in accordance with applicable law through the creation of an authentic deed that serves as the legal basis for the change. The notarial deed provides legality for amendments to the articles of association, capital structure, shareholders' rights and obligations, as well as the new corporate governance. This function not only provides legal certainty for the company but also protects the rights of shareholders and third parties involved, such as creditors and business partners (Kara et al., 2021, p. 101833). The involvement of notaries in this process ensures that every change that occurs has a strong legal basis, thereby reducing the risk of future disputes.

Despite the vital role of notaries, there are several problems that often arise in practice, which can hinder the status change process. One of the main issues is the difference in interpretation regarding the requirements that must be included in the notarial deed. The absence of detailed technical guidance in the regulation often forces notaries to make their interpretations regarding the content of the deed, such as amendments to the articles of association and the management of share ownership. This can lead to inconsistencies in implementation in the field, where different notaries may create deeds with varying standards. Such inconsistencies can lead to legal problems in the future, especially if there are discrepancies between the deed created and the company's ongoing practices.

Notaries also often face administrative challenges, such as the lengthy process of document verification and data validation. In the change of corporate status, notaries must ensure that all required documents, such as shareholder approvals and the latest financial statements, are complete and meet legal requirements. However, in practice, this process is often hindered by incomplete documents submitted by the company owner, which slows down the deed creation process (Gunther Teubner, 2022, p. 48). The inability of business owners to provide complete and accurate documents not only delays the status change process but also risks rendering the deed legally flawed.

Another problem faced by notaries is the challenge of adapting to the electronic registration system, which is part of the status change procedure. Although electronic registration is intended to speed up and simplify the process, the system often experiences technical disruptions or is difficult to access. Notaries unfamiliar with digital technology may struggle to operate this system, leading to data input errors or delays in the registration of changes (Trinugroho et al., 2021, p. 105598). These obstacles indicate that in addition to their traditional role in deed creation, notaries also need to improve their digital literacy to adapt to technological developments in legal administration.

In addition to technical and administrative hurdles, notaries also face significant legal liability risks. If there is an error in the creation of a deed or if the deed made does not comply with legal provisions, the notary can be legally sued by the aggrieved parties. Errors in creating authentic deeds can have serious consequences, including the annulment of the deed, claims for compensation, or even the revocation of the notary's practice license. Therefore, notaries must perform their duties carefully and ensure that all legal procedures are followed correctly to avoid detrimental legal consequences.

The role of notaries in the status change of corporations is crucial but fraught with challenges that require attention and caution. To support this role, clearer regulations and comprehensive technical guidance are needed so that notaries can carry out their duties more effectively and consistently and are able to face existing administrative and legal challenges.

The regulation of Article 17 Paragraph 3 of Permenkumham No. 21 of 2021 plays a significant role in restructuring the process of changing the status of single-owner corporations to limited liability companies by providing a strong legal basis through notarial deeds and electronic registration. This regulation aims to enhance legal certainty, ensure transparency in status changes, and protect the rights of shareholders and third parties involved. By involving notaries, this regulation ensures that status changes are well documented and legally valid, ultimately preventing future legal disputes and providing assurance that the changes are carried out in accordance with the applicable provisions.

However, this regulation also introduces several challenges that affect the smoothness of the status change process. One negative impact felt by business actors

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is the increased costs and time required due to the obligation to use notary services and conduct electronic registration. Additionally, the lack of technical guidance and technical problems with the registration system often add to the complexity of the process, which can be a hindrance, especially for small businesses with limited access and resources. These obstacles cause the regulation, which should facilitate the status change process, to instead add administrative burdens for business actors.

Although this regulation has succeeded in enhancing the legality and structure of the status change process, its implementation in the field still requires improvement. Enhancements that can be made include the development of more comprehensive technical guidance, improvement of notary services, and the enhancement of the electronic registration system to be more reliable and user-friendly. With these steps, it is hoped that the regulation can function optimally in supporting the process of corporate status changes efficiently and fairly, in line with its original objectives.

4. Conclusions

Permenkumham No. 21 of 2021 plays a crucial role in the process of changing the status of single-owner corporations to limited liability companies by mandating the involvement of notaries and electronic registration as mandatory steps. This regulation strengthens legal certainty, transparency, and protection for shareholders and third parties involved in the status change. The presence of a notarial deed makes the status change more structured and legally documented, thereby reducing potential conflicts in the future.

However, the implementation of this regulation in the field still faces various obstacles that hinder the smooth process of change. The main challenges encountered include high costs and time due to the requirement of creating a notarial deed, unclear technical guidance, and frequent disruptions in the electronic registration system. These obstacles not only slow down the process but also add administrative burdens for business actors, especially small and medium enterprises with limited resources.

Overall, although this regulation has successfully provided a strong legal foundation for the status change of corporations, improvements are needed to address shortcomings in its implementation. More detailed technical guidelines, enhanced notary services, and improvements to a more reliable and accessible electronic registration system are essential. These steps will ensure that the regulation can function as intended—to facilitate and expedite the process of corporate status changes and provide the legal certainty expected by all parties involved.

References

Agustanti, R. D., Waluyo, B., Ariani, N., & Wirawan, R. (2024). Peningkatan perekonomian pelaku usaha melalui pendaftaran perseroan perorangan dalam mendukung sustainable development goals. *SELAPARANG: Jurnal Pengabdian Masyarakat Berkemajuan, 8*(2), 1828–1840. https://doi.org/10.31764/jpmb.v8i2.22580

Aisyah, C. (2021). Implikasi ketiadaan akta notaris pada pendirian, perubahan, dan pembubaran perseroan perorangan: (Implications of the absence of notary act on the establishment, amendment, and discontinuation of single owner corporation). *Majalah Hukum Nasional, 51*(1), 41–58. https://doi.org/10.33331/mhn.v51i1.140

Aji, W. P. (2022). Transplantasi Hukum Perseroan Perorangan Sebagai Perseroan *Terbatas Pasca Omnibus Law*. https://dspace.uii.ac.id/handle/123456789/37949

Ariansyah, K., Sirait, E. R. E., Nugroho, B. A., & Suryanegara, M. (2021). Drivers of and barriers to e-commerce adoption in Indonesia: Individuals' perspectives and the implications. T*elecommunications Policy, 45*(8), article number 102219. https://doi.org/10.1016/j.telpol.2021.102219

Contractor, F. J., Dangol, R., Nuruzzaman, N., & Raghunath, S. (2020). How do country regulations and business environment impact foreign direct investment (FDI) inflows? *International Business Review, 29*(2), article number 101640. https://doi.org/10.1016/j.ibusrev.2019.101640

Da Silva, V. L., Kovaleski, J. L., Pagani, R. N., Silva, J. D. M., & Corsi, A. (2020). Implementation of Industry 4.0 concept in companies: Empirical evidences. *International Journal of Computer Integrated Manufacturing, 33*(4), 325–342. https://doi.org/10.1080/0951192X.2019.1699258

Gunther Teubner. (2022). *Substantive and Reflexive Elements in Modern Law | 11 | Luhmann and La* (1st Edition). Routledge. https://www.taylorfrancis.com/chapters/edit/10.4324/9781003075103-11/substantive-reflexive-elements-modern-law-gunther-teubner

