

# IMPLEMENTATION OF MANDATORY ENTERPRISE REGISTRATION (*WAJIB DAFTAR PERUSAHAAN - WDP*) FOLLOWING THE EFFECTIVENESS OF LAW NO. 40 YEAR 2007 CONCERNING LIMITED LIABILITY COMPANIES IN THE ERA OF REGIONAL AUTONOMY

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## Article Info

Received : 21 February 2014 | Received in revised form : 25 June 2014 | Accepted : 2 August 2014  
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## Abstract

*Implementation of company registration shall be constrained because of differences in the interpretation of the meaning of the provisions of Article 29 of Law No. 40 of 2007 on Limited Liability Company, which determines that the registration of the company held by the Ministry of Justice and Human Rights. The provisions of Article 29 is interpreted by many practitioners as *lex specialis* of Act 3 of 1982 regarding Company Registration Requirement. The reality is not so. Company registration remains to be done pursuant to Act 3 of 1982. There are no provisions that override or cancel that Act 3 of 1982 to enforce Article 29 of Law No. 40 of 2007. Each law urgency is equally important. Act 40 of 2007 for the purpose of publication, while Act 3 of 1982 is to find out information about the company, either types of business activities, locations, shares and so forth. Registration of the company is still to be done on both the ministry under the provisions of law referred to.*

**Keywords:** *Company Law, Enterprise Registration, Regional Autonomy*

## Abstrak

*Implementasi wajib daftar perusahaan menjadi terkendala dikarenakan adanya perbedaan penafsiran dalam memaknai ketentuan Pasal 29 Undang-Undang No.40 tahun 2007 tentang Perseroan Terbatas, yang menentukan bahwa pendaftaran perusahaan dilaksanakan oleh Kementerian Hukum dan Hak Asasi Manusia. Ketentuan Pasal 29 tersebut ditafsirkan oleh banyak praktisi sebagai *lex specialis* dari Undang-Undang No.3 tahun 1982 tentang Wajib Daftar Perusahaan. Realitasnya adalah tidak demikian. Pendaftaran Perusahaan tetap harus dilakukan berdasarkan Undang-Undang No.3 tahun 1982. Tidak ada ketentuan yang mengesampingkan atau membatalkan bahwa Undang-Undang No.3 tahun 1982 dengan berlakunya Pasal 29 Undang-Undang No.40 tahun 2007. Masing-masing undang-undang dimaksud memiliki urgensi yang sama pentingnya. Undang-Undang No.40 tahun 2007 untuk kepentingan publikasi, sedangkan Undang-Undang No.3 tahun 1982 adalah untuk mengetahui informasi tentang perusahaan, baik jenis kegiatan usaha, lokasi, saham dan lain sebagainya. Pendaftaran perusahaan adalah tetap harus dilakukan di kedua kementerian berdasarkan ketentuan undang-undang yang dirujuk.*

**Kata Kunci:** *Hukum Perusahaan, Daftar Perusahaan, Otonomi Daerah*

## I. Introduction

Law Number 3 Year 1982 of the Republic of Indonesia concerning Mandatory Enterprise Registration (*'Wajib Daftar Perusahaan'*, hereinafter briefly referred to as *'WDP'*) requires all enterprises in the territory of the Republic of Indonesia to register

with the relevant government authorities, in this case through the existing Provincial/City/Municipality Mandatory Enterprise Registration (*WDP*) Offices, and all Service Offices/Units the functions and responsibilities of which include the area of Trade or Officials who have the task and responsibility to implement Integrated One Stop Services in the regions concerned.

From the government's point of view, *WDP* can serve as source of information in the context of developing business in the country. Furthermore, seen from the private sector's point of view, such information can be used for the purpose of identifying business partners in all parts of Indonesia, thus it is expected to encourage the growth of domestic investment.

Following the implementation of Law Number 32 Year 2004 concerning Regional Governance, there has been a continuous decrease in the number of *WDP* year in year out. In 2006, a total of 104.380 enterprises implemented mandatory enterprise registration, which subsequently decreased to 898 enterprises in 2012.<sup>1</sup>

Such situation has raised certain issues from the government's point of view which has the objective of developing and increasing domestic investment as well as public transparency. Some of the causing factors supposedly leading to a decline in *WDP* implementation include insufficiently firm sanctions imposed on enterprises failing to implement *WDP*, high administrative costs as well as the time consuming process involved in implementing *WDP*.

By looking at the intent underlying the introduction of the *WDP* Law laying down the legal basis for every enterprise in conducting registration, and setting out the general provisions for mandatory enterprise registration, it becomes evident that its purpose is not primarily administrative in nature. As stated in the considerations in the preamble to the *WDP* Law, enterprise registry is an official registry which can be used by parties requiring such information. In principle, there are 3 (three) parties which can benefit from the said enterprise registry, namely as follows:

- a. The Government, in the context of providing guidance, mentorship and supervision including for the purpose of safeguarding State revenues requiring accurate information. The Enterprise Registry is paramount in the context of assessing overall business conditions and development in the territory of the state of the Republic of Indonesia, including foreign enterprises. By doing so, it becomes possible to develop and provide protection to businesses conducting their activities in an honest manner.
- b. Business circles, using the enterprise registry as source of information for their business purposes. In addition to that, it is also helpful in preventing dishonest business practices (unfair business practice, smuggling, etc.). The Enterprise Registry can also be used as source of information for their business purposes and for third parties with an interest in the business or enterprise concerned.
- c. Other interested parties or community members requiring verifiable information.<sup>2</sup>

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<sup>1</sup> Data obtained from Domestic Trade Policy Center, Trade Policy Study and Development Agency, Ministry of Trade (Pusat Kebijakan Perdagangan Dalam Negeri, Badan Pengkajian dan Pengembangan Kebijakan Perdagangan, Kementerian Perdagangan).

<sup>2</sup> Wahyuni Safitri, S.H., M.Hum, *Wajib Daftar Perusahaan Sebelum dan Sesudah Berlakunya Undang-Undang Number 40 Year 2007 tentang Perseroan Terbatas (Mandatory Enterprise Registration Before and After the Effectiveness of Law Number 40 Year 2007 concerning Limited Liability Companies)* <http://www.3sfirm.com/index.php/journal/41-karya-tulis/136-wajib-daftar-perusahaan>.

In view of the above stated benefits, the purpose of the enterprise registry as set forth in article 2 of the *WDP* Law is to record authentic information of a enterprise and it is official source of information to all interested parties concerning the identity, data and other information about the enterprise indicated in the enterprise registry in an effort to ensure certainty in conducting business activities, as provided for in article 3 of the *WDP* Law, namely that the enterprise registry is to open to all parties, and as furthermore set out in article 4 namely that any interested party, after having paid the administrative fee provided for by the minister, shall be entitled to obtain the information required by receiving a copy or an official excerpt from the information indicated in the enterprise registry. Every copy or excerpt issued based on the provisions of article (1) of this article shall serve as perfect tool of evidence.<sup>3</sup>

It is set forth in the general provisions of the *WDP* Law that the enterprise registry is an official record maintained in accordance with or based on the provisions of the Law concerning Mandatory Enterprise Registration or the *WDP* Law, and or the implementing regulations thereof, and or sets for the matters that every enterprise is required to register and it must be validated by the competent official at the Enterprise Registry Office concerned.<sup>4</sup>

A rather significant issue related to business activities is enterprise documents. Management decisions are frequently made based on information obtained from a certain document. Enterprise documents can be used as a sort of “data bank.” The term data bank will be further elaborated in the analysis part. The legal basis used as reference in maintaining enterprise records or documents is set forth in the provisions of Article 6 of the Commercial Code (*Kitab Undang-Undang Hukum Dagang* hereinafter briefly referred to as ‘*KUHD*’) which came into effect as from July 17,1938 by virtue of *Staatsblad* 1938 number 276. The general provisions of Chapter II of

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<sup>3</sup> Ibid.

<sup>4</sup> Some notes regarding the *WDP* Law as follows:

1. Purpose, to record appropriately made information concerning enterprises, and serving as source of official information for all interested parties concerning the identity of the enterprise indicated in the enterprise in the context of ensuring certainty in doing business.
2. Nature, open to all interested parties, after fulfilling the administrative fee stipulated by the minister, they are entitled to obtain the required information by obtaining a copy of or an official excerpt from the information indicated in the Enterprise Registry validated by the competent official at the Enterprise registration office concerned.
3. Obligation, it is mandatory for every Enterprise to be registered in the Enterprise Registry (*‘Daftar Perusahaan’*). Mandatory Registration must be made by the owner or the management (*pengurus*) of the enterprise concerned or they can be represented by another person by granting a valid power of attorney.
4. Exemption, the following are exempted from Mandatory Registry (*‘Wajib Daftar’*):
  - a. Every state enterprise in the form of Government Agency (*Perusahaan Jawatan* or briefly referred to as *PERJAN*) as provided for in Law No.9 year 1969 State Gazette 1969 No.40 *jo. Indonesische Bedrijvenwet (Staatsblad* year 1927 No.419) as amended and supplemented.
  - b. Every small individual enterprise run personally by the entrepreneur himself or employing only closest family members and not requiring a business license and not being in the form of a legal entity or a partnership.

The basis for the administration of the *WDP* Law itself is the Decree of the Minister of Industry and Trade of the Republic of Indonesia No.12/MPP.Kep/1/1998 concerning the administration of *WDP* stipulated on January 16, 1998, which is the implementation of the *WDP* Law. The decree was issued based on the consideration that there is a need for complementing in order to ensure uninterrupted and higher quality services for enterprise registration, providing information, promotion, benefit of enterprise registration to the business community and the community in general, enhancing the role of enterprise registry, and appointing the administrator and implementer of *WDP*.

*KUHD* Article 6 read as follows:<sup>5</sup>

- 1) *Setiap orang yang menjalankan perusahaan diwajibkan untuk menyelenggarakan catatan-catatan menurut syarat-syarat perusahaannya tentang keadaan hartanya dan apa saja yang berhubungan dengan perusahaannya, sehingga catatan itu sewaktu-waktu dapat diketahui semua hak dan kewajibannya.*
  - 2) *Ia diwajibkan dalam enam bulan pertama dari tiap-tiap year untuk membuat neraca yang diatur menurut syarat-syarat perusahaannya dan menandatangani sendiri.*
  - 3) *Ia diwajibkan menyimpan selama tiga puluh year buku-buku dan surat-surat dimana ia menyelenggarakan catatan-catatan dimaksud dalam alinea pertama berserta neracanya, dan selama sepuluh year.*
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- 1) Every person running an enterprise shall be obligated to maintain records in accordance with the conditions of his/her enterprise concerning his/her assets and all matters related to his/her enterprise, so that [based on] such records all his/her rights and obligations may be known.
  - 2) He/she shall be obligated to prepare the balance in the first six months every year in accordance with the provisions of his/her enterprise and to personally sign the same.
  - 3) He/she shall be obligated to keep for thirty years the books and documents in which he/she maintains the records as intended in the first paragraph along with the balance, and for ten years. [Unofficial translation]

Furthermore, the provisions concerning mandatory enterprise registration were set forth for the first time in Article 23 of the *KUHD*<sup>6</sup>, providing that a firm's shareholders are obligated to have the deed registered in a registry maintained for such purpose at the registrar's office of the *raad van justitie* (District court) within the jurisdiction of the company's domicile.

The provisions of Article 38 paragraph (2) of the *KUHDP* further set forth as follows:<sup>7</sup>

Para persero diwajibkan untuk mendaftarkan akta itu dalam keseluruhannya beserta ijin yang diperolehnya dalam register yang diadakan untuk itu pada panitera raad van justitie dari daerah hukum kedudukan perseroan itu, dan mengumumkan-kannya dalam surat kabar resmi.

[Unofficial translation: The shareholders are obligated to have the deed registered in its entirety along with the approvals obtained by them in the registry maintained for such purpose by the registrar of the *raad van justitie* in the jurisdiction of the company's domicile, and to have it announced in the official gazette.]

Based on the above quoted two articles, firms and limited liability companies are

<sup>5</sup> Wahyuni Safitri, S.H., M.Hum. Op.cit.

<sup>6</sup> Perseroan-perseroan firma harus didirikan dengan akta otentik, tanpa adanya kemungkinan untuk disangkal terhadap pihak ketiga, bila akta itu tidak ada [Unofficial translation: Companies in the form of firms must be established by way of authentic deed, the existence of which cannot be denied to third parties] (Civil Code (KUHPer) 1868, 1874, 1895, 1898, Commercial Code (KUHD) 1, 26, 29, 31).

<sup>7</sup> Wahyuni Safitri, S. H., M.Hum, Wajib Daftar Perusahaan Sebelum dan Sesudah Berlakunya Undang-Undang Number 40 Year 2007 tentang Perseroan Terbatas, (Mandatory Enterprise Registration Before and After the Effectiveness of Law Number 40 Year 2007 concerning Limited Liability Companies). Op.cit.

required to register their deed of establishment with the district court at the company's domicile, whereas in 1982 the mandatory enterprise registration is subsequently provided for in a separate regulation, namely the *WDP* Law which, being a specific provision, sets aside the general provisions of the *KUHD*. Article 5 paragraph (1)<sup>8</sup> of the *WDP* Law provides that every enterprise must be registered in the Enterprise Registry at the enterprise registry office concerned.

The provisions of article 2 of the *WDP* Law<sup>9</sup> clarify that the purpose of the enterprise registry is to "record" information made in an authentic manner about an enterprise, and it is an official source of information for all interested parties concerning the identity, daya and other information about the enterprise indicated in the enterprise registry. It is further provided in the provisions of Article 4 paragraphs (1) and (2) of the *WDP* Law<sup>10</sup> that the enterprise registry is "open to all parties." Every party interested in a certain enterprise, after paying the determined fee, can obtain a copy or an official excerpt of the enterprise concerned, and it is perfect tool of evidence.

