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MORALITY IN LAW: AN ANALYSIS OF THE LEGAL PHILOSOPHY AND INDONESIA NATIONAL LEGAL SYSTEM

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Abstract

This study investigates the moral position according to naturalism, positivism, and interpretivism perspectives along with the adjustment of the positivist view of morality within the law; and the moral position in Indonesia's national legal system as every country has its own legal reasoning pattern about morality in the law. The content of this paper is analyzed using qualitative methods and secondary data analysis. normative juridical legal research method. ***The result shows*** *that each perspective, whether it is naturalism, positivism, or interpretivism, has its own argument on how morality is established; why it is important to incorporate morality in the law, and what legal goals they must uphold; and Indonesia's reasoning pattern exhibits the combination of multiple philosophies of law schools characteristics.* ***The conclusion is*** *that the position of morality in Indonesia has a similarity to naturalism and interpretivism because from the very beginning of the law-making process up to the implementation, Indonesia can not separate morality from the law.*

Keywords*: Morality, Law, Legal Philosophy, Indonesia National Legal System, Naturalism, Positivism, Interpretivism.*

Abstrak

Penelitian ini mengindentifikasi kedudukan moral menurut perspektif naturalisme, positivisme serta penyesuaian pandangan positivisme dalam moralitas hukum; dan kedudukan moral dalam sistem hukum nasional Indonesia karena setiap negara memiliki pola penalaran hukumnya sendiri tentang moral dalam hukum. Isi artikel ini dianalisis dengan menggunakan metode kualitatif dan data sekunder dalam menganalisisnya. Hasil penelitian menunjukkan bahwa: setiap naturalisme, positivisme, atau interpretivisme memiliki argumentasinya sendiri tentang bagaimana moral ditemukan, mengapa moral penting untuk dimasukan ke dalam hukum, dan tujuan hukum apa yang paling mereka junjung tinggi; dan Pola penalaran Indonesia memperlihatkan perpaduan beberapa ciri aliran filsafat hukum.Kesimpulan didapatkan kedudukan moral di Indonesia sendiri, memiliki kemiripan dengan naturalisme karena sejak awal proses pembuatan hukum hingga pelaksanaannya, Indonesia tidak dapat memisahkan moral dari hukum.

Keywords*: Moralitas, Hukum, Filsafat Hukum, Sistem Hukum Indonesia*

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I. INTRODUCTION

Law and morality are classic discussion topics regarding the essence of law that fills the academic spaces, lawmaking processes, and law enforcement activities. Despite the number of discussions about this topic, the jurisprudence still unsuccessfully explicates the separation of morality as a non-legal matter with the law itself, thus leaving the discussion of this topic to the philosophy of law as mater scientiarum (the mother of jurisprudence).[1] Philosophy of law will then examine the position of morals and law through various schools of philosophy. Each school of philosophy provides the characteristics of reasonings and thoughts of its adherents in solving legal problems faced at different times and places.[2] Understanding these schools of philosophy guides people to an integral and holistic resolution of legal philosophy problems, including the existence and position of morals in law.[3]

Although the dichotomy of legal and moral positions as the naturalists and positivists believed still exists today, at this time, it is almost impossible to just hold on to one side of them wholly. Accordingly, this paper will study the moral position within the law in 3 (three) philosophies of law school, namely: naturalism, positivism, and legal intepretivism. Each of these philosophies has its own perspective about the moral position in the law. These perspectives are intriguing to comprehend as they show the models of legal reasoning that will be used in legal practice, such as the formulation and enforcement of the law. This is just as John Finnis said:

> *"The philosophy of law identifies the grounds for accepting 'general principles of law recognized by civilized nations as appropriate (just) and authoritative, along with the grounds for judging appropriate and authoritative the different kinds of private and public lawmaking and rights-affecting acts (juridical acts) such as contracts, constitutions, legislative enactments, customs, judicial decisions, and the like".*[4]

The reasoning models of legal philosophy that affect every legal product can also be recognized in Indonesia's national legal system. The national legal system of Indonesia has its own outlook on the recognition and moral position in the law. The novelty in this paper is able to show that the legal system in Indonesia considers the moral system, this can be inferred morally from the philosophical foundation of Pancasila

The research problems of this paper are:

1. The position of morals in the law according to naturalism, positivism, constructivism, and interpretivism;
2. The moral position in the Indonesian national legal system.