Jumantoro, T. R. P. (2024). Menilik Pro dan Kontra Pemanfaatan dan Penetapan Status Hukum Artificial Intelligence (AI) dalam Hukum Positif Indonesia. *Journal of Analytical Research, Statistics and Computation, 3*(1), Article number 1. https://doi.org/10.4590/jarsic.v3i1.28

Kara, A., Zhou, H., & Zhou, Y. (2021). Achieving the United Nations' sustainable development goals through financial inclusion: A systematic literature review of access to finance across the globe. *International Review of Financial Analysis, 77*, article number 101833. https://doi.org/10.1016/j.irfa.2021.101833

Lu, J., & Wang, J. (2021). Corporate governance, law, culture, environmental performance and CSR disclosure: A global perspective. *Journal of International Financial Markets, Institutions and Money, 70,* article number 101264. https://doi.org/10.1016/j.intfin.2020.101264

Permatasari, E., & Hanim, L. (2017). Peran Notaris dan Tanggung Jawab Notaris Terhadap Pelaksanaan Pendaftaran Badan Hukum Perseroan Terbatas Melalui Sistem Online. *Jurnal Akta, 4*(3), article number 401. https://doi.org/10.30659/akta.v4i3.1814

Putra, A. (2020). Penerapan Omnibus Law Dalam Upaya Reformasi Regulasi. J*urnal Legislasi Indonesia, 17*(1), 1–10.

Putri, B. A., & Putra, M. F. M. (2022). Peran Notaris dalam Pendirian Perseroan Terbatas Pasca Undang-undang Nomor 11 tahun 2020 Tentang Cipta Kerja. *PALAR (Pakuan Law Review), 8*(2), 515–526.

Rosenbloom, D. H., Kravchuk, R. S., & Clerkin, R. M. (2021). *Public Administration: Understanding Management, Politics, and Law in the Public Sector* (9th ed.). Routledge. https://doi.org/10.4324/9781003198116

Sani, H. B. A. (2020). State law and legal pluralism: Towards an appraisal. T*he Journal of Legal Pluralism and Unofficial Law, 52*(1), 82–109. https://doi.org/10.1080/07329113.2020.1727726

Sugianto, F., Tanaya, V., & Putri, V. (2021). Penilaian Efisiensi Ekonomi dalam Penyusunan Langkah Strategus Terhadap Regulasi. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional, 10*(3), 447. https://doi.org/10.33331/rechtsvinding.v10i3.694

Trinugroho, I., Law, S. H., Lee, W. C., Wiwoho, J., & Sergi, B. S. (2021). Effect of financial development on innovation: Roles of market institutions. *Economic Modelling, 103*, 105598. https://doi.org/10.1016/j.econmod.2021.105598

Wahyuni, R., Sari Dalimunthe, S. N. I., & Fakultas Hukum Universitas Pembangunan Nasional Vetaran Jakarta. (2022). Kedudukan Hukum Perjanjian di Dalam Pendirian Perseroan Terbatas Berbentuk Badan Usaha Mikro dan Kecil Berdasarkan Undang-undang Cipta Kerja. A*cta Diurnal Jurnal Ilmu Hukum Kenotariatan Dan Ke-PPAT-An, 6*(1), 51–64. https://doi.org/10.23920/acta.v6i1.1059

Widya, E., Prananingtyas, P., & Ispriyarso, B. (2019). Pelaksanaan penerbitan nomor induk berusaha melalui sistem online single submission (studi pendirian perseroan terbatas di kota semarang). *Notarius, 12*(1), 231–252. https://doi.org/10.14710/nts.v12i1.26901

Zhadira, G. R., & Lukman, F. A. (2022). Peran dan Tanggung Jawab Notaris Dalam Pendirian Perseroan Perorangan Pasca Berlakunya Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja. Syntax Literate ; *Jurnal Ilmiah Indonesia, 7*(11), 17547–17559. https://doi.org/10.36418/syntax-literate.v7i11.12178

Sylantieva, I. (2024). Features of international practice of interaction between political authority and civil society.
Legal Horizons, 20(1), 71-78. https://doi.org/10.54477/LH.25192353.2024.1.pp.71-78

FEATURES OF INTERNATIONAL PRACTICE OF INTERACTION BETWEEN POLITICAL AUTHORITY AND CIVIL SOCIETY

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Abstract

The article analyzes international legal acts on guaranteeing the participation of public institutions in the law-making process and the reform process. It has been found that the legislation of the vast majority of international countries provides for the creation of special units that function on a permanent basis. It was established that the effectiveness of international politics directly depends on the participation of civil society in the entire political process. It is theoretically justified that in most international countries, civil society institutions are partners in decision-making and implementation of public policies and are involved in all stages of its development. The main principles of the interaction of government bodies and public institutions are determined - openness of government, participation of public institutions in social processes, responsibility of state bodies to public institutions, coherence of actions. The main directions regarding the involvement of public institutions in the implementation of political processes, regulated by the practical recommendations «Standards and practices in the member states of the Council of Europe regarding public participation in decision-making», were considered. It is substantiated that effective mechanisms of interaction between public institutions and state bodies are: involving the public using information and communication technologies (electronic portals, consultation platforms); conducting consultations (expert seminars, public discussions, surveys, questionnaires, proposals, meetings). The importance of conducting consultations with the mandatory provision of feedback was noted. The stages of conducting online consultations with civil society, which are part of the e-government initiative of the Republic of Malta, as well as the international positive experience of interaction between the political authorities and society in terms of the social protection of the rights and freedoms of citizens, because the provision of state social policy to ensure the appropriate level of social protection are considered as one of the main factors of proper interaction between political power and civil society. The positive experience in the context of the researched Estonia, Croatia, France was analyzed, and suggestions were made for its implementation in domestic legislation.

Keywords: legal acts, interaction mechanisms, political power, civil society, information and communication technologies, implementation.

Intorduction

The relationship between political authority and civil society is a cornerstone of democratic governance, serving as a vital mechanism for ensuring accountability, transparency, and public participation in the law-making process. In contemporary global politics,

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the interaction between these two entities has evolved into a multifaceted partnership, with civil society increasingly recognized as a key player in shaping public policy and governance. This article delves into the features of international practice concerning the interaction between political authority and civil society, highlighting the importance of legal frameworks that facilitate this collaboration.

International legal instruments, such as treaties and conventions, play a critical role in establishing norms and standards for civil society's involvement in political processes. Many countries have adopted legislation that mandates the creation of specialized units dedicated to fostering public participation in decision-making. These units not only serve as conduits for civil society engagement but also ensure that the voices of various stakeholders are heard and considered in the formulation and implementation of public policies. As a result, the effectiveness of political authority is increasingly linked to the degree of civil society participation, reinforcing the notion that governance is most effective when it is inclusive and representative.