## II. Provisions concerning Enterprise Qualification and the Obligation for Enterprise Registration under the *WDP* Law

The obligation for enterprise registration as set forth under the provisions of Article 5 paragraphs (1), (2) and (3) of the *WDP* Law<sup>11</sup> sets the requirement for every enterprise to be registered in the enterprise registry, by submitting its deed of establishment. Registration must be made by the owner or the management of the enterprise concerned or it can be delegated to another person based on a valid power of attorney. In the event of a enterprise owned by several persons, the owners are obligated to register, and once one of them fulfills such obligation all the others are discharged of such obligation. Persons required by law to register and willfully fail to do so shall be deemed to have committed a crime. Such crime is classified as crime

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<sup>8</sup> Article 5 of the *WDP* Law sets forth as follows: (1) Every enterprise must be registered in the Enterprise Registry ('*Daftar Perusahaan*'). [unofficial translation]

<sup>9</sup> Article 2 of the *WDP* Law sets forth as follows:

The purpose of Enterprise Registry ('*Daftar Perusahaan*') is to record appropriately prepared information about an enterprise and to serve as official source of information for all interested parties concerning the identity, data, as well as other information concerning the enterprise indicated in the Enterprise Registry ('*Daftar Perusahaan*') in the context of ensuring certainty in doing business. [unofficial translation]

<sup>10</sup> Article 4 of the *WDP* Law sets forth as follows:

- (1) Every interested party, after having fulfilled the administrative fee stipulated by the Minister, shall be entitled to obtain the required information by obtaining a copy of or an official excerpt from the information indicated in the Enterprise Registry ('*Daftar Perusahaan*') validated by a competent official from the enterprise registration office.
- (2) Every copy or excerpt issued pursuant to the provisions of paragraph (1) of this article shall be perfect tool of evidence. [unofficial translation]

<sup>11</sup> Article 5 of the *WDP* Law sets forth as follows:

- (1) It is mandatory for every enterprise to be registered in the Enterprise Registry ('*Daftar Perusahaan*').
- (2) Registration must be made by the owner or executive of the enterprise concerned or it can be delegated to another person by granting a valid power of attorney.
- (3) If the enterprise is owned by several persons, the owners shall be obligated to conduct registration. If one of them has fulfilled such obligation, the others shall be discharged from such obligation.
- (4) If the owner and or executive of a enterprise which is domiciled in the territory of the State of the Republic of Indonesia does not reside in the territory of the State of the Republic of Indonesia, the executive (*pengurus*) or the proxy assigned to manage the enterprise shall have the obligation to register the enterprise. [unofficial translation]

in the economic field, and under article 32 of the *WDP Law*<sup>12</sup> they are subject to the criminal sanction of imprisonment for not more than 3 (three) months, and or a fine of not more than Rp.3.000.000,- (rupiah three million). Enterprises required to be registered in the enterprise registry are enterprises domiciled and conducting their business activities in the territory of the state of the Republic of Indonesia, in the form of: legal entity, partnership, individuals. Large enterprises that need to be registered include branch offices, auxiliary offices, subsidiary enterprises as well as agents authorized to enter into agreements. On the other hand, exempted from registration in the enterprise registry are Government Agencies (*Perusahaan Jawatan* or briefly referred to as *PERJAN*) and small enterprises owned by individuals managed by the entrepreneurs themselves and assisted by their family members such as for example street vendors.<sup>13</sup>

The method, place and time of registration are provided for in article 10 of the *WDP Law*, setting out that Registration must be made within 3 (three) months after the enterprise is established and is running its business activities. Registration is made by filling out a form stipulated by the Minister and filing the same with the enterprise registry office located: at the domicile of the office of the enterprise concerned; at the place of domicile of each branch office, auxiliary office, or the office of subsidiary enterprise; at the place of domicile of the office of each agent and enterprise representative office which has the authority to enter into agreements; if the enterprise concerned cannot be registered at the above mentioned places for any reason, registration is to be made at the Enterprise Registration Office in the Capital City of the Province concerned.<sup>14</sup>

Following are the matters that must be registered by virtue of the articles of the *WDP Law*:

a. The provisions of article 11 of the *WDP Law*, namely:

- 1) If the enterprise concerned is incorporated as a Limited Liability Company, in addition to complying with the provisions of the law concerning Limited Liability Companies, the following matters must be registered:
  - a) 1) name of the company;
  - 2) mark of the enterprise;
  - b) 1) date of the company's establishment,

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<sup>12</sup> Article 32 of the *WDP Law* sets forth as follows:

- (1) Any person obligated under this Law and or the implementing regulations thereof to register his/her enterprise in the Enterprise Registry (*‘Daftar Perusahaan’*) who intentionally or due his/her negligence does not fulfill his/her obligation shall be subject to the criminal sanction of imprisonment for not more than 3 (three) months or the criminal sanction of fine of not more than Rp.3, 000,000.- (three million rupiah).
- (2) The criminal act as intended in paragraph (1) of this article shall be a crime.

<sup>13</sup> See the provisions of Article 6 of the *WDP Law* which provide as follows

- (1) Exempted from the mandatory registry (*‘wajib daftar’*) shall be as follows:
  - a. Every State Enterprise which is in the form of Government Agency (*Perusahaan Jawatan* or briefly referred to as *PERJAN*) as provided for in Law Number 9 Year 1969 (State Gazette Year 1969 Number 40) jo. *Indische Bedrijvenwet* (*Staatsblad* Year 1927 Number 419) as amended and supplemented;
  - b. Every Small Individual enterprise which is run personally by its owner or by employing only his/her own closest family members and which does not require a business license and is not a legal entity or a partnership.
- (2) Small Individual Enterprise as intended in item b paragraph (1) of this article shall be further provided for by the Minister with due observance of applicable laws and regulations. [unofficial translation]

<sup>14</sup> <http://ehukum.com/index.php/hukum-bisnis/26-tujuan-sifat-dan-manfaat-wajib-daftar-perusahaan>

- 2) term of the company's establishment;
  - c)
    - 1) the company's principal activities and other business activities;
    - 2) business permits held;
  - d)
    - 1) address of the enterprises at the time of the company's establishment and all changes thereof;
    - 2) address of the company's each branch office, auxiliary office and agent as well as representative office;
  - e) related to the management and commissioners:
    - 1) full name and every alias;
    - 2) every former name if it is different from item e sub-item 1;
    - 3) personal identity number and date;
    - 4) address of permanent residence;
    - 5) address and country of permanent residence if not permanently residing in the territory of the State of the Republic of Indonesia;
    - 6) place and date of birth;
    - 7) country of birth if born outside the territory of the State of the Republic of Indonesia;
    - 8) citizenship at the time of registration;
    - 9) every former citizenship if it is different from item e sub-item 8;
    - 10) signature;
    - 11) date first started fill position;
  - f) other business activities of each individual management and commissioner;
  - g)
    - 1) authorized capital;
    - 2) the amount and nominal value of each share;
    - 3) the amount of issued capital;
    - 4) the amount of paid up capital;
  - h)
    - 1) date of the commencement of business activities;
    - 2) date and number of the legal entity's validation;
    - 3) date of filing application for registration.
- 2) If registered shares have been issued, regardless of whether or not they have been fully paid up, in addition to the matters intended in paragraph 1) of this article the following matters concerning the holder of each of such shares must also be registered:
- a) complete name and every alias;
  - b) every former name if it is different from paragraph 2) sub-paragraph 1;
  - c) number and date of personal identity;
  - d) address of permanent residence,
  - e) address and country of permanent residence if not residing in the territory of the State of the Republic of Indonesia;
  - f) place and date of birth;
  - g) country of birth if born outside the territory of the State of the Republic of Indonesia;
  - h) citizenship;
  - i) every former citizenship if different from paragraph 2) sub-paragraph 8;

- j) total number of shares owned,
  - k) amount of money paid up for each share.
  - 3) An official copy of the deed of establishment must be submitted at the time of registration.
  - 4) Matters which must be registered, specifically for Limited Liability Companies selling their shares to the public through the capital market, will be further provided for by the Minister.
- b. Provisions of Article 12 of the *WDP* Law, namely:
- 1) If the enterprise concerned is in the form of a Cooperative, the following matters must be registered:
    - a)
      - 1) name of the cooperative,
      - 2) name of the enterprise if it is different from item h sub-item 1;
      - 3) mark of the enterprise.
    - b) date of establishment;
    - c) principal activities and other business activities;
    - d) the enterprise's address based on the deed of establishment;
    - e) related to each management and member of the supervising body:
      - 1) full name and every alias;
      - 2) every former name if it is different from item 2) sub-item 1;
      - 3) number and date of personal identification;
      - 4) address of permanent residence;
      - 5) signature;
      - 6) date on which he/she first assumed position;
    - f) other business activities of each management and member of supervising body;
    - g)
      - 1) date of commencement of business activities;
      - 2) dated of filing application for registration.
  - 2) At the time of registration, an official copy of the cooperative's deed of establishment along with a copy of validation thereof by the competent official must also be submitted.
- c. The provisions of Article 13 of the *WDP* Law, namely:
- 1) If the enterprise concerned is in the form of Limited Partnership (*Persekutuan Komanditer*), the following matters must be registered:
    - a) date and term of the partnership's establishment;
    - b)
      - 1) name of the partnership and or name of the enterprise concerned
      - 2) mark of the enterprise;
    - c)
      - 1) principal activities and other business activities of the partnership;
      - 2) business permits held;
    - d)
      - 1) address of domicile of the partnership and or address of the enterprise concerned;
      - 2) address of each branch office, auxiliary office, and agent as well as representative office of the partnership concerned;
    - e) total number of partners specifying total number of active and passive partners respectively;

- f) related to each active and passive partner;
    - 1) full name and every alias;
    - 2) every former name if it is different from item f sub-item 1;
    - 3) number and date of personal identification;
    - 4) address of permanent residence;
    - 5) address and country of permanent residence if residing outside the territory of the State of the Republic of Indonesia;
    - 6) place and date of birth;
    - 7) country of birth if born outside the territory of the State of the Republic of Indonesia,
    - 8) citizenship at the time of registration;
    - 9) every former citizenship if it is different from item f sub-item 8;
  - g) Other business activities of each active and passive partner;
  - h) amount of capital and or value of goods paid up by each active and passive partner;
  - i)
    - 1) date of commencement of the partnership's activities;
    - 2) date of each active and passive partner joining if it occurs after the establishment of the partnership;
    - 3) date of filing application for registration;
  - j) signature of each active partner authorized to sign for the partnership's purposes;
- 2) If the enterprise concerned is in the form of a Limited Partnership issuing shares, in addition to the matters intended in paragraph 1) hereinabove, the following matters related to capital must also be registered:
    - a) amount of limited capital (*modal komanditer*);
    - b) total number of shares and the value of each share;
    - c) amount of issued capital;
    - d) amount of paid up capital.
  - 3) An official copy of the deed of establishment legalized by a competent official must be submitted at the time of registration.
- d. The provisions of Article 14 of the *WDP* Law, namely:
- 1) If the enterprise concerned is in the form of a partnership (*Persekutuan Firma*), the following matters must be registered:
    - a)
      - 1) date of the partnership's establishment;
      - 2) term of the partnership's establishment, if any;
    - b)
      - 1) name of the partnership or name of the enterprise concerned;
      - 2) mark of the enterprise concerned if any;
    - c)
      - 1) principal activities and other business activities of the partnership;
      - 2) business permits held;
    - d)
      - 1) address of the partnership's domicile;
      - 2) address of each branch office, auxiliary office, and agent as well as representative office of the partnership concerned;
    - e) related to each partner:
      - 1) full name and every alias;

- 2) every former name if it is different from item e sub-item 1;
  - 3) number and date of personal identification;
  - 4) address of permanent residence;
  - 5) address and country of permanent residence if he/she does not reside permanently in the territory of the State of the Republic of Indonesia;
  - 6) place and date of birth;
  - 7) country of birth if born outside the territory of the State of the Republic of Indonesia;
  - 8) citizenship at the time of registration;
  - 9) every former citizenship if it is different from item e sub-item 8;
  - f) other business activities of each partner;
  - g) total amount of the partnership's fixed) assets;
  - h)
    - 1) the date of commencement of the partnership's activities;
    - 2) the date on which each new partner joins after the partnership is formed;
    - 3) date of filing application for registration;
  - i) signature of each partner authorized to sign for the partnership's purposes).
- 2) If the enterprise in the form of Limited Partnership has a deed of establishment, official copies legalized by a competent official must be submitted at the time of registration.

e. The provisions of Article 15 of the *WDP* Law, namely:

- 1) If the enterprise is in the form of individual, the following matters must be registered:
  - a)
    - 1) the owner's or entrepreneur's full name and every alias;
    - 2) every former name if it is different from item a sub-item 1;
    - 3) number and date of personal identification;
  - b)
    - 1) address of permanent residence;
    - 2) address and country of permanent residence if the person concerned does not have permanent residence in the territory of the State of the Republic of Indonesia;
  - c)
    - 1) the owner's or entrepreneur's place and date of birth
    - 2) country of birth if he/she was born outside the territory of the State of the Republic of Indonesia;
  - d)
    - 1) the owner's or entrepreneur's citizenship at the time of registration;
    - 2) every former citizenship of the owner or entrepreneur if it is different form item d sub-item 1;
  - e) name of the enterprise or the mark of the enterprise if any;
  - f)
    - 1) principal activities and other business activities;
    - 2) business permits held;
  - g)
    - 1) address of the enterprise's domicile;
    - 2) address of each branch office, auxiliary office, agent and representative office of the enterprise concerned, if any;

- h) amount of the enterprise's fixed assets if any;
  - i)
    - 1) the date on which the enterprise started its activities;
    - 2) the of applying for registration.
    - 3) If the enterprise in the form of individual business possesses a deed of establishment, official copies of the deed of establishment legalized by a competent official must be submitted at the time of registration.
- f. The provisions of Article 16 of the *WDP* Law, namely:
- 1) In the event of an enterprise in the form of business other than those intended in Articles 11, 12, 13, 14 and 15 of this Law, the following matters must be registered:
    - a) the name and mark of the enterprise;
    - b) date of the enterprise's establishment;
    - c)
      - 1) the enterprise's principal activity and other business activities;
      - 2) business permits held;
    - d)
      - 1) the enterprise's address based on the deed of establishment;
      - 2) the address of each branch office, auxiliary office, agent and representative office of the enterprise;
    - e) related to each management and commissioner or supervisor:
      - 1) full name and every alias;
      - 2) every former name if it is different from item e sub-item 1;
      - 3) number and date of personal identification;
      - 4) address of permanent residence;
      - 5) address and country of permanent residence, if not permanently residing in the territory of the State of the Republic of Indonesia;
      - 6) place and date of birth;
      - 7) country of birth if born outside the territory of the State of the Republic of Indonesia;
      - 8) citizenship at the time of registration;
      - 9) every former citizenship if it is different from item e sub-item 8;
      - 10) signature;
      - 11) date on which he/she assumed position;
    - f) other business activities of each management and commissioner or supervisor;
    - g)
      - 1) authorized capital;
      - 2) the amount of issued capital;
      - 3) the amount of paid up capital;
    - h)
      - 1) date of commencement of the enterprise's activities;
      - 2) date of filing application for registration.
  - 2) At the time of registration, official copies of the deed of establishment and other statements as well as the legalization by a competent official must be submitted.

g. The provisions of Article 16 of the *WDP* Law, namely:

Other matters which must be registered to the extent that it is not provided for in Articles 11, 12, 13, 14, 15, and 16 of this Law shall be further provided for by the Minister.