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[1] Darji Darmodiharjo dan Shidarta, *Fundamentals of Legal Philosophy: What and How is Indonesian Legal Philosophy*, 6th edition, Jakarta: PT. Gramedia Pustaka Utama, 2006, p. xi-xii.

[2] Teguh Prasetyo dan Abdul Hakim Barakatullah, *Philosophy, Theory and Legal Studies (Thoughts Towards a Just and Dignified Society)*, Jakarta: Raja Grafindo Persada, 2013, p. 90.

[3] Darmodiharjo dan Shidarta, *Fundamentals of Legal Philosophy: What and How is Indonesian Legal Philosophy, p.* xii. Book or journal?

[4] John Finnis, "What is the Philosophy of Law", *The American Journal of Jurisprudence* 59, No. 2 (2014): p. 134.

II. DISCUSSION

1. The Position of Morals in The Law According to Naturalism, Positivism, And Interpretivism.

Some of the main schools of philosophy are naturalism, utilitarianism, positivism, the historical school of jurisprudence, sociological jurisprudence, realism, and critical legal studies.[5] Among these main philosophies of law schools, the debate on the position of law and morals is the strongest between 'naturalism' and 'positivism' due to the contrasting beliefs of their adherents about morals within the law. For instance, Martin P. Golding mentions, "The principles of natural law are a meeting ground for law and morality",[6] therefore it is ascertained that naturalist believes there is an essential connection between law and morality.[7] On the other side, John Austin, as one of the positivists states, "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry".[8] This statement shows how the positivist believes in a strict separation of morals and law.[9]

Paul Scholten says while the law is in place, it remains to be found (*Het recht is er, doch het moet worden gevonden*).[10] As mentioned above, the philosophy of law school is a basic belief or worldview[11] that will help its adherents find the formulation of the law because they offer guidance to the adherents on how a legal question is seen, understood, and answered. Each philosophy of law school guides in finding the law through inquiries related to the essence of law (ontological aspect), the method of legal reasoning (epistemological aspect), and the purpose of the legal reasoning activity (axiological aspect).[12] The discussions on the views of naturalism, positivism, and interpretivism will also be carried out by looking at the three aspects above along with one of the leading experts' opinions from each of these schools to see the models of reasoning in placing moral values in law.

Firstly, naturalism. The perspectives of naturalism are represented by several figures as follows:

1. Plato: He believed in objective forms of justice and goodness implies an objective normative standard. Laws that did not fall within the limits of an objective standard (in Plato's view, the "good of the whole state") were not really laws at all.[13]
2. Cicero: He identified that any natural law philosophy has three main components,

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[5] Telly Sumbu, Ralfie Pinasang, dan Frans Maramis, *Legal Philosophy Textbook,* Manado: Universitas Sam Ratulangi, 2016, p. 8.

[6] Martin P. Golding, *Philosophy of Law*, New Jersey: Prentice-Hall, Inc., 1975. P. 33.

[7] Jeffrie G. Murphy dan Jules L. Coleman, *Philosophy of Law an Introduction to Jurisprudence*, London: Westview Press, 1990, p. 11.

[8] Leslie Green and Thomas Adams, "Legal Positivism", *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>.

[9] Achmad Ali, *Revealing Legal Theory and Judicial Theory (Judicialprudence) Including the Interpretation of Laws (Legisprudence)*, Jakarta: Prenada Media Group, 2012, p. 49.

[10] Shidarta, *The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots*, Yogyakarta: Genta Publishing, 2013, p. 188.

[11] ERLYN INDARTI, "Discretion and Paradigm: A Study of Legal Philosophy", *Inauguration Speech of Professor in Philosophy of Law at the Faculty of Law, Diponegoro University,* Semarang, 4 November 2010, p. 5.