A theoretical framework underpins the interaction between political authorities and civil society, positing that civil society organizations (CSOs) should be regarded as partners rather than mere participants in the governance process. This shift in perspective recognizes the valuable insights and expertise that civil society can bring to policymaking, particularly in areas that directly affect citizens' lives. Consequently, a collaborative approach is essential for enhancing the legitimacy and effectiveness of political decisions, as it encourages a more holistic understanding of the issues at hand.

The principles that govern the interaction between government bodies and public institutions are paramount to fostering a productive relationship. Openness and transparency are essential, as they build trust between authorities and civil society. Moreover, ensuring accountability through mechanisms that require government bodies to report back to public institutions enhances this trust and reinforces the participatory nature of governance. Coherence in actions among all stakeholders is crucial for achieving common goals, particularly in addressing complex social issues that require a coordinated response.

The effectiveness of international politics directly depends on the participation of civil society in the entire political chain, namely from conception to implementation (Communication of the Commission - on the way to the direction of the culture of consultation and dialogue - general principles and minimum standards for conducting consultations with interested parties, 2002). Starting from the end of the 20th century, the main principles that most countries strive to implement are the openness of government, the participation of public institutions in public processes, the responsibility of state bodies to public institutions, the coherence of actions, and the effectiveness of activities (Lizakovska, 2020). For this purpose, appropriate institutions and public associations are being formed, and appropriate interaction mechanisms are being developed and implemented.

Among the main principles of interaction between authorities and the public are the following: transparency, impartiality, openness and accessibility, responsibility and efficiency, and independence (Participation of public institutions in the decision-making process, 2016). Evidently, in most international countries, civil society institutions are partners in the decision-making and implementation of public policies. They are involved in all stages of policy development.

The purpose of the article is to analyze the main legal acts that regulate activities in this direction, as well as the definition of the main principles, directions, standards, and mechanisms of interaction between political power and civil society.

Materials and Methods

The methodology employed in this study is designed to explore and analyze the international practices of interaction between political authority and civil society. To ensure a comprehensive understanding of the subject matter, a combination of qualitative research methods is applied. The methodology consists of several key steps: a review of international legal frameworks, case study analysis, and comparative analysis. These methods aim to provide a detailed examination of how different countries structure their interactions between political authority and civil society, as well as the outcomes of these interactions.

The first step in this research is a systematic review of existing international legal documents, treaties, and conventions that govern the interaction between political authority and civil society. This includes but is not limited to The Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), Council of Europe recommendations on civil society participation, The European Convention on Human Rights (ECHR).

The focus of the literature review is to identify key international legal norms and standards that frame the participation of civil society in political processes. Additionally, scholarly articles, policy papers, and reports from international organizations (e.g., the United Nations, the European Union, the Organization for Security and Co-operation in Europe) are examined to capture evolving trends and practices. Some issues of international legal regulation as well as effective mechanisms of interaction between public institutions and state authorities were examined by I. Dynnyk, A. Kostenko, S. Lizakovska, V. Roman, K. Sihalov, Yu. Saranchuk, P. Seleznev, O. Khomei, and others. At the same time, the ongoing reforms related to the European integration of Ukraine, as well as the fact that Ukraine is in a state of martial law, caused both new challenges in the context of the research topic and actualized the need for additional researches on international standards and effective mechanisms of interaction between the political authorities and civil society. This review establishes a theoretical foundation for analyzing the practical implementation of civil society participation in various political contexts.

Results

Making a historical excursion, it should be noted that the historical beginnings of the interaction of the authorities with the institutions of public society date back to 1957, when, based on the Treaties of Rome, the European Economic and Social Committee was created, which communicated with representatives of public institutions of the member states of the European Union. The International Covenant on Civil and Political Rights (1966) stipulates that citizens should be given the appropriate rights and opportunities to participate in public administration, the right to vote, and the right to access public service (Article 25) (International Covenant on Civil and Political Rights, 1966). Article 8 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1999) defines that everyone has the right to have effective access to participation in the government of his or her country and in the conduct of public affairs (Declaration on the Right and Duty of Individuals, Groups and Bodies of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1999). In 1998, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted, in 2002 the Fundamental Principles of the Status of Non-Governmental Organizations in Europe were adopted, and in 2009, the Lisbon Agreement (treaty on the reform of the European Union) was adopted, which envisages significant changes in the development of European countries, in particular, the activities of state authorities

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should be more transparent, and the process of «decision-making» should be open (The Lisbon Agreement, 2009).

Since 2000, the European Commission has initiated a reform to restore contact with civil society, which, as a result, will contribute to further increasing the efficiency of public administration, and the White Paper on European Governance defines mechanisms for strengthening the participation of civil society in the political process. The Convention for the Protection of Human Rights and Fundamental Freedoms is a key legal act in the direction of guaranteeing the participation of public institutions. In addition, the importance of the participation of public institutions is mentioned in the Recommendations CM/Rec of the Committee of Ministers to the member states on the participation of citizens in local public life (2001), Recommendations CM/Rec of the Committee of Ministers to the member states on the evaluation, audit, and monitoring of participation, as well as policies on participation at the local and regional levels (2009), etc.

It should be noted that the legislation of the vast majority of countries of the world provides for the creation of special units that function permanently (advisory bodies according to the areas of activity, coordinators). In addition, which is quite important, the legislation regulating the activities of government authorities defines specific requirements for ensuring the organization and holding of public consultations during the preparation of regulatory legal acts (Roman, 2016). Also, the practical recommendations of 2016 «Standards and Practices in the Member States of the Council of Europe Regarding Public Participation in Decision-Making» define the main directions for the involvement of public institutions in the implementation of political processes.

An effective condition for the interaction of public institutions and state bodies in different countries is the involvement of the public with the use of information and communication technologies. The most common mechanism is central electronic portals, which provide information, electronic services, and consultation platforms. For example, in Estonia, the functionality of electronic portals includes the publication of draft laws and amendments to them; the provision of proposals by registered users within the established deadline. It should be noted that there is no feedback in Estonia, however, all submitted proposals are analyzed by document developers and further covered in a report published on the website. After the consultation stage, as a rule, documents are submitted for consideration by the Ministries (Study of Estonia's participation in the implementation of the open method of coordination in social protection and social integration, 2002).

One of the important levels in the interaction of the analyzed bodies is the holding of consultations. The main mechanisms of consultations are expert seminars, public discussions, surveys, questionnaires, proposals, and meetings. Providing feedback is an important stage of consultation. Worthy of attention is the experience of conducting online consultations with civil society, which are part of the e-government initiative of the Republic of Malta. They are implemented in stages. During the first stage (open consultation), representatives of the public who have previously prepared relevant comments are invited. During the second stage (closed consultation), submitted proposals and comments are checked. During the third stage (feedback), a part of the materials is subject to publication as a result of changes. The fourth stage (summarizing the results of the consultations) is a report based on the results of the consultations, which is reviewed by civil society. It should be noted that comments can be submitted via an interactive form, e-mail, or phone. To improve efficiency in this direction, free basic courses for familiarizing citizens with information and communication technologies have been organized in this republic (Participation of public institutions in the decision-making process. Review of standards and practices in the member countries of the Council of Europe, 2016).