In 1995, the provisions concerning limited liability companies under the Commercial Code (*KUHD*) were subsequently replaced by Law No. 1 Year 1995, and by adopting the said law the provisions related to limited liability companies previously provided for in article 36 up to and including article 56 of the *KUHD* along with the amendments thereto under Law No. 4 Year 1971 were declared no longer applicable.

For the implementation of the *WDP* Law in 1998, Decree of the Minister of Industry and Trade No.12/MPP/Kep/1998 was issued which was subsequently amended by Decree of the Minister of Industry and Trade No.327/MPP/Kep/7/1999 concerning the administration of the Mandatory Enterprise Registration (*Wajib Daftar Perusahaan* or abbreviated as *WDP*) as well as Regulation of the Minister of Trade No. 37/M-DAG/PER/9/2007 concerning the Administration of Mandatory Enterprise Registration. The decree was issued based on the consideration of the need to supplement uninterrupted implementation and enhancing the quality of enterprise registration services, providing information, promotion, benefits of enterprise registration for business circles and the public, enhancing the role of the enterprise registry as well as appointing administrators and implementers of *WDP*.

Accordingly, the basis for the administration of *WDP* prior to and during the validity of the former Law concerning Limited Liability Companies, applicable to enterprises in the form of limited liability companies (*PT*), firms (*firma*), limited partnerships (*persekutuan komanditer*), Cooperatives, individual or other forms of enterprises, is provided for in the *WDP* Law and the decree of the relevant minister.

By virtue of Decree of the Minister of Industry and Trade of the Republic of Indonesia No.12/MPP.Kep/1/1998 concerning the administration of *WDP* further provides for enterprises exempted from *WDP*, namely as follows:

- 1) small individual enterprises;
- 2) enterprises led, operated, or managed by the owner himself/herself, or by employing only their own family members;
- 3) enterprises not required to possess business permit or a certificate of equal status issued by the competent authorities;
- 4) enterprises which are not a legal entity or partnership.

It is further provided that businesses or activities engaging outside the economic area or the nature and objectives of which are not solely profit and or business profit oriented, shall not be subject to *WDP*, namely as follows:<sup>15</sup>

- 1) Formal education (school) of all types and levels organized by any party whatsoever.
- 2) Non-formal education (other than school).
- 3) Notary services.
- 4) Attorney services.
- 5) Individual Medical Practitioner and Group of Medical Practitioners.

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<http://hati-situnurlola.blogspot.com/2010/06/wajib-daftar-perusahaan.html> Op.Cit.

The above mentioned enterprises are in the form of the following:<sup>16</sup>

- 1) Legal entities, including cooperatives.
- 2) Partnerships.
- 3) Individuals.
- 4) Other enterprises.

or pursuant to the Minister of Industry and Trade decree include the following forms of business:<sup>17</sup>

- 1) Limited liability companies (*PT*), Cooperatives, Limited Partnerships (*Persekutuan Komanditer - CV*), Firms (*Firma - Fa*), Individuals.
- 2) Other enterprises engaging in profit oriented business activities.

The scope of regulation includes the following, among other things:

- 1) Authorities and Responsibilities.<sup>18</sup>
- 2) Procedure for the Use of Enterprise Registration (*Tata Cara Penggunaan Pendaftaran Perusahaan*).<sup>19</sup>
- 3) Fees.<sup>20</sup>

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>^</sup> The Minister has the authority to stipulate the place of domicile, the organizational structure of enterprise registration (KPP), provisions and procedures for the administration of Mandatory Enterprise Registration (WDP). The place of domicile and organizational structure of KPP are as follows: Directorate for the Registration of Enterprises at the Directorate General of Domestic Trade acting as KPP which has the function as WDP administrator at the Central level.

<sup>^</sup> Enterprise Registration is conducted by the Owner/Person In Charge or the Enterprise's authorized Proxy at the Level II KPP Tingkat II at the place of the enterprise's domicile. However, such power does not include the power to sign the Enterprise Registration Form. Enterprise Registration is conducted by filling out the Enterprise Registration Form obtained free of charge and submitting the same directly to the local Level II KPP attaching the following documents:

- a. Enterprises Incorporated as Limited Liability Company (*PT*):
  1. Original and copy of the Enterprise's Deed of Establishment and Company Deed of Establishment Data acknowledged by the Department of Justice.
  2. Original and copy of the Resolution on the Amendment of the Company's Establishment (if any).
  3. Original and copy of the Decree Approving Legal Entity.
  4. A copy of the Identification Card or Passport of the President Director or person in charge.
  5. A copy of the Business License or Statement equivalent thereto issued by the competent Authorities.
- b. Enterprises In the Form of Cooperative:
  1. Original and a copy of the Cooperative's Deed of Establishment.
  2. A copy of the Identification Card of the Executives (*Pengurus*).
  3. A copy of the ratification of legal entity status by the competent Official.
  4. A copy of the Business License or Statement equivalent thereto issued by the competent Authorities.
- c. Enterprises In the Form of Limited Partnership (*CV*):
  1. Original and a copy of the Enterprise's Deed of Establishment (if any)
  2. A copy of the Identification Card or Passport of the person in charge/executive (*pengurus*).
  3. A copy of the Business License or Statement equivalent thereto issued by the competent Authorities. [unofficial translation]

<sup>20</sup> Enterprises the registration of which has been approved shall be obligated to pay WDP administration fee in compliance with applicable provisions, and such administration fee must be paid in full before TDP is issued. The enterprise shall be obligated to put the TDP in a place which is easily accessible and visible to the public, and the number of TDP must be indicated on the nameplate and the documents of the enterprise concerned used in conducting its business activities.

- 4) Amendment and Replacement of *TDP*.<sup>21</sup>
- 5) Loss and Damage of *TDP*.<sup>22</sup>
- 6) Cancellation.<sup>23</sup>
- 7) Annulment/Dissolution.<sup>24</sup>

Discussion on the TDP Law has become increasingly interesting after the author has obtained information on the characteristics of enterprises incorporated as limited liability companies. The requirement for establishing a limited liability company is to have an official deed (deed drawn up by a notary) which indicates the name of the limited liability company, capital, field of business, address of the enterprise and other information. The said deed must be approved by the Minister of Law and Human Rights of the Republic of Indonesia (formerly the Minister of Justice). In order to obtain approval from the minister of justice, the following requirements must be fulfilled:

- 1) The limited liability company concerned is not contradictory to public order and morality.
- 2) The deed of establishment meets the requirements set forth by Law.
- 3) At least 25% of the authorized capital has been issued and paid up (in accordance with Law No. 1 Year 1995 & Law No. 40 Year 2007, both concerning limited liability companies).

Prior to the Law concerning Limited Liability Companies (Law No. 1 year 1995), Limited Liability Companies had had to be registered at the local District Court after obtaining approval; however, after Law No. 1 Year 1995 came into effect, the deed of establishment had to be registered at the Enterprise Registration Office (in accordance with Mandatory Enterprise Registration Law Year 1982) (in other words, registration

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<sup>21</sup> Every enterprise making changes in matters registered in accordance with the provisions shall be obligated to report it to the Head of the local Level II KPP. Such changes shall be made by filling out Amendment Forms obtained free of charge. The obligation to report such changes must be complied with by no later than 90 (ninety) days as from the time at which such changes occur. Some of the changes may result in the replacement of TDP, such as:

- a. Transfer of ownership or management of the enterprise concerned.
- b. Change of the name of the enterprise concerned.
- c. Change in the form and or the status of the enterprise concerned.
- d. Change in the address of the enterprise outside the working territory of the Level II KPP concerned.
- e. Change in the Enterprise's Main Field of Business Activities. [unofficial translation]

<sup>21</sup> In view of the obligation to file an application distinction is made between the loss of TDP and the damage of TDP, whereby for the purpose of obtaining replacement of TDP which has been lost the enterprise concerned applies in writing to the Head of the Level II KPP enclosing the Statement on Loss from the Police by no later than 90 (ninety) days as from the date of such loss.

<sup>23</sup> The enterprise registration and TDP shall be declared void if it is found that the enterprise concerned has registered the enterprise's data in an untrue manner and or not in accordance with the business license or statement of equivalent status, by issuing a Decision on Cancellation. The enterprise concerned shall conduct re-registration in accordance with the procedure for the implementation of Enterprise registration as described above, by submitting the original TDP which was cancelled.

<sup>24</sup> An enterprise shall be deleted from the Enterprise Registry in the event of the following:

- a. Change in the form of the enterprise concerned; or
- b. Liquidation of the enterprise concerned; or
- c. The enterprise concerned terminates all of its business activities; or
- d. The enterprise concerned comes to a halt due to the expiration or termination of the Deed of Establishment; or
- e. The enterprise concerned halts its activities/is dissolved based on a District Court Decision which has permanent legal force. [unofficial translation]

at the District court concerned was no longer required). Subsequently, pursuant to Law No. 40 Year 2007, the said requirement to register with the Enterprise Registration Office was also removed. At the same time, the requirement to make announcement in the Official Gazette of the Republic of Indonesia (*Berita Negara Republik Indonesia* – abbreviated as *BNRI*) remained applicable, provided however that while under Law No. 1 Year 1995 such was the obligation of the Board of Directors of the Limited Liability Company concerned, under Law No. 40 Year 2007 it became the authority/obligation of the Minister of Law and Human Rights to make such announcement.

One of the new provisions of the new Law concerning Limited Liability Companies is that the application for the establishment of a limited liability company (*PT*) and the information about amendments to the articles of association are submitted online by filling out forms and attaching supporting documents through the system known as the Legal Entities' Administration System (*Sistem Administrasi Badan Hukum* or briefly referred to as *SABH*). The *SABH* under the authority of the Department<sup>25</sup> of Law and Human Rights through the Directorate General of General Law Administration, hence enterprise registration which is an integral part of the *SABH* process also falls under the authority of the Department of Law and Human Rights, as provided for in article 29 of the new Law concerning Limited Liability Companies. It is evident that the provisions of the said article 29 are different from article 21 paragraph (1) of the former Law on Limited Liability Companies and the elucidation thereof namely that the registration of enterprises is conducted with reference to the *WDP* Law. The difference between the provisions of Article 29 of the new Law on Limited Liability Companies and the provisions of article 21 paragraph (1) of the old Law concerning Limited Liability Companies can be found in the parties authorized to conduct enterprise registration. According to the new Law concerning Limited Liability Companies, the authority lies with the Department of Law and Human Rights through the Directorate General of General Law Administration, while under the old Law concerning Limited Liability Companies which refers to the *WDP* Law such authority belongs to the Department of Trade through the Directorate for Enterprise Registration at the Directorate General of Domestic Trade acting in its capacity as Enterprise Registration Office (*Kantor Pendaftaran Perusahaan* or briefly referred to as *KPP*) at the central government level and the regional office of the Department of Trade at the level I and level II regional government. The question that arises in view of such difference is whether the said provision of article 29 of the new Law concerning Limited Liability Companies means that enterprise registration as provided for under the *WDP* Law is no longer applicable to Limited Liability Companies?

Based on the foregoing, there appears to be a normative contradiction between the two laws mentioned above raising an issue, notably that with the existence of two different provisions the *WDP* Law provides for sanctions applicable for crime or violation if the provisions of the *WDP* Law are not complied with, while the new Law concerning Limited Liability Companies does not provide for such sanctions, hence the question is whether once the company's data are included in the company registry in accordance with the provisions of Article 29 paragraph (3) of the new Law concerning Limited Liability Companies, is it still required to conduct registration in accordance with the provisions of the *WDP* Law in view of the above mentioned provisions concerning sanctions? According to Sudikno Mertokusumo, the interpretation of law is a method of finding law when regulation does exist, however it is not clear

<sup>25</sup> The author of the article is still using the term 'departemen' (department), while the term that should be used is 'Kementerian' (Ministry).

enough for it to be applicable to a certain case/event. There are various methods for interpreting the law, one of the methods of legal interpretation in this context is the systemic interpretation method, according to which the law needs to be read as a whole, ensuring that its individual provisions are not considered separately from the entire body of the law; rather than that, individual provisions must be considered in conjunction with provisions of similar type, finding the relationship among several regulations constituting a larger system as a whole.<sup>26</sup>

In this context, the provisions of *WDP* Law and the new Law concerning Limited Liability Companies in view of article 29 paragraph (1) of the new Law concerning Limited Liability Companies can be compared as follows,

(1) The Company Registry is administered by the Minister

The definition of Minister according to article 1 sub-article 16 of the new Law concerning Limited Liability Companies is as follows:

Minister shall be the minister who has functions and responsibilities in the field of law and human rights.