[12] Shidarta, *The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots*, 146, 155, p. 180.

[13] Donald R. McConnell. (2008) "The Nature in Natural Law," *Liberty University Law Review*: Vol. 2: Iss. 3, Article 8.

those are: true law is a right reason in agreement with nature, it is of universal application, unchanging and everlasting; either an attempt to alter or repeal or abolish this law is a sin; and God is the author, promulgator, and enforcing judge of this law. Cicero underlines the universality and immutability of natural law, its standing as a 'higher' law, and its discoverability by reason (in this sense 'natural').[14]

3. Aristotle: He asserts that there are certain actions that are essentially wrong or unjust such as the acts of murder, theft, and adultery, thus simply to do any of them is to go wrong. In Aristotle's view, the laws that forbid the performance of these actions are valid for all societies and times, so that is why they can be said to be 'natural' laws. These laws ought to be incorporated within the law system of all societies everywhere.[15]

As represented by some figures above, since thousands of years ago, the idea of natural law has emerged as a manifestation of human efforts to yearn for a higher law than positive law, that is, to seek absolute justice. At one time, the ideas of natural law reached their peak, while at other times, they were also ignored.[16] Nevertheless, the existence of natural law that is rooted in the human heart prevails universally and eternally.[17] This background of natural law schools causes the **ontology** aspect of naturalism to be placed at a very abstract level, whereas law is interpreted as principles (especially truth and justice) rather than norms.[18] This interpretation of the law as principles of truth and justice is encouraged by idealism that the idea of truth and justice does not come from experience but precedes experience (apriori not aposteriori) thus, this original and foremost value must be maintained and incorporated in every legal form.[19]

Based on the legal ontology above, the **epistemology** of natural law school applies intuitive-deductive reasoning[20]. The pattern of intuitive-deductive reasoning is illustrated in naturalism by seeing the highest level of law (eternal law) as an activity of intellectual intuition (originating from God) and at the lower level of law being replaced by sensible intuition (things that are visible to the human senses). Hence, moral values in the abstract dimension of intellectual intuition must become the basis for formulating specific lower rules that are visible and practical. Dworkin defines this characteristic by saying, "Natural law is a theory which makes the content of law depend on the correct answer to some moral question".[21] This legal reasoning pattern of naturalism is similar to moral reasoning,[22] which is a method of reasoning that requires the determination of 'what one ought to do' in concrete rules are carried out on moral considerations such as what is morally right, good or bad, just or unjust, fair

[14] Raymond Wacks, *Philosophy of Law, A Very Short Introduction,* New York: Oxford University Press Inc, 2006, p. 3-5.
[15] Tony Burns, *Aristotle and Natural Law,* London: Continuum International Publishing Group, 2011, p. 5.
[16] Emil El Faisal dan Mariyani, *Legal Philosophy Textbook,* Palembang: Bening Media Publishing, 2020, 54.
[17] Helmanida, "School of Natural Law in Legal Philosophy", *Jurnal Simbur Cahaya 44,* XVI (2011), p. 2316.
[18] Shidarta, *The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots, p.* 16.
[19] Shidarta, *The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots*, p. 189.
[20] Deductive is a way of thinking that starts from an assumption or general statement to reach a more specific conclusion. (see Imron Mustofa, "Window of Logic in Thinking: Deduction and Induction as the Basis of Scientific Reasoning", *Jurnal El-Banat* 6, No. 2 (2016), p. 133).
[21] Aisha U-K Umaru, "On the Place of Morality within Natural Law: A Critical Examination of John Finnis' Divergence from Traditional Natural Law Theory in Natural Law and Natural Rights", ResearchGate, available at https://www.researchgate.net/publication/339365814.
[22] Shidarta*, The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots*, p. 189.

or unfair, honest or dishonest, nice or not nice, and so on.[23]

According to the explanation of ontology and epistemology aspect above, it must be clearly seen that the **axiology** aspect of naturalism has placed the value of justice as the objective of law that should be attained.[24] Naturalism rest assured that the justice value must not be eliminated even though there will be born a man-made law at the most concrete level. If the soul of positive law does not comprise the truth and justice value, then the law is considered an unjust law and what is unjust can not be called a law.[25] So, referring to the ontology, epistemology, and axiology aspect above, it can be suggested that naturalism acknowledge the importance of moral value within the law.