It should be noted that the involvement of civil society in consultations and legislative initiatives, as a rule, is carried out based on an open offer. For example, the Code of Practice on Consultation of the Republic of Croatia defines a clear list of criteria for representatives of public associations involved in consultations. Among the main ones are experience, previous contributions to the topic of discussion, and qualifications (Code of Croatia on consultation with the interested public in the process of legislation, other regulations and assets, 2009).

The experience of different countries on the issues of interaction between political power and society in the direction regarding social protection of the rights and freedoms of citizens is also worthy of attention because the provision of state social policy to ensure the proper level of social protection is one of the main factors of proper interaction between political power and civil society (Silantieva, 2023). Thus, a feature of French social policy is mandatory types of insurance - sickness, unemployment, and family insurance. O. Berezin, M. Bezpartochnyi, and L. Nikileva, in addition to insurance, also consider an effective system of family benefits and additional systems of social protection (especially in the area of pension and health insurance) as achievements of France in the studied context (Berezin et al., 2013).

In terms of applicability to domestic legislation, the findings suggest that integrating these international best practices could improve public engagement in the law-making process. Suggested actions include establishing permanent government units focused on civil engagement, increasing the use of ICTs for public consultations, and ensuring transparency in policy-making by institutionalizing feedback loops.

In conclusion, the study reinforces the notion that the partnership between political authorities and civil society is essential for effective governance. By adopting practices observed in countries like Estonia, Croatia, and France, domestic political institutions can foster greater civic involvement, leading to policies that better reflect the public interest and contribute to a more stable and equitable political environment. This integrative approach not only strengthens democratic governance but also serves as a valuable mechanism for protecting and promoting citizens' rights within the policy framework.

Discussion

This analysis demonstrates that international practices of interaction between political authority and civil society emphasize inclusivity, transparency, and active public involvement. By examining the frameworks in countries such as Estonia, Croatia, France, and Malta, we can identify several principles and practices that promote an effective partnership between the state and civil institutions.

One of the primary findings is the importance of creating permanent structures within government institutions to engage civil society consistently. For example, in Malta's e-government initiative, specialized units facilitate regular consultations with citizens through digital platforms, making the process of public involvement streamlined and accessible. Similarly, Estonia's advanced digital democracy initiatives have led to a proactive civil engagement culture where public input is encouraged at all stages of policy-making. These models show that permanent units dedicated to public involvement can ensure that civil society has a continuous voice in governance, which in turn improves policy legitimacy and public trust.

ICTs, especially in the form of online portals and consultation platforms, have proven to be essential tools for broadening public participation. By lowering physical

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and logistical barriers, countries can expand access to consultations and feedback channels, making the policy process more inclusive. Estonia, for instance, has extensively integrated ICTs to promote digital citizenship, allowing citizens to participate directly in policy discussions through secure online systems. Such practices highlight how digital platforms can not only engage a larger segment of society but also make participation more efficient and timely, especially for groups that may be underrepresented in traditional political processes.

The study reveals that successful interaction between political authorities and civil society is often supported by clear feedback mechanisms, which ensure that public contributions are valued and visibly integrated into decision-making. Feedback processes enhance transparency, as civil society groups can see how their input impacts policy decisions, building accountability and trust in political institutions. Countries like France and Croatia, which publish consultation outcomes and explain policy choices in response to public feedback, set an important precedent. Their approach helps to establish a more reciprocal relationship between civil society and political authority, where contributions are recognized and have a tangible impact.

Public consultations are identified as a cornerstone of effective state-civil society interaction, allowing diverse voices to inform policy development. Expert seminars, public discussions, surveys, and other consultation tools are instrumental in engaging different segments of the population. The case of Malta, where structured online consultations are an integral part of e-governance, is an example of how formalized consultations can be effectively conducted, ensuring both inclusivity and efficiency. Through these consultations, policies are more likely to align with societal needs, enhancing the relevance and acceptance of government actions.

Adopting the successful practices of countries like Estonia, Malta, Croatia, and France could significantly strengthen the engagement of civil society in the legislative and reform processes. Domestic policy-makers could benefit from establishing specialized units within government structures to handle civil society relations, promoting ICT-facilitated consultations, and institutionalizing transparent feedback processes. These steps would not only enhance civic involvement but also contribute to building a robust, participatory democracy that aligns more closely with international standards.

The findings underscore the importance of a cooperative approach to governance, where civil society serves as both a participant and a watchdog in the policy process. By adopting international best practices, governments can build a resilient civil society that contributes constructively to public discourse, offering insights and accountability that strengthen democratic structures. This approach is crucial for adapting to complex social issues, such as social justice and rights protection, where public support and understanding are integral to successful policy implementation.

In summary, the study reinforces that civil society plays an indispensable role in shaping effective governance. The international models discussed here offer valuable insights that could guide the development of domestic frameworks to strengthen state-civil society interaction, foster transparency, and build a foundation for policies that better reflect the needs and values of society.

Conclusions

Evidently, in recent years, international standards regarding the interaction of government and society have significantly developed in the part related to strengthening the guarantee of participation. Mandatory and relevant involvement of civil society representatives by state bodies and local self-government bodies is determined by national legislation. The Convention for the Protection of Human Rights and

Fundamental Freedoms is the main document that provides guarantees related to the participation of civil society in state policy. The legislation of most countries also provides for the creation of special bodies that operate permanently (advisory bodies according to the areas of activity, coordinators). An effective condition for the interaction of civil society institutions and state authorities is the involvement of the public with the use of information and communication technologies. The most common mechanism is central electronic portals, which provide information, electronic services, and consultation platforms. In most countries, civil society institutions act as partners in decision-making and are involved at all stages of policy development (development, implementation, study).

The main mechanisms of interaction between the political authorities and civil society include the presence of a perfect legislative framework, openness and transparency of the authorities (timely publication of projects of regulatory legal acts, other information); consideration of public opinion and community attitudes; timely informing of the public; consultations with experts and public representatives; interaction on partnership relations; provision of an appeal mechanism in case of violations; development of effective, efficient and accessible electronic portals; ensuring the preparation of textbooks, methodological manuals on the implementation of public participation mechanisms; conducting educational training and advanced training courses for both political authorities and civil society.

The practical recommendations outlined in the «Standards and Practices in the Member States of the Council of Europe Regarding Public Participation in Decision-Making» highlight the various avenues for involving civil society in political processes. Information and communication technologies (ICT) have emerged as powerful tools for facilitating public engagement, enabling governments to reach broader audiences and gather diverse perspectives through electronic portals, consultation platforms, and online surveys. Conducting consultations is vital, as they not only solicit input from civil society but also ensure that feedback is integrated into the decision-making process, thereby reinforcing the notion of participatory governance.

The article also examines successful international case studies, such as the e-government initiative in Malta and the positive experiences of countries like Estonia, Croatia, and France, which illustrate the potential for effective collaboration between political authorities and civil society. These examples underscore the significance of social protection policies in fostering a conducive environment for civil society participation, as ensuring citizens' rights and freedoms is fundamental to building a robust democratic framework.