Compared to the provisions of article 21 paragraph (1) of the old Law concerning Limited Liability Companies and the elucidation thereof:

- (1) The company's Board of Directors shall be obligated to register in the enterprise registry
- a) The deed of establishment along with the approval of the Minister of Justice.
  - b) Amendment deed of the articles of association along with the approval of the Minister of Justice.
  - c) Amendment deed of the articles of association along with the report to the Minister of Justice.

Based on the foregoing, the definition/meaning of the enterprise registry (*daftar perusahaan*) is enterprise registry (*daftar perusahaan*) as intended in the *WDP* Law. Furthermore, with reference to the provisions of article 5 paragraph (1) of the *WDP* Law, every enterprise must be registered in the enterprise registry (*daftar perusahaan*) at the enterprise registration office. In this context, the definition of enterprise under the *WDP* Law as described earlier includes, among others, limited liability companies. Furthermore, pursuant to article 9 of the *WDP* Law, registration is conducted by filling out a registration form stipulated by the Minister at the local enterprise registration office. Minister as intended in the *WDP* Law based on article 1 sub-article (e) is: the Minister responsible in the field of trade. At the same time, in decree of the Minister of Trade of the Republic of Indonesia No. 12/MPP/Kep/U1998 year 1998 as amended with Decree of the Minister of Industry and Trade

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<sup>26</sup> There is a need for the interpretation of the law. This is due to the fact that laws are legal products formulated in an abstract and passive manner. Abstract because they are extremely general in nature; and passive because they will not cause a legal effect in the absence of a concrete event. Accordingly, they have an extremely broad scope of applicability. Consequently, in specific cases they tend to apply the interpretation method which is the most favorable for their position. Therefore, abstract legal events require an incentive in order for them to be actively implementable. In general, matters requiring interpretation are agreements and laws.

No. 327/MPP/Kep/7/1999 concerning the Administration of Mandatory Enterprise Registration and Decree of the Minister of Trade Number 37/M-DAG/PER/9/2007 concerning the administration of enterprise registration it is stated that the place of domicile and composition of the enterprise registration office is both at the central, provincial as well as at the regency/city/municipality level.

Furthermore, with the new Law concerning Limited Liability Companies coming into force, namely in the Closing provisions in Article 160 it is provided that: At the time of this Law becoming effective, Law Number 1 Year 1995 concerning Limited Liability Companies (State Gazette of the Republic of Indonesia Year 1995 Number 13, Supplement to the State Gazette of the Republic of Indonesia Number 3587), is revoked and is declared not applicable. The new Law concerning Limited Liability Companies came into force on August 16, 2007 when the provisions of the new Law concerning Limited Liability Companies became effective and the old Law concerning Limited Liability Companies was declared no longer valid. After relating the articles of the three laws, namely the old Law concerning Limited Liability Companies, the *WDP* Law and the new Law concerning Limited Liability Companies, it can be concluded that with the inapplicability of the provisions of the above mentioned old Law concerning Limited Liability Companies, the *WDP* Law related in the elucidation on Article 21 paragraph (1) is no longer applicable to Limited Liability Companies, while for other forms of business such as Firms (*Firma*), Cooperatives, Limited Partnerships (*Persekutuan Komanditer - CV*), as well as other enterprises conducting business activities aimed at obtaining profits or business profits, the *WDP* Law remains applicable. This is due to the fact that the new Law concerning Limited Liability Companies provides that enterprise registration is administered by the Minister who is responsible in the field of law and human rights. Accordingly, the Minister of Law and Human Rights has the authority to administer company registration.

In addition to the foregoing, for the effectiveness of a law ensuring that it achieves its purposes while there are different provisions for certain matters, there are two legal principles applicable, namely as follows:

- a. Specific law sets aside general law (*lex specialis derogat lex generali*).
- b. Currently effective law voids the law preceding it (*lex posterior derogat legi priori*).

The intent of the above stated legal principle is that specific events are subject to the law specifically providing for the same, even though such specific events can also be subject to a law providing for a broader or more general event. At the same time, a law which is first in force no longer applies if a new law subsequently comes into force providing for the same matter.

The authority to issue a Enterprise Registration Certificate (*Tanda Daftar Perusahaan* or briefly referred to as *TDP*) after the registration of the enterprise concerned is validated, as the *TDP* is obtained as part of the enterprise registration process, the administration of registration, specifically the registration of legal entities incorporated as limited liability enterprise including the issuance of company registration certificate is the authority of the Ministry of Law and Human Rights and it is no longer the authority of the Ministry of Trade. By applying *Government online* through the *SABH* dealing with legal entities starting from the application for the approval of legal entities, approval of amendments as well as the issuance of the company registration certificate is within the authority of the Department of Law and Human Rights.

Thus it can be concluded that while the *WDP* Law is still applicable to legal entities other than legal entities incorporated as limited liability company such as Firms (*Firma*), Limited Partnerships (*Persekutuan Komanditer - CV*), Cooperatives and individual businesses, company registration of limited liability companies does no longer refer to the *WDP* Law, rather than that, it is subject to Law concerning Limited Liability Companies No. 40 year 2007 while further provisions on company registry have been set forth by the Minister of Law and Human Rights namely in the Regulation of the Minister of Law and Human Rights No.M.HH.03.AH.01.01 year 2009 concerning Company Registry.

### **III. A Brief Overview of Regional Autonomy Viewed from the Perspective of Governance Principles in Indonesia**

Referred to as governance principles are better and more efficient ways of conducting governance in a state. In the theory of state, it is commonly referred to as *Ratio Gubernandi*. The issue arises in view of the fact that in the course of its development, the tasks faced by the organization of the state are becoming increasingly difficult. In addition to that, state territory is also expanding hence there is a need to divide it into several territories which calls for specific provisions concerning the tasks of the central and the regional governments respectively. In principle, the state as an organization has the authority to provide for all matters related to its citizens, including the authority to determine the state's objectives and the ways to achieve the same. Furthermore, in implementing governmental functions, state power can be:

- a. Concentrated, namely power is in the hands of one/several, or a limited number of persons. The second form of power is centralized power, meaning that power is in the hands of a number of people jointly forming the center of authority;
- b. Distributed, which means that government authority is divided along two basic lines, namely horizontally and vertically. Horizontally, government functions are divided based on different types of functions, thus creating state institutions. At the same time, vertical division creates a line between the central and the regional governments.<sup>27</sup>

In the implementation of government functions with distributed power, we can generally distinguish between two types of governance principles, namely the principle of expertise and the principle of territory.

#### **a. The Principle of Expertise**

By running the government based on the principle of expertise, it means that the implementation of functions is left to experts. Implementation can be determined based on the distribution of tasks horizontally and vertically. If tasks are distributed horizontally, all tasks are divided into several areas, and the implementation thereof is left to experts such as Ministers and their staff members. Under such conditions, government agencies are created based on expertise such as Ministries for the purpose of implementing government functions based on expertise in their respective fields (leaving *obyective staatzorg* to the experts). Each Ministry is led by a Minister assisted by his/her staff members who are state apparatus officials. In

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<sup>27</sup> H. Abubakar Busro, S.H., Abu Daud Busroh, S.H., *Hukum Tata Negara (Constitutional Law)*, ed.1, (Jakarta : Ghalia Indonesia, 1985), p.145.

state theory, it is referred to as *Government by Official*, namely the implementation of government functions with the civil servant system. In practice, as a result of such conditions experts assisting government functions become concentrated at the central government located in the state's capital city. At the same time, regional governments lack qualified experts in the implementation of regional government functions. In addition to that, problems occasionally arise across Ministries as several Ministries may have inter-related functions. Such problems are generally resolved by forming cooperation or a Committee across Ministries, in state theory referred to as *Government by Committee*. For example, for the purpose of dealing with the issue of smuggling in the state of Indonesia, cooperation has been established between the Ministry of Justice, Ministry of Finance (Customs and Excise) and the Police Institution.

At the same time, the implementation of governmental functions based on the principle of expertise can also be distributed vertically. In such case, the government distributes its functions to the regions, thus creating representative offices of the central government in the regions with a hierarchical status based on the principle of expertise. However, in course of its development in the modern era state territory has become rather extensive, making it increasingly difficult for the central government to implement its governmental functions in an adequate and efficient manner covering the entire territory of the state. Therefore, in implementing governmental functions, the central government does not solely rely on the principle of expertise; rather than that, it also applies the principle of territory.

## **b. The Principle of Territory**

The principle of territory implies the implementation of governmental functions by taking into account the element of state territory. Relying solely on the principle of expertise in implementing governmental functions has the consequence of state power becoming concentrated / brought together in one place, and the need to use a uniform system. Such approach is certainly not suitable for countries which have a vast territory and diverse population, as it is bound to hamper the uninterrupted implementation of governmental functions. For the purpose of an appropriate and efficient implementation, governmental functions need to be implemented based on the principles of expertise and territory. Viewed from the principle of territory, there are theoretically two types of governance principles, namely de-concentration and decentralization.

With de-concentration, state territory is divided into a number of large and small regions, whereby in each of the regions there representatives from the central government. Such representatives possess powers on behalf of the central government, with certain limitations.<sup>28</sup>

Amrah Muslim, *S.H.*, states that de-concentration is delegating some of the central government's powers to the central government's instrumentalities in the regions.<sup>29</sup> The central government's representatives or instrumentalities in the regions have the power to act and make decisions upon their own initiative related to their respective territories. At the same time, however, they are still implementing elements in the regions with a superior - subordinate hierarchical relationship with the central

<sup>28</sup> Padmo Wahyono, *S.H.*, *Negara Republik Indonesia (State of the Republic of Indonesia)*, ed. 2, (Jakarta : CV. Rajawali, 1986 ), p.76.

<sup>29</sup> Drs. Musanef, *Sistem Pemerintahan Di Indonesia (System of Governance In Indonesia)*, ed.4, (Jakarta : CV. Haji Masagung, 1993 ), p.19.

government. They implement the functions of the central government in the regions concerned in line with the policy stipulated by the central government. Thus, the central government still has the responsibility for funding, planning as well as the implementation procedures of the same. As implementing elements in the regions, particularly related to vertical agencies, they are coordinated at the level of local Head of Region in his/her capacity as central government apparatus. However, in terms of implementation policy, de-concentration remains to be bound by the policy determined by the central government. Officials assigned to the regions based on the de-concentration principle are employees of the central government, while their territory is referred to as administrative territory.

Decentralization is when state territory is divided into several large and small regions, and each region has a number of specific powers or a sort of central government powers within certain limitations set forth by law.<sup>30</sup> According to Prof. Dr. Prajudi, *S.H.*, the issue of decentralization is related to the delegation of certain state administration responsibilities to autonomous bodies (not to certain positions), rather than the powers related to certain issues. As a matter of comparison we can refer to the view expressed by Amrah Muslim, *S.H.*, who defines decentralization as distribution of power to bodies and groups within the community concerned enabling them to take care of their own internal affairs.<sup>31</sup> According to yet another opinion, the relationship between the central and regional government based on the decentralization principle is delegation of some powers from the central government to the regional government selected by the people in the region concerned, enabling them to gradually and by using their own apparatus handle their own internal affairs at their own initiative and cost insofar as they do not deviate from central government policy.<sup>32336)</sup>

The above quoted views concerning the definition of decentralization represent the definition of decentralization in the political meaning of the word. There are also several theoretical definitions of decentralization, namely as follows:

- 1) Functional decentralization, which is the granting of right/powers to a certain group which has a function in community to take care of its own interests, either by relating or not relating it to a certain region. Generally, such group has a certain function in the field of economy (production and distribution) or in the field of agriculture, and in the implementation of its functions, it can include more than one regions;
- 2) Cultural decentralization, providing an opportunity or right to minority groups in the community to manage their own interests in the field of culture. It is generally related to the field of education and religion;
- 3) Technical decentralization, which is delegation of the right to a certain body consisting of experts to implement certain functions of technical nature. The body concerned normally forms a committee which is vested with full right to implement technical function concerned;
- 4) Collaborative decentralization, granting the right to the private sector to participate in the implementation of governmental functions for public purposes/ in the interest of the people. They normally have a strong economic position, and are involved in government agencies in an honorary position and without

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<sup>30</sup> Prof. Padmo Wahyono, *S.H.*, op.cit. p.76.

<sup>31</sup> Drs. Musanef, op.cit., p. 21.

<sup>32</sup> H. Abubakar Busro, *S.H.* Abu Daud Busroh, *S.H.*, op.cit., p.147.

<sup>33</sup>

receiving salaries.

In addition to creating autonomy right, the delegation of the central government's functions to the regions also gives rise to *medebewind* functions to the regional government concerned. The term 'autonomy' originates from the word 'auto' or 'self', and the word 'nomos' which means governance. Accordingly, autonomy is self-governance or managing one's own internal affairs. At the same time, Logemann is of the view that an independent power to act (*vrije beweging*) granted state administration units governing in their own regions, namely power based on their self-initiative that they can use to administer public affairs, is governance referred as autonomy.<sup>34</sup> It is expected that this form of governance can adequately fulfill the needs of the local community concerned by distributing tasks and obligations between the central government and the regional government.