In conclusion, the interaction between political authority and civil society is a dynamic and evolving process that is crucial for effective governance. By understanding and implementing the principles and practices that promote this interaction, governments can create more inclusive, responsive, and accountable political systems. This article aims to contribute to the ongoing discourse on this essential relationship, providing insights and recommendations for enhancing civil society's role in political processes worldwide.

References

Berezin, O.V., Bezpartichnyi, M.G., Nikileva, L.O. (2013). *Mechanisms of formation and methodology of development of social service institutions and enterprises*. Poltava: Inter Graphics, 210 p.

Code of Croatia on consultation with the interested public in the process of

DOI: https://doi.org/10.54477/LH.25192353.2024.1.pp.71-78

legislation, other regulations and assets (2009). https://www.osce.org/files/f/documents/1/d/570906.pdf.

Communication of the Commission - on the way to the direction of the culture of consultation and dialogue - general principles and minimum standards for conducting consultations with interested parties. (2002). http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52002DC0704 .

Declaration on the Right and Duty of Individuals, Groups and Bodies of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. (1999). http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf.

International Covenant on Civil and Political Rights. (1966). http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

Lizakovska, S.V. (2020). European standards of interaction between public authorities and civil society institutions. *State Administration and Regional Development, 8*, 422–444. https://pard.mk.ua/index.php/journal

Participation of public institutions in the decision-making process. Review of standards and practices in the member countries of the Council of Europe. (2016). https://www.kmu.gov.ua/storage/app/sites/1/17.pdf

Roman, V. (2016). Models of decentralization of power in the European Union. *Theory and Practice of Public Administration, 2*(53), 25-37.

Silantieva, I.V. (2023). Peculiarities of implementation of the system of social protection of the population in foreign countries. In: *Protection of socially vulnerable groups: international and national dimensions: materials of the All-Ukrainian Scientific and Practical Conference (Kyiv, October 19, 2023)* (28-32). Kyiv: Institute of State and Law named after V.M. Koretsky National Academy of Sciences of Ukraine and the Public Organization «Incubator of Democratic Initiatives».

Study of Estonia's participation in the implementation of the open method of coordination in social protection and social integration. (2002). https://joinup.ec.europa.eu/community/epractice/case/awards-osale-estonian

The Lisbon Agreement (agreement on reforming the European Union). (2009). https://infocenter.rada.gov.ua/uploads/documents/29057.pdf

THE LEGAL RATIONALE BEHIND THE DETERMINATION OF MINIMUM CAPITAL REQUIREMENTS FOR LIMITED LIABILITY COMPANIES BY FOUNDERS IN INDONESIA

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Abstract
Changes in regulations regarding the minimum capital requirements for limited liability companies have brought implications for corporate law in Indonesia. Indirectly, the absence of a minimum capital threshold as essential wealth owned by the company is neither necessary nor urgent as a requirement for the establishment or operation of a limited liability company. The government's rationale for changing these provisions aligns with the mandate of the Academic Manuscript of the Draft Law Number 11 of 2020 on Job Creation, which aims to simplify and facilitate the growth of Micro and Small Enterprises in the economy. This study will normatively analyze and interpret the provisions regarding the minimum capital requirements. It employs a legislative approach and a historical approach to explore the legal rationale (ratio legis) behind the establishment of capital requirements in previous regulations. The findings broadly conclude that the ratio legis for the minimum capital regulation in Indonesia depends on economic conditions and the principle of ease of doing business.However, there is an ambiguity in the regulation of minimum capital requirements in Law of the Republic of Indonesia Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation as Law (hereinafter referred to as the Job Creation Law), which replaces Law Number 11 of 2020 on Job Creation. Specifically, the phrase «decision of the founder» used to determine the amount of capital differs from the phrase in the regulatory reference in the Academic Manuscript of the Job Creation Law, which is Government Regulation Number 29 of 2016 on Changes to Limited Liability Company Capital Requirements, where the phrase is «agreement of the founders.» The Job Creation Law does not acknowledge the existence of a capital partnership, thus the phrase needs to be reconsidered, as capital partnership constitutes a company based on an agreement.

Keywords: Ratio Legis; Minimum Capital; Job Creation Law

1. Introduction

In the context of Indonesia's economy, business entities play a crucial role in driving

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economic growth and enhancing public welfare. Various forms of business entities, ranging from sole proprietorships to legally recognized corporate bodies, significantly contribute to the national economic landscape. At the most basic level, individual entrepreneurs, such as sole proprietorships, dominate the informal sector with relatively limited capital. At the mid to upper levels, business entities formed by groups of individuals include both non-legal entities, such as Firms and Limited Partnerships (Commanditaire Vennootschap), and legal entities, such as Limited Liability Companies (LLCs). Among these, LLCs are the preferred choice due to their legal protections for owners and stakeholders, offered through the concept of limited liability. This legal protection separates the personal assets of the owners from the liabilities of the company, providing legal certainty and security for investments made (Watson, 2019)

The legal framework for Limited Liability Companies (LLCs) in Indonesia has evolved significantly from the colonial era to the present day. During the Dutch colonial period, business entities similar to LLCs were known as Naamloze Vennootschap (NV) and were governed by the Commercial Code (Wetboek van Koophandel), which remained in effect even after Indonesia gained independence. Over time, the Indonesian government began drafting specific regulations for LLCs, starting with the enactment of Law Number 1 of 1995 concerning Limited Liability Companies. This regulation was later replaced by Law Number 40 of 2007 on Limited Liability Companies (Company Law), which serves as the primary legal foundation for the establishment and operation of LLCs in Indonesia. The regulatory landscape continued to evolve with the introduction of the Job Creation Law, which amended several provisions in the Company Law to adapt to the needs of economic development and simplify the process of business formation. These changes were driven by the government's desire to improve the ease of doing business in Indonesia, enhance economic competitiveness, and support the growth of micro, small, and medium enterprises (Rosser & Edwin, 2010). This provides legal protection for assets with liability as stipulated in the founding agreement of the legal entity (Dewi, 2021).

The changes in the minimum capital requirements introduced by the Job Creation Law and Government Regulation No. 8 of 2021 represent a significant shift in Indonesia's business regulation landscape. Previously, the Company Law stipulated a minimum capital requirement for establishing a Limited Liability Company (LLC), which was seen as a barrier for small and medium-sized enterprises (SMEs) looking to formalize their businesses. However, the Job Creation Law amended these provisions, allowing the founders of a company to determine the amount of authorized capital based on their agreement, effectively removing the mandatory minimum capital requirement. This regulatory adjustment aims to simplify business establishment processes, reduce barriers to entry, and enhance Indonesia's Ease of Doing Business (EODB) ranking. By eliminating stringent capital requirements, the government seeks to foster a more inclusive business environment that supports the growth and development of SMEs, thus contributing to economic diversification and increased entrepreneurial activity

The removal of the minimum capital requirement introduces several key issues that warrant closer examination, particularly concerning potential legal challenges, the impact on creditor protection, and the broader implications for the business environment. Without a mandated minimum capital, there are concerns that companies may lack sufficient financial stability, which could jeopardize creditors' interests and increase the risk of insolvency. This regulatory shift may also lead to debates on whether the legal protection traditionally afforded by the Limited Liability Company structure adequately balances the needs of business flexibility with financial responsibility. The focus of this research is to critically analyze these emerging issues and assess the broader impact of the regulatory changes on Indonesia's business landscape. This analysis is crucial as it seeks to provide insights into whether the current legal framework effectively supports economic growth while safeguarding the interests of stakeholders, including business owners, creditors, and the public at large

According to M. Yahya Harhap, the characteristics of a Limited Liability Company (LLC) as a capital partnership, generally defined under Article 1 point 1 of the Company Law, include the following: (1) it is a partnership consisting of capital/shares; (2) its establishment is based on an agreement; (3) it engages in specific business activities; and (4) the company is formed through a legal process involving government approval (Harahap, 2011).