According to Maddick, the definition of decentralization consists of two related elements. First, the establishment of autonomous regions; and second, granting legal powers to deal with certain areas of governance, both specifically as well as in general terms.<sup>35</sup> In the context of decentralization, regional autonomy is outside the central government's organizational hierarchy. On the other hand, according to the de-concentration principle, official territory/administrative territory are within the central government's organizational hierarchy. Based on the concept of autonomy, each regional government is basically free to make decisions, take its own initiative independent of the central government's control. Accordingly, the decentralization principle which creates the concept of regional autonomy is closely related to democracy. Due to their ability to take its own initiatives related to the interests of the local community, regional governments are also in a position to determine and improve their own fate. Public administration experts frequently express the view that conceptually the decentralization principle is an instrument for the achievement of certain purposes, as stated by James W. Feslert and A.F. Leemans. The purposes to be achieved are national unity, democratic governance, independence as a manifestation of autonomy, efficient administration and social-economic development.<sup>36</sup>

In the administration of the regional function we also come across the assistance (*medebewind*) function, namely the regional government's function in implementing the affairs of the central government or the affairs of a regional government at a level above the regional government concerned, with the responsibility to report to the assigning party. What distinguishes it from the autonomy function is the authority to formulate regional regulations. Based on the right of autonomy, regional governments have the right to issue regional regulations according to their own policy. At the same time, under the assistance function or *medebewind* such right must be based on the central government's policy. Based on the overall implementation of governmental functions under the principle of territory, there are three forms/systems of regional governance, namely as follows:

1. regional governance with the right of autonomy based on the decentralization principle;
2. regional governance with the function to implement the regulations of the central

<sup>34</sup> Ibid., p.155.

<sup>35</sup> Prof.DR.Bhenyamin Hoessein."Implikasi Undang-Undang Nomor 22 Tahun 1999 Terhadap Pembangunan dan Penyelenggaraan Sektor Transportasi", (Implications of Law Number 22 Year 1999 To Development and the Administration of the Transportation Sector), (Paper presented in Internal Discussion at the Faculty of Law, Universitas Indonesia, August 1999), p.4.

<sup>36</sup> Ibid. p.7.

government or the regional government one level higher than the regional government concerned based on the assistance principle (*medewind*);

3. regional governance based on the de-concentration principle creating official territory or administrative territory.

Regarding provisions concerning governance principles in the state of Indonesia, reference can be made to article 18 of the 1945 Constitution concerning Regional Governance. In principle, the said article also provides for the life as a state and it also indirectly provides for matters related to social welfare. In this respect, Indonesia's territory is to be divided into large and small regions, with a form and composition of governance duly observing and being based on the principles of deliberation within the system of state governance. For the purpose of implementing Article 18 of the 1945 Constitution, Law Number year 1974 concerning Regional Governance was adopted. The principle element of Law Number 5/1974 is that the state of Indonesia is a unitary state hence there will be no regions with the character of a state within its territory. Referred to as large and small regions are Provinces and smaller regions, which constitute autonomous and administrative regions. In autonomous regions there are regional representatives with their governance being based on the principle of deliberation (*musyawarah*). In addition to that, there are regions which historically possess an original composition, and which can be considered as special regions with due attention to such regions' rights of origin. This Law concerning regional governance also sets out the principle that the form and system applicable to the central government as articulated in the 1945 Constitution are also applicable to regional governments proportionately and in accordance with their respective environments. Law Number 5/1974 was subsequently supplemented by adopting Law Number 5 Year 1979.

In fact, the founding fathers had already reached national consensus concerning the structure of our state, namely as a unitary state and based on the decentralization principle. In the implementation of governance functions there are certain areas of governance administered based on centralization by the central government with de-concentration as a refined form thereof, and there are also functions implemented in a decentralized manner. By applying the decentralization principle with regional autonomy as its manifestation, it is expected that the diversity aspect of regional communities and the democratic element can be fulfilled. However, in its implementation, the Law on Regional Governance has introduced the de-concentration principle which tends to adopt the Integrated Field Administration Model. Under the said model, the working territory boundaries of Vertical Agencies of various departments and the working territory boundaries of Regional Heads in the regions concerned are treated equally. In addition to that, in the context of decentralization there is also an overlap between the territory of autonomous region and Administrative territory. As a result, there is a demand on the Head of Region and Head of Territory to play a double role as representatives of the central government.<sup>37</sup> Such strategy adopted by the central government by introducing the models of centralization, de-concentration and decentralization through the Law on Regional Governance has created non-conducive conditions for the development of regional autonomy in the territory of the state of Indonesia. The wave of reform taking place in Indonesia recently has been successful in effecting amendments to the

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<sup>37</sup>

Ibid., p.2.

Law on Regional Governance. Law Number 5/1974 and Law Number 5/1979 have been replaced by Law Number 22 year 1999 and were most recently amended by Law Number 32 year 2004, which is expected to create more favorable conditions for the implementation of regional autonomy and democracy based on the principle of decentralization.

#### IV. Indonesia Is a State Based on the Principle of Law

The adoption of the principle of state based on the principle of law is also expressly articulated in the Preamble of the 1945 Constitution, specifically in the part stating that

*“Indonesia adalah negara yang berdasar atas hukum (Rechtsstaat), dan tidak berdasarkan kekuasaan belaka (Machtsstaat).”*

[Unofficial translation: “Indonesia is a state based on law (*Rechtsstaat*), and not based only on power (*Machtsstaat*).”]

Based on the above formulation, state administrators are expected to make continuous endeavors towards creating prosperity and welfare for their people, in accordance with the main principles of a state which is based on law (*rechtsstaat*). The Minutes of the Meetings of the Investigation Committee for the Preparation of Indonesia’s Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, or briefly referred to as *BPUPKI*) and the Preparatory Committee for Indonesia’s Independence (*Panitia Persiapan Kemerdekaan Indonesia*, or briefly referred to as *PPKI*) related to the Formulation of the 1945 Constitution (quoted from the Preparatory Text of the 1945 Constitution, volume I, Jajasan Prapantja, Jakarta, 1959 by Muhammad Yamin), page 417. As a state based on law, as formulated in the amendment to the 1945 Constitution Article 1 paragraph (3), the State of the Republic of Indonesia has positioned itself among the ranks of material/social *rechtsstaat* or as a state based on law in the sense of a welfare state or *verzorgingsstaat*. This is enunciated in the fourth line of the Preamble to the 1945 Constitution, which reads as follows

*“...untuk membentuk suatu pemerintahan negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia dan untuk memajukan kesejahteraan umum, mencerdaskan kehidupan bangsa, dan ikut melaksanakan ketertiban dunia yang berdasarkan kemerdekaan, perdamaian abadi, keadilan sosial...”*

*“... in order to form a Government of the State of Indonesia which shall protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the nation, and to partake in implementing world order based upon independence, eternal peace and social justice...” [Unofficial translation]*

In the development of economic policy in the current globalization era various new ideas have emerged bringing a new nuance into and creating a link between the fields of economy and law respectively. It is not surprising, therefore, that in the context of planned economy policy and programs a new doctrine in legal jurisprudence and legal theory emerged, namely the doctrine of *law as a tool of social engineering*, even though it actually originated from Pound’s liberal idea teaching that judges should be aware of social changes and developments (rather than development as development)

taking place, and to be able to adapt their decisions to ongoing social-economic developments. The author is quoting from the article written by Prof. Soetandyo Wignjosoebroto in his book with the title *Hukum – Paradigma, Metode dan Dinamika Masalahnya* (Law –Paradigm, Methods and Dynamics of Issues), which exclusively discusses law and the economic system. It is obvious that law has a distinctively different role in *market economy* as opposed to *planned economy*. The freedom of contract cannot be fully implemented, whereby economic and business activities are in principle no longer governed by the legal norms of *privaatrechtelijk*, but those of *publikrechtelijk*.

Based on the above described state platform applicable in Indonesia, it is evident that various areas of public life within the state organization structure are governed by a set of policies. The economic sector, too, is subject to such regulatory framework. One of the proposed purposes of this research is to explore the extent to which harmonization has taken place between policy and state economic practices in the field of company law related to various aspects of its dynamics. In other words, this research is structured as a research in the field of economic law, which first of all analyzes the fundamentals of the economy of the state of the Republic of Indonesia in general, and then by focusing more specifically on legal certainty in the field of law enforcement in Indonesia, with special emphasis on the controversy surrounding the enforceability of Article 29 of the Law concerning Limited Liability Companies as well as the effects of its enforcement on the *WDP* Law.

Economic democracy as the basis of development has positive characteristics which need to be continuously nourished and developed. It is expected that by returning to the essence and spirit of the 1945 Constitution and by upholding the said *Pancasila* economic principle, sustained economic development can be achieved. The positive characteristics as intended above are as follows:<sup>38</sup>

- a. The economy shall be organized as a common endeavor based upon the principle of family system. (Article 33 of the 1945 Constitution).
- b. Production branches which are important for the state and which affect the livelihood of the public shall be controlled by the state. (Article 33 of the 1945 Constitution).
- c. Land and water and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people. (Article 33 of the 1945 Constitution).
- d. State resources and finances shall be used based on deliberation for consensus among Institutions of the People's Representatives, and the relevant policies shall also be supervised by the Institutions of the People's Representatives (Article 23 of the 1945 Constitution).
- e. Every citizen shall have the right to work and to a living befitting human beings.

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<sup>38</sup> On the other hand, certain negative characteristics must be avoided, which are in fact occurring and developing in the era of globalization. Such negative characteristics are as follows:

- a. The system of *free fight liberalism* which leads to the exploitation of human beings and other nations whereby along its history, Indonesia has incurred and maintained its position of in the world economy.
- b. The system of *etatism* whereby the State and the apparatus of State Economy dominate, oppress and suppress the potentials and creativity of economic units outside the Public sector.
- c. Concentration of economic power upon a single group in the form of monopoly which is harmful to the people

(Article 27 of the 1945 Constitution).

- f. Individual property rights are recognized and the use thereof may not be contradictory to the public interest (Article 33 Elucidation on the 1945 Constitution).
- g. The potentials, initiatives and creativity of every citizen shall be developed to the maximum extent possible to the extent that they are not harmful to the public interest (Article 33 Elucidation on the 1945 Constitution).
- h. The poor and neglected children shall be taken care of by the state (Article 34 of the 1945 Constitution).

Based on the principles of Economic Democracy (*Demokrasi Ekonomi*) there are three important elements in the economic order which is organized as a joint endeavor based on the family principle, namely the public sector, the private sector and the cooperatives sector. The above mentioned three sectors need to be developed in a harmonious and solid manner. The function of the *WDP* Law and the Law concerning Limited Liability Companies is basically to serve as a concrete measure in the context of creating positive aspects in economic democracy, particularly in a state which is based on law. Indeed, it needs to be recognized that in doing business no instrument can be totally free from matters implied in negative characteristics. However, law does provide a framework of regulations to create order, resilience and security in the implementation of economic democracy.<sup>39</sup>

It needs to be pointed out that the synergy among government, apparatus, community and law enforcement apparatus is in fact guided by the basic principle of natural resources development, namely sustainability and optimal use for the interest of the people to the greatest possible extent, as set out in Article 33<sup>40</sup> of the 1945 Constitution, which is actually already articulated in the objectives of the state, with a focus on setting out the basic ideas concerning the direction of development and the endeavors to bring prosperity to its people. There needs to be an objective for any state which exists as an organization. Such objective of the state is manifested as an obligation, serving as direction to an organized society, and it therefore indicates the organized characteristics of such objective.<sup>41</sup>

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<sup>39</sup> In line with the Inaugural Speech as Senior Professor (Guru Besar) at the Faculty of Law of Universitas Indonesia delivered on November 17, 1979 by Prof. Padmo Wahjono, S.H., with the title 'Indonesia ialah Negara yang Berdasar atas Hukum' (Indonesia Is A State Based On Law), he stated as follows:

“Whereas a State should be based on law in all respects, as idealized since Plato with his “*Nomoi*” by E. Kant with his State of Law (formal), by J. Stahl with his State of Law (material) as well as Dicey with his “Rule of Law” [unofficial translation]

<sup>40</sup> See Article II paragraph 1 Supplementary Rules of the 1945 Constitution, stating that “Dengan ditetapkannya perubahan Undang-Undang Dasar ini, Undang-Undang Dasar Negara Republik Indonesia Year 1945 terdiri atas Pembukaan dan pasal-pasal.” (“With the stipulation of these amendments to the Constitution, the 1945 Constitution of the State of The Republic of Indonesia shall consist of the Preamble and articles.”) [Unofficial translation] See also Jimly Asshidiqie, *Konsolidasi Naskah Undang-Undang Dasar Tahun 1945 Setelah Perubahan Keempat* (Consolidated Text of the 1945 Constitution After the Fourth Amendment), p.64.

<sup>41</sup> Teaching Material Ilmu Negara (State Science Teaching Material) – 2001, Loc.Cit., p.56., whereby it is affirmed that the existence of state is not justified if it does not have an objective, in fact, such existence should be preceded by an objective. In other words, the existence of an objective should be construed first, which is then followed by the materialization of an independent state as an instrument for achieving the same. Accordingly, the existence of the state’s objective is a prerequisite for the existence of such state. The objectives of a state are articulated in the constitution of the state concerned, whereby the 1945 Constitu-

It needs to be noted that following the amendment to the 1945 Constitution, it has been expressly stated in Article 1 paragraph (3), of the Third Amendment to the 1945 Constitution that the State of Indonesia is a state based on law.<sup>42</sup> Such statement is based on the fact that the 1945 Constitution is a manifestation of the objectives of the state of the Republic of Indonesia as mandated in the basic ideas articulated in line IV of the Preamble to the 1945 Constitution, stating as follows:

*"Kemudian dari pada itu untuk membentuk suatu pemerintahan negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia dan untuk memajukan kesejahteraan umum, mencerdaskan kehidupan bangsa, dan ikut melaksanakan ketertiban dunia yang berdasarkan kemerdekaan, perdamaian abadi, dan keadilan sosial"*

*"Furthermore, in order to form a Government of the State of Indonesia which shall protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the nation, and to partake in implementing world order based upon independence, eternal peace and social justice." [Unofficial translation]*

The above formulation of state objectives has massive content, filled with ideological, political, economic, social-cultural as well as defense and security content and ideals, all of which are further elaborated in the form of endeavors towards bringing maximum prosperity to the people. One of the basic objectives is the economic sector, which further broken down to various sectors and sub-sectors, both of the national as well as international scale including those that cover the smallest units of existing groups in society.

As a state based on law, the State of the Republic of Indonesia has positioned itself among the ranks of material/social *rechtsstaat*<sup>43</sup> or a state based on law in the sense of a welfare state or *verzorgingsstaat*.<sup>44</sup> The actual wording is set out in line IV of the Preamble to the 1945 Constitution as stated above. It is therefore relevant to state that the national fisheries sector, which also has a highly strategic potential and

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tion is the formulation and manifestation of the objectives of the State of the Republic of Indonesia.

<sup>42</sup> Maria Farida Indrati Soeprapto, Kedudukan dan Materi-Muatan Peraturan Pemerintah Pengganti Undang-Undang, Peraturan Pemerintah, dan Keputusan Presiden Dalam Penyelenggaraan Pemerintahan Negara di Republik Indonesia (Status and Substance of Government Regulation In Lieu of Law, Government Regulation, and Presidential Decree in the Administration of State Governance in the Republic of Indonesia), Summary of Dissertation, Post-Graduate Program, Faculty of Law, Universitas Indonesia – 2002, p.19.

<sup>43</sup> According to Maria Farida Soeprapto the term *Rechtsstaat* in this context should be translated as a State based on Law (in accordance with the elucidation on the 1945 Constitution) in the sense of the word as state based on law or a state governed by law. In other words, as a logical consequence, the State of the Republic of Indonesia is a state based on law (*Rechtsstaat*) rather than solely based on power (*Machstaat*). In a State which adopts the principle of State based on law (*rechtsstaat*), while at the same time adopting the principle of governance which is based on a constitutional system, the fulfillment of the provisions of the Constitution is an obligation which must be complied with. Refer to the view of Jimly Asshidiqie in the Consolidated Text of the 1945 Constitution Following the Fourth Amendment, stating that "such concept of State Based On Law is mentioned in the elucidation on the 1945 Constitution using the term *rechtsstaat* as opposed to *machtsstaat* which was expressly rejected by the formulators of the Constitution. However, bearing in mind that it has not been included in an article, while it is being planned to delete the elucidation on the Constitution from the official text of the Constitution, such provision concerning the State Based On Law needs to be reaffirmed in an. The formulation expressly stating that Indonesia is a State Based On Law can also be found in the Constitution of Federal Republic of Indonesia of 1949 (Konstitusi RIS 1949) and the Provisional Constitution of 1945 (UUDS 1945)." (p.3).

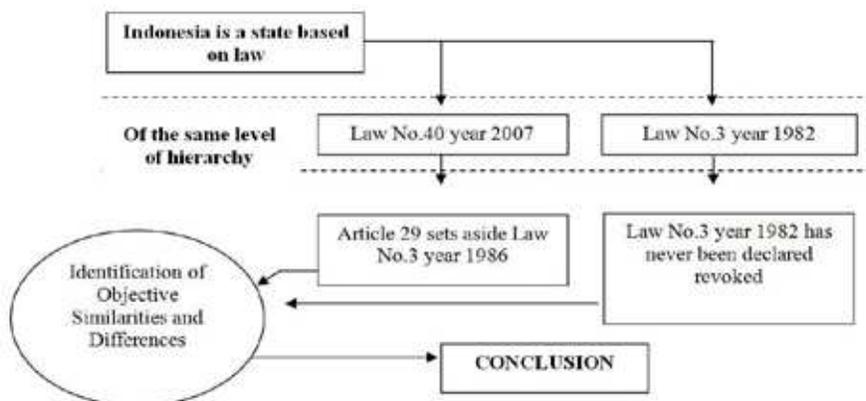
<sup>44</sup> Maria Farida Indrati Soeprapto, Op.cit.

position, is filled with multi-aspect and multi-dimensional aspects, whereby law has an important function in harmonizing those various aspects with the aim of creating legal certainty as mandated in the constitution.<sup>45</sup>

It would appear that Indonesia's economy has not really taken off.<sup>46</sup> At the root of the crisis in Indonesia there are basically 6 causing factors. First, according to Paul Krugman, the primary driving force behind accelerated economic growth prior to the crises was the growth of investment rather than efficiency and innovation. Second, the market value of most of the enterprises listed on the capital markets in this region has been overvalued. Third, the financial structure of enterprises is basically not sound. Fourth, mark-up practices have been occurring in the process of extending credits, thus eventually bringing a destructive effect on the capital structure itself. Fifth, an unhealthy concentration of economy had occurred, with data from 1996 indicating that in 1996 only 200 private sector conglomerates (owned by more or less 50 families), and 100 large state-owned enterprises, whereas the middle of the pyramid was almost empty. Sixth, the decline of Indonesia's economy has also been caused by the absence of *good corporate governance* in the management of enterprises<sup>47</sup>

The lack of harmony in applicable laws and regulations in Indonesia does not mean that the law is not being enforced, however, it is necessarily related to the situation and conditions of life as a state. There is a need to carefully examine the background, motives and objectives of adopting a law. It can be illustrated through the following diagram:

Diagram 4.1. Hierarchy of Similarities in Laws



<sup>45</sup> Conditions being currently faced by the Indonesian nation are rather complex and multidimensional, requiring a serious and genuine approach. Based on the generally prevailing conditions and the policy direction provided under the 1999-2004 Broad Outlines of State Policy (GBHN), five major issues can be identified which are currently being faced by the Indonesian nation, namely as follows:

1. proliferation of social conflict and the emergence of the symptoms of national disintegration;
1. weak enforcement of law and human rights;
2. slow economic recovery;
3. low level of people's welfare, increase of social disease, and weak national cultural resilience; and
4. inadequate development of regional and social development.

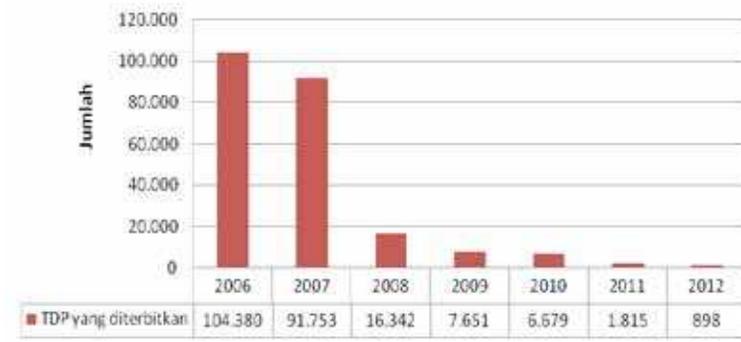
<sup>46</sup> Sofyan Djalil, Good Corporate Governance, paper presented in Seminar Corporate Governance at Universitas Sumatera Utara on June 26, 2000, p.1.

<sup>47</sup> Maria Farida Indrati Soeprapto, Op.cit.

Law must remain within the avenue of creating certainty and order in society. However, any lack of harmony needs to be subject to scrupulous and careful examination and analysis in order to avoid damages or even greater losses.

Following is information concerning enterprises implementing *WDP* based on data compiled by the team of the Domestic Trade Policy Center, Trade Policy Study and Development Agency, Ministry of Trade:

Perkembangan Perusahaan yang melakukan WDP periode tahun 2006 - 2012



Based on the interview also conducted by the team of the Domestic Trade Policy Center, Trade Policy Study and Development Agency, Ministry of Trade using questionnaires conducted in survey areas involving business actors (38 business actors subject to *TDP* requirement and 22 business actors not subject to *TDP*) in connection with the *TDP* Law, the following profiles have been obtained as illustrated in the diagram below.

### Business Actors' Knowledge about Mandatory Enterprise Registration (*Wajib Daftar Perusahaan - WDP*)



Based on the interview related to business actors' knowledge about enterprise registration provisions, 55 respondents or 92% said they know that there are

provisions concerning enterprise registration, 3 respondents or 5% said they did not know, while 2 respondents or 3% did not provide an answer. Based on information indicated in the diagram above, it can be concluded that the majority of the said business actors are aware of the provisions concerning enterprise registration.

**Business actors who have obtained mandatory enterprise registration certificate (*tanda daftar perusahaan*, or *TDP*) (civil partnership groups, firms, limited partnerships (*CV*), limited liability companies (*PT*), Cooperatives and Foundations (*Yayasan*))**

Based on the above diagram it is evident that out of 38 business actors required to obtain *TDP* a total of 92% or 35 respondents have obtained *TDP* however 8% or 3 respondents have not obtained *TDP*.

**Business actors who have obtained mandatory enterprise registration certificate (*TDP*) (enterprises owned by individuals)**

Based on the above diagram it is evident that out of 22 business actors who are not required to obtain *TDP*, 27% or 6 respondents have obtained *TDP* and 73% or 16 respondents have not obtained *TDP*.

Based on the above information and data obtained there appears to be a misunderstanding of the law, which consequently leads to an impediment in law enforcement. Such a situation exists and is occurring in the State of the Republic of Indonesia which is juridically a state based on law.

## **V. Applicability of the *WDP* Law Following the Effectiveness of the Law concerning Limited Liability Companies**

The reason for the choice of title, namely applicability of the *WDP* Law following the coming into force of the Law concerning Limited Liability Companies, is that enterprises other than those incorporated as limited liability companies continue to be subject to the provisions of the *WDP* Law. At the same time, according to interpretation in most circles, enterprises incorporated as limited liability companies are not subject to the provisions of the *WDP* Law; rather than that, they are only subject to the provisions set out in Article 29 of the Law concerning Limited Liability Companies and being subject to the said article is considered as a form of compliance with laws and regulations applicable in Indonesia.

The decrease in the number of enterprises which have registered in the database of the Ministry of Trade has been generally caused by two factors, namely (a) the applicability of the Law concerning Limited Liability Companies; and (b) regional autonomy. The Law concerning Limited Liability Companies has contributed significantly bearing in mind that the pattern of registration is systemic and there has been a great number of enterprises incorporated as limited liability companies, particularly compared to other types of enterprises which exist and are provided for in the Law concerning Limited Liability Companies. Upon careful examination of the said dramatic decrease, the basic assumption is that enterprises incorporated as limited liability companies have stopped conducting enterprise registration at the Ministry of Trade.

In view of such condition, the focus of examination is shifted to facts occurring following the coming into force of the Law concerning Limited Liability Companies with the aim of mapping out juridical thought concerning the said law and comparing it to the *WDP*

Law in the context of similarities and differences in the objectives of each of the above mentioned laws. In order to reach that point, this study looks at the vies of scholars who are expert in the field of limited liability companies, among others:

## **1. The opinion of M. Yahya Harahap**

The provisions on company registration under the Law concerning Limited Liability Companies are set forth in Chapter II, part three, paragraph 1, providing for the company registration consisting of Article 29, so there is only one article.

### **a. The party administering the Company Registry**

It is expressly stated in Article 29 paragraph (1) that the Company registry is “administered” by the Minister. This is quite different from the provisions of Article 21 of Law No.1 year 1995 which does not specifically provide for company registry. It refers to enterprise registry (*‘daftar perusahaan’*). Referred to as enterprise registry (*‘daftar perusahaan’*) according to the Elucidation on Article 21 paragraph (1) of Law No.1 year 1995 is enterprise registry (*‘daftar perusahaan’*) as intended in the TDP Law at the Department of Trade. At the same time, during the KUHD era the company registry (*‘daftar perseroan’*) had been administered by the Registrar of the District Court (initially *raad van justitie*). This is reaffirmed in Article 38 paragraph (2) of the KUHD. Shareholders are required to register in the Public Registry at the District Court within the jurisdiction of the company’s place of domicile. Neither the registration system provided for in Article 21 of Law Number 1 Year 1995, nor the one provided for in Article 38 of the KUHD is adopted in Article 29 of the Law concerning Limited Liability Companies. The said provisions have been left out. It is evident that lawmakers wish to have all company document administration centralized under one roof, namely under the Ministry of Law and Human Rights. With such centralized system, the management of company administration is not conducted separately at several agencies. A person interested to know the identity of the amendment of a company’s articles of association can check it at a single agency. One has to bear in mind the reaffirmation in the provision of Article 29 paragraph (5) namely that the *‘Daftar Perseroan’* is open to the public. Anybody can examine it at the Ministry of Law and Human Rights. It is not limited to certain people only. These provisions are mandatory rules (*dwingendrecht*). Therefore, the said provisions are not merely theory; officials in charge in this field must provide adequate services without expecting a return or asking for compensation.

### **b. Data Included in the Enterprise Registry (*‘Daftar Perusahaan’*)**

The data which should be included in the enterprise registry (*‘daftar perseroan’*) is specified in Article 29 paragraph (2) of the Law concerning Limited Liability Companies, consisting of the following:

- 1) Name and place of domicile, purposes and objectives as well as business activities, term of establishment and capital;
- 2) The Company’s full address as intended in Article 5;
- 3) The number and date of the deed of establishment and the decree of the Minister concerning the approval of the legal entity of the Company as intended in Article 7 paragraph (4);

- 4) Number and date of the articles of association amendment deed and approval of the Minister as intended in Article 23 paragraph (1);
- 5) Number and date of the articles of association amendment deed and the date of receiving the Minister's announcement as intended in Article 23 paragraph (2);
- 6) Name and place of domicile of the notary who has drawn up the deed of establishment and the articles of association amendment deed.
- 7) Full name and address of shareholder of Publicly Listed Company drawn up in compliance with the provisions of laws and regulations in the field of Capital Markets. This is in line with the provisions of Article 29 paragraph (4).
- 8) Number and date of the liquidation deed or number and date of court stipulation concerning the dissolution of the company which has been notified to the Minister.
- 9) Expiration of the company's legal entity status.
- 10) Balance sheet and profit and loss statement for the bookkeeping year concerned for companies which are required to be audited.