The legal framework for Limited Liability Companies (LLCs) in Indonesia highlights two key aspects: the division into shares and establishment through a Notarial Deed. Capital plays a critical role in the formation of an LLC, governed by Articles 32 and 33 of the Company Law, which outline basic capital requirements. However, the Job Creation Law (Law No. 6 of 2023) and its regulation, PP 8/2021, amended these provisions, removing the minimum capital requirement and allowing founders to determine the authorized capital. This change aims to simplify business establishment, enhance the Ease of Doing Business (EODB) ranking, and support the growth of micro and small enterprises, aligning with global practices like those in Malaysia, where authorized capital is not mandatory. While the removal of minimum capital requirements encourages business formation, it raises concerns about creditor protection and the adequacy of asset safeguards, as previously, a set minimum capital provided a clearer guarantee of legal certainty and financial stability for stakeholders.

This research employs a normative approach with doctrinal research methods to analyze the relevant laws and legal doctrines concerning changes in the minimum capital requirements for limited liability companies. This approach is chosen because the study focuses on a systematic examination of legal texts, particularly the Job Creation Law and related regulations in Indonesia, as well as comparisons with similar regulations in other countries, such as the Netherlands, Malaysia, and Vietnam. The normative-doctrinal approach allows for an in-depth understanding of the legal framework and the principles underlying these regulatory changes (Mathias M Siems, 2016).

The research begins with a literature review to gather primary and secondary legal materials, such as laws, government regulations, and academic journals related to capital requirements for companies. These sources are analyzed using qualitative analysis methods, focusing on the interpretation of legal texts and conceptual discussions on the legal principles underlying the regulatory changes. This approach allows for a thorough examination of the impact and implications of the legal modifications on the business landscape.

To understand the historical and sociological context of the regulatory changes, this study also employs historical and comparative approaches. The historical approach is used to trace the development of capital regulations in Indonesia and other countries, providing a background on how these regulations have evolved over time. The comparative approach is applied to examine similar regulations across various jurisdictions, identifying patterns and influences that may affect policymakers. This dual approach helps in drawing connections.

2. Sociological and Historical Aspects of Corporate Regulation in Indonesia

According to Philipus M. Hadjon, ratio legis refers to the underlying spirit or rationale behind the formation of legislation. Satjipto Rahardjo, on the other hand, states that ratio legis is a legal principle (Priyatno et al., 2023). This section provides the background, research objectives, and structure of the study. The research focuses on the evolving regulations regarding the minimum capital requirements for limited liability companies (LLCs) in Indonesia. The background highlights the historical and sociological factors influencing these regulatory changes, as well as the comparative perspectives with similar legal frameworks in other countries such as the Netherlands, Malaysia, and Vietnam. The objective of this research is to analyze the legal rationale (ratio legis) behind the amendments to capital requirements, assess their impact on business actors and

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creditors, and explore the broader implications for Indonesia's business environment. The structure of the study is systematically divided into several subchapters, beginning with an exploration of theoretical concepts, followed by a detailed review of historical and legal developments, a comparative analysis with international regulations, and concluding with a discussion on the future legal challenges and policy recommendations. This structured approach aims to provide a comprehensive understanding of the significance of regulatory changes and their impact on the legal and economic landscape.

This section outlines the origins of corporate regulation from the VOC era to the Dutch colonial period. During the VOC (Dutch East India Company) era, the foundation of business and corporate regulations was established as the VOC functioned as one of the first public limited liability companies in history. Founded in 1602, the VOC introduced the concept of limited liability for shareholders, a characteristic that became a defining feature of modern corporations (Sjawie & SH, 2017). Following the dissolution of the VOC, the Dutch East Indies government took over its operations, and the Commercial Code (Wetboek van Koophandel) was introduced. This code further elaborated on business responsibilities and procedures, marking the first codification of commercial law in Indonesia. Initially, the Commercial Code was applied only to Europeans, while indigenous people and other foreign residents were subject to their customary laws, which led to complexities due to diverse and unclear customary practices in business interactions (Fernando et al., 2022). Despite its limitations, the Commercial Code laid the groundwork for future corporate regulations, although it did not yet include provisions on minimum capital requirements for companies, focusing instead on general corporate structures and responsibilities.

i. VOC Era and Dutch East Indies Period

This section outlines the origins of corporate regulation from the VOC era to the Dutch colonial period. During the VOC (Dutch East India Company) era, the foundation of business and corporate regulations was established as the VOC functioned as one of the first public limited liability companies in history. Founded in 1602, the VOC introduced the concept of limited liability for shareholders, a characteristic that became a defining feature of modern corporations (Sjawie & SH, 2017). Following the dissolution of the VOC, the Dutch East Indies government took over its operations, and the Commercial Code (Wetboek van Koophandel) was introduced. This code further elaborated on business responsibilities and procedures, marking the first codification of commercial law in Indonesia. Initially, the Commercial Code was applied only to Europeans, while indigenous people and other foreign residents were subject to their customary laws, which led to complexities due to diverse and unclear customary practices in business interactions (Fernando et al., 2022). Despite its limitations, the Commercial Code laid the groundwork for future corporate regulations, although it did not yet include provisions on minimum capital requirements for companies, focusing instead on general corporate structures and responsibilities.

ii. The New Order Era (1967 – 1998)

This section examines regulatory changes during the New Order and their impact on minimum capital requirements for companies. During the New Order era (1967–1998), the Indonesian government introduced Law Number 1 of 1995 concerning Limited Liability Companies, which marked a significant shift from previous regulations under the Commercial Code. This law established a formal framework for LLCs separate from the older provisions and introduced a minimum authorized capital requirement to stabilize and oversee the growth of companies during a period of economic turbulence, particularly the monetary crisis in the late 1990s (Allen et al., 2021), The imposition of minimum capital requirements was intended to ensure that companies had sufficient financial capacity, which was seen as crucial during the economic crisis that weakened the Indonesian rupiah.