The data which must be indicated in the company registry ('*daftar perseroan*') presents information concerning the overall objective conditions of the company concerned.

### **c. Date of Entry of Company Data in the Company Registry ('*Daftar Perseroan*')**

The company's data entered in the Registry in the above described manner shall be entered on 'the same date' of the following:

- 1) Decree of the minister concerning the approval of the company as a legal entity, or the date of the minister's approval of the amendment of the articles of association which requires an approval.
- 2) Receipt of the notification of the amendment of the articles of association not requiring approval; atau
- 3) Receipt of notification concerning changes in the company's articles of association which do not constitute an amendment to the articles of association.

According to the elucidation on Article 29 paragraph (4) sub-paragraph (c), "changes in the company's data" include, among other things "transfer of right" on shares, change of members of the board of directors and board of commissioners, liquidation of the company.

The foregoing represents the basic provisions concerning the scope of company registry ('*daftar perseroan*') while further provisions concerning company registry ('*daftar perseroan*') under article 29 paragraph (6) are provided for in a Regulation of the Minister (hereinafter briefly referred to as PERMEN).

## **2. In the opinion of Rudhi Prasetya<sup>48</sup>**

### **a. Registration and Announcement**

According to Article 38 of the *KUHD*, the deed of establishment which has been approved by the Minister of Justice must be registered with the Registrar of the

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<sup>48</sup> The author has personally conducted an interview Prof. Rudhy Prasetya in Surabaya on the occasion of an official visit with the team of the Domestic Trade Policy Center, Trade Policy Study and Development Agency, Ministry of Trade.

District Court at the place of the limited liability company's domicile as set forth in its articles of association. It subsequently announced in the Official Gazette approved by the Minister; similarly, any changes occurring in the articles of association must be registered in the 'Enterprise Registry' ('*Daftar Perusahaan*'), and must be subsequently announced in the Supplement to the Official Gazette. The question that arises is what the purpose of requiring the deed of establishment which contains the articles of association or changes thereof to be registered at the District Court (according to the *KUHD*), in the Enterprise Registry ('*Daftar Perusahaan*') (according to the 1995 Law), or the Company Registry ('*Daftar Perseroan*') (according to the 2007 Law), and to be subsequently announced in the Supplement to the Official Gazette? The intent of registration with the Registrar of the District Court, in the Enterprise Registry ('*Pendaftaran Perusahaan*'), or the Company Registry ('*Daftar Perseroan*') as well as publication in the Supplement to the State Gazette are all forms of publication to the public.\

In the spirit of the *KUHD*, registration at the District Court must be accompanied by a set of copies of the deed of establishment setting out the articles of association approved by the Minister of Justice. Such copies of the deed must be maintained in the archives of the Court Registrar's Office at all times as an inseparable part of such registration. The purpose of such requirement is to ensure that the articles of association of the limited liability company (PT) concerned can be viewed by anybody so that the provisions applicable to the limited liability (PT) concerned are known to them. Therefore, every person is in fact entitled to request the Court's Registrar to issue an official copy and the deed maintained in the above described manner. It is an important point to be noted, considering that based on experience, registrars do not have an understanding of this and they go by the assumption that the records maintained at court are intended merely for the purposes of the company's internal parties. Similar seems to be intent of the 1995 Law requiring registration at the Enterprise Registration Office ('*Kantor Pendaftaran Perusahaan*') administered by the Ministry of Trade and Industry.

However, there is a difference in terms of "place of registration" as provided for under the *KUHD*, Law Number 1 Year 1995, and the Law concerning Limited Liability Companies. Whole the place of registration under the *KUHD* is the District Court Registrar, under Law Number 1 Year 1995 the place of registration is at the Enterprise Registration Office ('*Kantor Pendaftaran Perusahaan*') at the Ministry of Trade and Industry. In both cases, registration must be administered by the Board of Directors. At the same time the Law concerning Limited Liability Companies sets forth that the place of registration is at the Ministry of Law and Human Rights under the Legal Entities Administration System (*Sistem Administrasi Badan Hukum*, or briefly referred to as *SABH*) and the obligation to conduct registration is no longer required of the Board of Directors, but it must be automatically conducted by the Minister of Law and Human Rights. Similarly, the above mentioned announcement in the Supplement to the Official Gazette is a form of announcement to the public for public cognizance, with only one distinctive difference under the Law concerning Limited Liability Companies. While under the *KUHD* and Law Number 1 Year 1995, announcement in the Supplement to the Official Gazette must be made by the company's Board of Directors, under the Law concerning Limited Liability Companies it is required of the Minister, rather than the Board of Directors, to make such announcement (vide Article 30 of the Law concerning Limited Liability Companies).

The intent is to ensure that the public, third parties in particular, are able to gain insight

into the provisions of the articles of association of any limited liability company. This is closely related to the *ultra vires* doctrine which is applicable in Indonesia, according to which the company's executives (*pengurus*) are personally liable if in the course of implementing their duties they contradict the provisions of the articles of association. Such being the case, third parties may suffer potential damages, namely instead of being able to make claims against the company's assets, they can only make claims against the company's executives (*pengurus*) concerned personally. Executives (*pengurus*) are also shareholders of the company concerned. It is therefore paramount for all third parties to have an insight into the company's articles of association, in order to know what that executives (*pengurus*) of the company are allowed and not allowed to do according to the company's articles of association; it is in such context that the announcement of a limited liability company's articles of association is of utmost significance.

### **b. Mandatory Enterprise Registration (*Wajib Daftar Perusahaan*)**

In fact, the *WDP* Law had existed long before Law Number 1 Year 1995 came into force. The matters provided for by the *WDP* Law are completely unrelated to the company law. The *WDP* Law had existed long before Law Number 1 Year 1995 came into existence. According to Article 5 of the *WDP* Law, every enterprise shall register in the Enterprise Registry (*'Daftar Perusahaan'*) (administered by the Ministry of Trade and Industry), including Firms (*Firma*), limited partnerships (*CV*), or other forms of business entities. According to Article 6 of the *WDP* Law, exempted from such provision are Government Agencies (*Perusahaan Jawatan* or briefly referred to as *PERJAN*) and Small Individual Enterprises run personally by the entrepreneurs themselves or by employing their closest family members which are not required to possess a business license and are not incorporated in the form of a legal entity or partnership.

According to Chapter III of the *WDP* Law, every enterprise failing to comply with the requirement to register is subject to the criminal sanction of imprisonment for not longer than 3 (three) months or the criminal sanction of fine of up to Rp.3, 000, 000.- (rupiah three million).

This raises a question as to the objectives and purposes of the *WDP* Law. In Article 2 of the said law it is stated that:

*"the objective of such Enterprise Registration is to record data and information compiled in an appropriate manner concerning an enterprise and serving as source of official information for all interested parties concerning the identity, data, as well as other information concerning the enterprise indicated in the Enterprise Registry ('Daftar Perusahaan') in the context of ensuring certainty in doing business. Accordingly, the object of this law tends to be administrative in nature for Governance purposes towards ensuring that there is adequate data available as materials for the Government in policy making."* [unofficial translation]

Prior to Law Number 1 Year 1995 coming into force, the *KUHD* had been applicable. According to the *KUHD*, company registration as announcement to the public is conducted through registration at the Office of the Registrar of the District Court concerned (*vide* explanation No. 84). At the time the draft of the 1995 Law was formulated, with a view to efficiency, the drafters of Law Number 1 Year 1995 decided to use the already existing instrument, namely the institution of Enterprise Registration

(*'Pendaftaran Perusahaan'*) under the above mentioned *WDP* Law, as an instrument for the announcement of the incorporation of Limited Liability Companies. Based on such consideration, it was stipulated in Article 21 paragraph (1) of Law Number 1 Year 1995 that Company Registration (*Pendaftaran Perseroan*) for the purpose of announcement to the public must be conducted in the Enterprise Registry (*'Daftar Perusahaan'*), further elaborating in the elucidation on the said article that referred to as Enterprise Registration (*'Pendaftaran Perusahaan'*) shall be Enterprise Registry (*'Daftar Perusahaan'*) as intended in the *WDP* Law.

Then another view emerged among drafters of the Law concerning Limited Liability Companies. There was apparently a notion that Company Registration (*'Pendaftaran Perseroan'*) could be implemented more efficiently if it was conducted separately under the Ministry of Law and Human Rights itself, independently and separately from Enterprise Registration (*'Pendaftaran Perusahaan'*) as intended in the *WDP* Law. It was in such context that the requirement to make announcement through the Company Registry (*'Daftar Perseroan'*) administered by the Minister of Law and Human Rights was set forth in the Law concerning Limited Liability Companies.

In view of the foregoing, we need to be reminded of the need to be able to make a distinction between and think selectively of what is intended as “Company Registration” (*“Pendaftaran Perseroan”*) and “Enterprise Registration (*“Pendaftaran Perusahaan”*). “Company Registration” (*“Pendaftaran Perseroan”*) implies the definition under the Law concerning Limited Liability Companies, whereas “Enterprise Registration” (*“Pendaftaran Perusahaan”*) is as defined under the *WDP* law. In the event that Company Registration (*'Pendaftaran Perseroan'*) is not complied with, the logical question arises as to whose obligation it is to conduct such Company Registration (*'Pendaftaran Perseroan'*)?

According to the mechanism under Law Number 1 Year 1995, as indicated in Article 23 of Law Number 1 Year 1995, the Board of Directors is obligated to conduct such registration, and if the Board of Directors fails to comply, it is individually and severally liable for all actions undertaken by the company. It is totally different, however, under the mechanism set forth in the Law concerning Limited Liability Companies. According to Article 29 of the Law concerning Limited Liability Companies, the Company Registry (*'Daftar Perseroan'*) is conducted and maintained by the Minister. Accordingly, it is no longer the obligation of the Board of Directors, as the provisions concerning the obligation of the Board of Directors in view of Company Registration (*'Pendaftaran Perseroan'*) which have been revoked are no longer provided for under the Law concerning Limited Liability Companies.

## **VI. Applicability of the *WDP* Law after regional autonomy**

The *WDP* Law is a law in Indonesia which is still in effect despite the fact that the Unitary State of the Republic of Indonesia has entered the era of regional autonomy. To the extent that there are no regulations at a level equal to law which amend or revoke a law, such law remains in full force and effect and is legally binding. Some of the causes leading to a dramatic decrease in company registration (*'pendaftaran perusahaan'*) are related to two main factors, namely as follows:

1. The dynamics of the flow of work coordination between the central and the regional governments which has not been maximal, as a consequence of regional autonomy;

2. The interpretation of enterprise registration (*'pendaftaran perusahaan'*) based on the Law concerning Limited Liability Companies which tends to set aside enterprises incorporated as limited liability companies being subject to the *WDP* Law.

As for the first mentioned impediment, it tends to be of a matter of technical impediment related to the flow of coordination between the central and the regional governments. One of the causes leading to such impediment is due to enterprise registration (*'pendaftaran perusahaan'*) administration patterns which do not fully apply the same guidelines. This in spite of the fact that the Ministry of Trade already had a system in place which was considered to be adequate for the purpose of dealing with technical matters. Such technical aspects will not be further elaborated upon in this normative part of the analysis. The Law concerning Limited Liability Companies is the main subject of this study due to the fact that up to the present time there is a highly adequate administration pattern for enterprises incorporated as limited liability companies. In addition to that, limited liability companies are a form of enterprises with the greatest appeal to a majority of businessmen. This is unlike other forms of companies known under the *WDP* Law. Coming back to the technicalities of company registration, it needs to be noted that enterprises other than limited liability companies do not normally have a frame of reference for enterprise registration other than those provided for under the *WDP* Law. At the same time, simple forms of enterprises which are also subject to the *WDP* Law are also facing an impediment due to the lack of an understanding by individual entrepreneurs of existing laws and regulations they must comply with. As a matter of simple comparison, which in my view is relevant, namely individual businesses do not necessarily have Taxpayer Identification Number (briefly referred to as *NPWP*), even though it is a mandatory requirement. If compared to the socialization concerning the obligation of entrepreneurs to possess *NPWP* and the obligation to conduct enterprise registration under the *WDP* Law, there is clearly a difference. However, due to the level of legal compliance in society and the understanding thereof the actualization of the said regulation in its implementation is not yet maximal. With reference to and based on the explanation offered by Rudhy Prasetya, who is a senior professor at Universitas Airlangga, specializing in company law, he firmly states that the purpose of Enterprise Registration (*'Pendaftaran Perusahaan'*) is to record appropriately prepared information of an enterprise and to serve as source of official information for all interested parties concerning the identity, data, as well as other information concerning the enterprise indicated in the Enterprise Registry (*'Daftar Perusahaan'*) in the context of creating certainty in doing business. Accordingly, the object of this law tends to be administrative in nature for Governance purposes in order to ensure that there is adequate data available as materials for the Government in policy making.

As his view clearly indicates, there has been an effort to reposition the understanding of the differences between the objectives of enterprise registration (*'pendaftaran perusahaan'*) and company registration (*'pendaftaran perseoran'*). The purpose of enterprise (*'pendaftaran perusahaan'*) is not only for publicity discourse, but also to know specific matters related to the kinds and types of businesses that exist in Indonesia. This is clearly different from the purpose of company registration (*'pendaftaran perseoran'*) which is limited to fulfilling the publicity principle.

The *WDP* Law serves as an instrument for providing answers to questions in the real sector of the business world, such as, among other things: (a) how many enterprises are there engaging in the oyster hatchery business sector in the Moluccas and Papua;

(b) what is the annual production capacity of automotive enterprises in Indonesia; (c) how many companies are engaging in sugar distribution activities all over Indonesia; (d) and other similar questions. It is not possible to clarify such questions with the Ministry of Law and Human Rights. Most of all, the purpose of taking stock of such questions is to provide an insight into the performance of real economic growth in Indonesia, as well as to explore business opportunities at the domestic level and opportunities to cooperate with foreign investors who are planning to invest their capital in business sectors they are interested in. The absence of such data would raise issues in keeping track of the movement of the wheels of national economy. In fact, by applying such pattern of enterprise registration could be ideally used for an early identification of forms of business which fall into the category of cartel, monopoly and other types of unfair business competition. Law as an instrument of state administration law is an instrument of positive law which must be complied with and implemented. Under the *WDP* Law, all enterprises subject to its provisions must comply with and fulfill the provisions of the said law. Enterprises incorporated as limited liability companies are no exception. It means that the *WDP* Law does not only serve publicity purposes; rather than that, it has broader purposes and objectives aimed at the country's economic development.

Therefore, the assumption that limited liability companies are only obligated to comply with the provisions of Article 29 of the Law concerning Limited Liability Companies, needs to be restructured. The restructuring of such understanding in its turn serves the interest of limited liability companies. In addition to that, the assumption that there is an excessive amount of bureaucracy that limited liability companies must fulfill also needs to be dealt with, based on the consideration that the mandate of the law must be followed and complied with by entrepreneurs who wish to conduct business activities in Indonesia. After all, every law is aimed at creating orderly conditions and an orderly business, in an effort to further enhance the national economy. If a limited liability company violates the law, it can be considered to have violated the *ultra vires* doctrine.

The authority to implement enterprise registration (*'pendaftaran perusahaan'*) which has been granted to the Enterprise Registration Office (*KPP*) of the Regency/City/Municipality or the Service Office/Service Unit is also part of the distribution of governmental functions in the field of trade to the provincial government, which then delegates such functions on to the regency/city government, as mandated by Government Regulation Number 38 Year 2007 Concerning the Distribution of Governmental Functions between the Government, the Province Regional Government, and the Regency/City Regional Government. The following is stated in Attachment DD to Government Regulation No. 38 year 2007:

1. It is the task of the Central Government to stipulate the guidelines, to develop human resources, coordinate, control, supervise the administration and presentation of information of mandatory enterprise registration (*'wajib daftar perusahaan'*) on the national scale.
2. It is the task of the Regional Government to coordinate, control, supervise, report and present information resulting from mandatory enterprise registration (*'wajib daftar perusahaan'*) on the scale of province.
3. The task of the Regency/City Regional Government is to supervise, report the implementation and administration, as well as the presentation of information on the implementation of mandatory enterprise registration (*'wajib daftar*

*perusahaan*) on the scale of regency/city.

Furthermore, the following is stated about the obligation to report in Regulation of the Minister of Trade Number 37/M-DAG/PER/9/2007 Conducting Administration of Enterprise Registration (*'Pendaftaran Perusahaan'*) Article 8:

1. Reports on the administration of enterprise registration (*'pendaftaran perusahaan'*) at the Central Level are submitted to the Minister through the Director General on an annual basis. At the Province level, reports are submitted to the Governor with copies to the Central *KPP* on a semi-annual basis, and at the Regency/City/Municipality level reports on the administration and implementation of enterprise registration are submitted to the Regent/Mayor with copies to the Province *KPP* and Central *KPP* on a monthly basis.
2. The administrator of enterprise registration (*'pendaftaran perusahaan'*) at the City/Municipality Level must submit reports on the administration and implementation of mandatory enterprise registration (*'wajib daftar perusahaan'*) to the Province *KPP* and the Central *KPP* in the form of the following:
  - a. Report on the implementation of enterprise registration; and
  - b. Copies of form approval.
3. Reports as intended in paragraph (2) sub-paragraph a can be submitted either annually or electronically.

Based on the foregoing it can be concluded that every enterprise (except for enterprises in the form of *Perjan* and individual enterprises) are obligated to register in the enterprise registry (*'daftar perusahaan'*). Such registration is conducted at the Regency/City/Municipality *KPP* or at the Service Office/Service Unit in charge of the trade sector. Furthermore, each administrator of enterprise registration at the level of regency/city/municipality must submit a report on the administration and implementation of mandatory enterprise registration (*'wajib daftar perusahaan'*) in the form of report on the administration of enterprise registration and a copy of the form approval to the Province *KPP* and Central *KPP*. Such reporting is mandated in the Regulation of the Minister of Trade.

The existence and binding legal force of Ministerial Regulation as intended in Article 8 paragraph (2) of Law No. 12 Year 2011 Concerning the Formulation of Laws and Regulations is recognized insofar as it is mandated by Legislation of higher hierarchy or if it is formulated based on powers. It means that the reporting requirement provided for under the Regulation of the Minister of Trade is recognized and it has binding legal force because it is further implementation of the *WDP* Law, and such reporting obligation must be implemented by the regency/city/municipality *KPP* with copies to the Province *KPP* and Central *KPP*, even though there are no sanctions for failing to report. The region's obligation to comply with all laws and regulations concerning mandatory enterprise registration (*'wajib daftar perusahaan'*) adopted at the central level (at a higher level) must serve as guideline in the implementation of laws and regulations in the Unitary State of the Republic of Indonesia. In Article 7 of Law No. 12 Year 2011 Concerning the Formulation of Laws and regulations it is stated that the hierarchy of laws and regulations is as follows:

1. 1945 Constitution
2. Stipulation of the People's Consultative Assembly (*MPR*)
3. Law/Regulation *In Lieu* of Law
4. Government Regulation

5. Regulation of the President
6. Regional Regulation of Province; and
7. Regional Regulation of Regent/City.

The elucidation on Article 7 paragraph (2) of Law No. 12 Year 2011 states that referred to as hierarchy in this provision is the hierarchy of each type of laws and regulations based on the principle that laws and regulations of lower hierarchy may not be contradictory to laws and regulations of higher hierarchy. In addition to that, it is set out in Article 8 paragraph (1) of Law No. 12 Year 2011 Concerning the Formulation of Laws and Regulations that Ministerial regulation is a type of regulation which has been provided for within the hierarchy of laws and regulations.<sup>49</sup>

It is further set forth in Article 8 paragraph (2) that the existence of laws and regulations as intended in Article 8 paragraph (1) is recognized and they have binding legal force insofar as they are mandated under laws and regulations of a higher hierarchy or insofar as they are formed based on powers. Referred to as 'based on powers' is the administration of certain affairs in compliance with the provisions of certain laws and regulations. Even though Ministerial regulations is not expressly mentioned in the hierarchy of laws and regulations, to the extent that the matters provided for in such Ministerial regulation serve the implementation of the matters mandated under Law, the existence of such Ministerial regulation is recognized and it is binding in nature. It is stated in the *WDP* Law that referred as Minister shall be the Minister responsible in the field of trade. In the implementation of mandatory enterprise registration ('*wajib daftar perusahaan*'), the Regulation of the Minister of Trade Number 37/M-DAG/PER/9/2007 Concerning the Administration of Enterprise Registration is an implementation of the provisions of Law No. 3/1982 Concerning Mandatory Enterprise Registration ('*Wajib Daftar Perusahaan*'). It is evident from the provisions of the following articles of the *WDP* Law:

1. Article 9 paragraph (1) : Registration is conducted by filling out registration form stipulated by the minister at the office enterprise registration.
2. Article 17 : Other matters which must be registered insofar as they are not yet provided for under Articles 11, 12, 13, 14, 15, and 16 of this Law shall be further provided for by the Minister.<sup>50</sup>
3. Article 18 : The Minister shall be responsible for the administration of Enterprise Registry ('*Daftar Perusahaan*').
4. Article 19 : The Minister shall stipulate the places of domicile and the composition of enterprise registration offices as well as the procedure for administering the Enterprise Registry ('*Daftar Perusahaan*').

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<sup>49</sup> The types of laws and regulations as intended in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly (Majelis Permusyawaratan Rakyat), the House of Representatives (Dewan Perwakilan Rakyat), the Regional Representatives' Council (Dewan Perwakilan Daerah), the Supreme Court (Mahkamah Agung), the Constitutional Court (Mahkamah Konstitusi), the Audit Board (Badan Pemeriksa Keuangan), the Judicial Commission (Komisi Yudisial), the Central Bank (Bank Indonesia), ministers, agencies, institutions or commissions of an equal rank formed under Law or mandated by Law, Regional House of Representatives of Province, Governor, Regional House of Representatives of Regency, Regent/Mayor, Head of Village or of equivalent rank.

<sup>50</sup> Articles 11, 12, 13, 14, 15 and 16 of the *WDP* Law provide for matters subject to mandatory registration. Article 11 if incorporated in the form of a Limited Liability Company. Article 12 if it is in the form of a cooperative. Article 13 if it is in the form of a limited partnership. Article 14 if it is in the form of a firm (partnership). Article 15 if the enterprise is in the form of an individual enterprise. Article 16 if the enterprise in the form of an enterprise other than those intended in Articles 11, 12, 13, 14 and 15.

5. Article 24 : Further provisions concerning matters as intended in Articles 20, 21, and 22 of this Law shall be stipulated by the Minister.<sup>51</sup>
6. Article 31 : The amount of administration fee for obtaining a copy or official excerpt as intended in Article 4 of this Law shall be stipulated by the Minister.
7. Article 38 : Matters not yet or not adequately provided for under this Law shall be further provided for by the Minister.

Accordingly, as Regulation of the Minister of Trade Number 37/M-DAG/PER/9/2007 Concerning the Administration of Enterprise Registration is an implementation of the *WDP* Law, the existence of the said Minister of trade regulation is recognized and it is binding in nature.

Based on the foregoing it can be concluded that laws and regulations of lower hierarchy may not be contradictory to laws and regulations of higher hierarchy. At the same time, the context of the implementation of the *WDP* Law, regional regulations must implement and serve as an extension of arms in view of matters stipulated in the *WDP* Law as well as other implementing regulations, including Regulation of the Minister of Trade Number 37/M-DAG/PER/9/2007 Concerning the Administration of Enterprise Registration. Regional Governments must make policies which are not contradictory to the *WDP* Law and the above mentioned Minister of trade regulation. In addition to the foregoing, province and city regional governments are also obligated to report on the implementation of registration activities by attaching copies of the approved enterprise registration forms, as mandated in Regulation of the Minister of Trade Number 37/M-DAG/PER/9/2007 Concerning the Administration of Enterprise Registration.

## VII. Conclusion

Law as an instrument of state administration law is a positive law instrument which must be complied with and implemented. In view of the existence of the *WDP* Law, all enterprises are obligated to comply with and follow the provisions of the same. Enterprise incorporated as limited liability companies are no exception. In other words, the *WDP* Law does not merely serve the purpose of publicity; rather than that, it has broader objectives and purposes for the development of national economy. Therefore, the view that limited liability companies are only obligated to comply with the provisions of Article 29 of the Law concerning Limited Liability Companies (Law No.40 year 2007) needs to be rearranged.

The factor of regional autonomy cannot be used as a basis for regions at the level of province not to implement the function of reporting enterprise registration to the central government. This despite the fact that in its implementation, the said regulation is further provided for in the government's policy under law. It needs to be noted that the existence of ministerial Regulation as intended in Article 8 paragraph (2) of Law No. 12 Year 2011 Concerning the Formulation of Laws and Regulations is recognized and it has legal binding force to the extent that it is mandated by Laws and Regulations of higher hierarchy or if it is adopted based on powers. In other words, the reporting obligation as provided for in the Minister of Trade Regulation is recognized and it

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<sup>51</sup> Article 20 the *WDP* Law sets forth that within 3 (three) months after receiving the completed registration form, the competent official of the enterprise registration office stipulates ratification or refusal to ratify.

has legal binding force, as it is further implementation of the *WDP* Law, whereby the said reporting obligation must be implemented by the regency/city/municipality *KPP* concerned with copies to the Province *KPP* and Central *KPP* respectively.

In addition to the need to provide further for the technical aspects, the possibility of introducing tighter sanctions, to enterprises as well as to public officials implementing the enterprise registration process in cases of non-implementation, also needs to be considered. In addition to that, there is also a need for provisions concerning incentives to enterprises and public officials implementing the administration process in an order and appropriate manner.

There are quite a lot of issues related to non-optimal *WDP* registration in the regions, however, they can be generally classified into 3 (tiga) main issues, namely as follows:

- a. The implementation of the computerization network system and *WDP* application program currently provided by the Ministry of Trade is unable to manage TDP issuance numbers automatically, it is not integrated among *WDP* data managers at the organizational level, it does not possess the ability to validate accuracy of data automatically, and it does not possess the ability to integrate with the system created by the PTSP.
- b. The *WDP* Law has experienced juridical distortion vis-à-vis other laws and regulations, hence it has changed the understanding of law, particularly concerning the obligation to conduct *WDP* under the Law concerning Limited Liability Companies (Law No.40 year 2007). The legal basis concerning institutions at which registration is conducted, as well as the responsibilities of *WDP* data management institutions (the central government, provincial government City/regency government and the Enterprise Registration Office - *KPP*) has also experienced distortion resulting in their lack assertiveness in implementing their respective responsibilities;
- c. Inadequate capacity and number of human resources managing *WDP* particularly in areas of registration, data base management data analysis and PPNS-*WDP*.

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