In the Reform Era, these regulations were revisited with the enactment of Law Number 40 of 2007, which amended the earlier law by adjusting the minimum capital to IDR 50,000,000 to reflect changes in the economic environment and the value of the rupiah post-crisis. This adjustment aimed to balance the need for investor protection with the realities of Indonesia's economic recovery. Corporate law observers noted that the increase in minimum capital during this period was partly driven by the need to stabilize the economic framework and provide greater security to creditors amid economic uncertainties. These changes set the stage for further reforms in the following decades, reflecting ongoing efforts to adapt corporate regulation to Indonesia's evolving economic landscape.

iii. Era of President Susilo Bambang Yudhoyono and President Joko Widodo

This section outlines the significant changes in minimum capital requirements for companies during the administrations of President Susilo Bambang Yudhoyono and President Joko Widodo. Under President Susilo Bambang Yudhoyono (2004–2009), the existing regulations were revised with the enactment of Law Number 40 of 2007 concerning Limited Liability Companies. This law updated the minimum authorized capital from IDR 20,000,000 to IDR 50,000,000 to align with the economic realities post-New Order and to provide a more stable financial foundation for companies. The adjustment was seen as necessary to protect creditors and maintain investor confidence, particularly in the aftermath of the economic crisis that had significantly impacted the value of the rupiah(Alwajdi, 2020). Under President Joko Widodo's administration (2014–present), the approach shifted towards enhancing the ease of doing business. In a bold regulatory reform, Government Regulation Number 29 of 2016 was introduced, removing the fixed minimum capital requirement and allowing the amount of authorized capital to be determined by the agreement of the company's founders. This change was part of a broader strategy to improve Indonesia's Ease of Doing Business (EoDB) ranking and stimulate investment, particularly in micro, small, and medium enterprises (MSMEs). The removal of the minimum capital requirement was a significant departure from previous policies, reflecting a new focus on flexibility and reduced barriers to business entry. These reforms were intended to foster a more inclusive business environment, encouraging entrepreneurship and investment across all levels of the economy.

3. Aspects of Lawmaking and Legal Principles in the Job Creation Law

The omnibus law approach represents a significant legislative innovation in Indonesia, marking the first time a comprehensive method of consolidating multiple laws into a single, overarching regulation has been employed. Law Number 6 of 2023, known as the Job Creation Law, is a landmark example of this approach. An omnibus law is a legislative technique used to amend, repeal, or introduce various laws that are interconnected, even if they cover diverse areas of regulation (Prasetyo et al., 2022). The main rationale behind adopting an omnibus law is to streamline and harmonize regulations that would otherwise be scattered and sometimes contradictory, thereby enhancing the efficiency of lawmaking and addressing complex legal challenges comprehensively. Jimly Asshiddiqie outlines three conditions for implementing an omnibus law: laws that are directly related and need amendment, laws that are indirectly related but interconnected in practice, and laws that are unrelated but converge in application. In Indonesia, the omnibus law technique was first championed by Sofyan Djalil, the then Coordinating Minister for Economic Affairs, who sought to address the fragmented nature of Indonesian legislation by introducing a more unified regulatory framework.

The regulation of minimum capital requirements in Indonesia has evolved significantly from the Dutch colonial era to the modern period. During the colonial period, the Commercial Code (Wetboek van Koophandel), influenced heavily by Dutch

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legal traditions, introduced the concept of limited liability and structured regulations around corporate capital, although specific minimum capital requirements were not yet standardized. The early regulations were primarily aimed at protecting creditors and maintaining financial stability within the business environment. Following Indonesia's independence, the regulatory framework began to adapt to the nation's unique economic conditions, leading to the establishment of more defined capital requirements with the enactment of Law Number 1 of 1995, which imposed a minimum authorized capital to ensure the financial integrity of companies. During the New Order and Reform Era, these regulations were revised to address economic challenges and align with changing market dynamics, particularly in response to financial crises that exposed vulnerabilities in the corporate sector. he shift towards more flexible capital requirements continued into the 21st century, culminating in the Job Creation Law, which significantly reformed the Company Law by removing fixed minimum capital thresholds. This evolution reflects Indonesia's ongoing efforts to balance historical legal principles with modern economic needs, aiming to create a more dynamic and accessible business environment while still ensuring financial accountability and protection for stakeholders.

The Job Creation Law faced significant legal challenges when, on November 25, 2021, the Constitutional Court of Indonesia declared it conditionally unconstitutional in case No. 91/PUU-XVIII/2020. The court ruled that the legislative process used to enact the law did not comply with procedural requirements outlined in the 1945 Constitution of Indonesia, particularly regarding public participation and transparency. The court mandated that the government revise the law within two years; otherwise, it would be declared permanently unconstitutional (Prasetyo et al., 2022). This decision had profound implications for the legal landscape, creating a period of uncertainty for businesses and regulators who had begun adapting to the new provisions of the Job Creation Law. In response, the government issued Government Regulation in Lieu of Law (Perpu) Number 2 of 2022 on Job Creation on December 30, 2022, as an interim measure to maintain the law's provisions while addressing the procedural issues highlighted by the court. This rapid legal response aimed to ensure continuity in the regulatory framework and mitigate disruptions to Indonesia's business environment, reaffirming the government's commitment to improving the ease of doing business and attracting investment despite the court's ruling.

The Job Creation Law is grounded in a philosophical commitment to enhancing the right to work and ensuring a decent standard of living for all citizens, as enshrined in Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This provision underscores the government's obligation to create opportunities for employment and promote economic welfare as fundamental aspects of national development. The Job Creation Law aims to achieve these goals through several strategic approaches: fostering investment, supporting the growth of Micro, Small, and Medium Enterprises (MSMEs), and enhancing the quality of the workforce. By streamlining and simplifying regulatory requirements, the law seeks to reduce barriers for businesses, particularly new and small enterprises, thereby creating a more dynamic and inclusive economic environment. Additionally, the law emphasizes improving the quality of human resources through training and skill development initiatives, ensuring that Indonesia's workforce can meet the demands of a rapidly evolving market. These strategies collectively aim to drive economic growth, increase job opportunities, and improve living standards, reflecting the broader goal of aligning Indonesia's legal and economic frameworks with global standards of ease of doing business.

The Job Creation Law brought significant amendments to the Company Law, particularly concerning authorized capital requirements for Limited Liability

Companies (LLCs). Previously, the Company Law stipulated a minimum authorized capital that companies were required to meet, which was seen as a barrier for small and new businesses. The Job Creation Law introduced flexibility by allowing the amount of authorized capital to be determined by the founders of the company, rather than being set by the government (Job Creation Law, 2023). This change reflects the government's rationale to reduce regulatory burdens and encourage entrepreneurship, particularly among Micro, Small, and Medium Enterprises (MSMEs). By removing the fixed minimum capital requirement, the law aims to create a more inclusive and accessible business environment, fostering growth and investment at all levels. This shift aligns with global practices observed in countries such as Malaysia and Vietnam, where similar deregulation has been implemented to promote ease of doing business and stimulate economic development. The new provisions grant business founders greater autonomy and responsibility in determining their financial structures, reinforcing the principle of freedom of contract and aligning Indonesia's corporate regulations with international standards.

The Job Creation Law's removal of minimum capital requirements for Limited Liability Companies (LLCs) in Indonesia mirrors similar regulatory shifts in other countries, such as Malaysia and Vietnam. In Malaysia, the Companies Act 2016 abolished the minimum capital requirement, allowing companies to be established with any amount of capital as determined by the founders. This deregulation aims to reduce entry barriers for new businesses, encouraging entrepreneurship and investment by simplifying the process of company formation (Ariani, 2012). Similarly, Vietnam's Law on Enterprises permits LLCs to set their initial capital based on the company's needs without a mandated minimum, aligning regulatory practices with the goal of promoting small and medium enterprise growth.

These international examples provide relevant benchmarks for Indonesia's decision to adopt a more flexible approach to capital requirements, reflecting a global trend towards regulatory environments that prioritize ease of doing business. However, the influence of Dutch legal traditions on Indonesian corporate law adds a unique dimension to this regulatory shift. Historically, the Dutch system maintained stricter capital requirements to protect creditors and ensure financial stability, as seen in the distinctions between public (N.V.) and private (B.V.) companies in the Netherlands. Despite these differences, the Dutch approach also evolved, eventually relaxing its capital requirements for B.V.s to foster a more business-friendly climate (Verkerk, 2010). Indonesia's recent reforms reflect an effort to balance these influences, adapting global best practices to the local context while maintaining legal protections that safeguard the business ecosystem.

On November 25, 2021, the Constitutional Court of Indonesia ruled in case No. 91/PUU-XVIII/2020 that the Job Creation Law (Law No. 11 of 2020) was conditionally unconstitutional. The Court found that the legislative process for enacting the law did not comply with the procedural standards required by the 1945 Constitution, particularly in terms of public participation and transparency. The Court ordered that the law must be revised within two years, and if the revisions were not completed within this period, the law would be deemed permanently unconstitutional. This decision created significant implications for the government, legislators, and business actors, who were required to navigate the legal uncertainties surrounding the law's status. In response, the government issued Government Regulation in Lieu of Law (Perpu) No. 2 of 2022 on Job Creation on December 30, 2022, as an interim measure to uphold the law's provisions while addressing the Constitutional Court's directives. This regulatory move underscored the government's commitment to maintaining legal continuity and minimizing disruptions in the business environment during the revision period.

Following the issuance of Government Regulation in Lieu of Law (Perpu) No. 2 of 2022, the regulation was subsequently re-established as Law No. 6 of 2023, which officially reinstated the provisions of the Job Creation Law. This new legislation introduced

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several amendments to existing laws, including significant changes to the Limited Liability Company Law (Law No. 40 of 2007). One of the most impactful amendments was related to authorized capital requirements for companies. Under the revised law, the amount of authorized capital is no longer fixed by the government; instead, it is now determined by the founders of the company. This change grants greater flexibility and autonomy to entrepreneurs, allowing them to decide the capital structure that best suits their business needs (Job Creation Law, 2023). By reducing the regulatory burden, this amendment aims to encourage the establishment of new businesses, particularly for micro, small, and medium enterprises (MSMEs), fostering a more dynamic and inclusive business environment in Indonesia.

The Job Creation Law is underpinned by a philosophical commitment to enhancing the right to work and achieving a decent standard of living for all citizens, as outlined in Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This provision emphasizes the state's obligation to create conditions that promote employment and improve welfare as part of national development. The Job Creation Law adopts several key strategies to fulfill these goals: encouraging investment, supporting Micro, Small, and Medium Enterprises (MSMEs), and improving the quality of the Indonesian workforce. By simplifying regulations and reducing bureaucratic barriers, the law seeks to make it easier for businesses, especially MSMEs, to establish legal business entities with lighter legal responsibilities. This approach is designed to create a more inclusive and supportive environment for micro and small enterprises, enabling them to access formal legal status that facilitates better access to financial resources and market opportunities. Overall, the strategic direction of the Job Creation Law reflects a broader effort to align Indonesia's economic and legal frameworks with the needs of a modern and competitive economy.

4. Conclusions

The amendments to the Company Law as part of the Job Creation Law represent a pivotal shift in Indonesia's regulatory landscape, reflecting a broader effort to modernize and streamline business regulations to foster economic growth. By removing the minimum capital requirements and granting greater flexibility to company founders, these changes aim to reduce barriers to entry, promote entrepreneurship, and enhance the overall ease of doing business in Indonesia. While this approach aligns with global and regional trends, it also introduces new challenges, particularly concerning creditor protection and financial accountability. As Indonesia continues to adapt its legal framework to meet the demands of a dynamic and competitive global market, it is essential for policymakers to monitor the impacts of these reforms closely. Ensuring that legal safeguards are maintained while encouraging business innovation will be crucial for sustaining long-term economic development and fostering a resilient business environment. This ongoing evolution in corporate regulation highlights the balance that must be struck between reducing regulatory burdens and protecting the interests of all stakeholders in Indonesia's growing economy.

References

Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*. Aspen Publishing.

Alwajdi, M. F. (2020). Urgensi Pengaturan Cyber Notary Dalam Mendukung Kemudahan Berusaha di Indonesia. J*urnal Rechts Vinding: Media Pembinaan Hukum Nasional, 9*(2), 257. https://doi.org/10.33331/rechtsvinding.v9i2.422

Ariani, N. V. (2012). Alternatif Penyelesaian Sengketa Bisnis di Luar Pengadilan. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional, 1(*2), 277. https://doi.org/10.33331/rechtsvinding.v1i2.101

Dewi, Y. K. (2021). The need to adopt a limited liability partnership for the legal profession in the partnership law: A critical review from Indonesia's perspective. *Cogent Social Sciences, 7*(1), 1999005. https://doi.org/10.1080/23311886.2021.1999005

Harahap, M. Y. (2011). *Hukum Perusahaan*. Sinar Grafika.

Mathias M Siems. (2016). The methods of comparative corporate law | 7 | Routledge Handbook of C (1st Edition). Routledge. https://www.taylorfrancis.com/chapters/edit/10.4324/9781315767017-7/methods-comparative-corporate-law-mathias-siems

Prasetyo, A. D., Abdul Rachmad Budiono, & Shinta Hadiyantina. (2022). Politik Hukum Perubahan Norma Perizinan dan Iklim Investasi Dalam Undang-Undang Cipta Kerja Menggunakan Metode Omnibus Law. Media Iuris, 5(2), 159–188. https://doi.org/10.20473/mi.v5i2.36165

Priyatno, D., Kamilah, A., & Mulyana, A. (2023). Corporate crime in expropriating land rights through intimidation and criminalization. *Cogent Social Sciences, 9*(1), 2187739. https://doi.org/10.1080/23311886.2023.2187739

Rosser, A., & Edwin, D. (2010). The politics of corporate social responsibility in Indonesia. *The Pacific Review, 23*(1), 1–22. https://doi.org/10.1080/09512740903398314

Sjawie, H. F., & SH, L. M. (2017). *Direksi perseroan terbatas serta pertanggungjawaban pidana korporasi.* Prenada Media.

Verkerk, B. (2010). Modernizing of Dutch Company Law: Reform of the Law Applicable to the BV and a New Legal Framework for the One-Tier board within NVs and BVs. *European Company Law, 7*(Issue 3), 113–119. https://doi.org/10.54648/EUCL2010022

Watson, S. M. (2019). The corporate legal person. *Journal of Corporate Law Studies, 19*(1), 137–166. https://doi.org/10.1080/14735970.2018.1435951

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