Secondly, the positivism. Contrary to naturalism, positivism argues that the moral and principle of law are only guidelines to be heeded for the formulation of the law, but if a legal product turns out to contradict the moral value, then the legal product is still valid.[26] There are two positivist points of view: analytical jurisprudence which is put forward by John Austin dan the pure theory of law put forward by Hans Kelsen. From John Austin's standpoint, the law is a command set, either directly or circuitously, by a sovereign individual or body, to a member or members of some independent political society in which his authority is supreme.[27]

"**Austin stressed that the subject matter of jurisprudence is positive law, or law strictly so called, which he described as the express or tacit commands of the sovereign. This supreme and legally illimitable power is the ultimate source of every legal rule in an independent political society. Austin acknowledged that subordinate officials (such as judges) make law, but he emphasized that they do so at the pleasure of the sovereign. The sovereign is identifiable, he argued, by two characteristics: habitual obedience from the bulk of the population, and habitual noncompliance with the commands of any other human superior**".

Meanwhile from Kelsen's standpoint:[28]

> *"Law is a normative phenomenon, and as such it must be carefully distinguished from factual phenomena and other normative phenomena. Law must be understood as it is not as it ought to be. Since this is so, legal scholars can invoke neither (i) empirical considerations from psychology, sociology, economics, political science, etc., nor (ii) normative considerations from ethics, theology, etc., in their analyses of the law. In keeping with the is/ought distinction, the validity of a given legal norm can only be explained by reference to the validity of another and higher legal norm. A structure of norms of different levels where norms on a higher level authorize the creation of norms on a lower level is described as 'Stufenbau'".*

[23] Gilbert Harman, "Moral Reasoning", Princeton University Papers, Available at ~~https://www.princeton.edu/~harman/Papers/Moral_Reasoning_Current.pdf. The requested URL /~harman/Papers/Moral_Reasoning_Current.pdf was not found on this server.~~

[24] Shidarta, *The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots*, p. 193.

[25] Dennis Patterson (*Ed.*), *A Companion to Philosophy of Law and Legal Theory*, United Kingdom: Blackwell Publishers, 1999, p. 226.

[26] Sukarno Aburaera, *Theoretical and Practical Legal Philosophy,* Jakarta: Kencana, 2013, p. 107.

[27] Ali, *Revealing Legal Theory and Judicial Theory (Judicialprudence) Including the Interpretation of Laws (Legisprudence)*, p. 56.

[28] Torben Spaak, "Kelsen and Hart on the Normative of Law", *Stockholm Institute for Scandinavian Law 1957-2010*, p. 402-403.

Furthermore, Stfenbau's theory involves a legal system that is a ladder system with tiered rules, where the lowest legal norms must adhere to higher legal norms and the highest legal norms (constitution) must adhere to the most basic legal norms (grundnorm) which are usually abstract.

Although Austin and Kelsen have their own notion of positivism, there is a similarity in the **ontology** aspect of their positivism characteristic that law is merely a positive legal norm.[29] The reasoning pattern employed in the positivist **epistemology** is doctrinal-deductive, whereby the abstract legal rules will be the cornerstone of validity tests in legal studies. Consequently, higher rules, legal concepts, and doctrines as abstract legal rules will be the reference of the validity test.[30] From the explanation of ontology and epistemology aspects above, the positivist **axiology** aspect regards legal certainty as the objective of the law. The positivist perceives that the legal certainty value will be materialized if there is a formal source of law in legislation.[31] Based on the ontology, epistemology, and axiology aspects previously mentioned, it can be concluded that positivism separates morality and law firmly, though it does not deny the existence of morals surrounding the law.

The positivist stand which does not deny morality can also be seen in H. L. A. Hart's statement. In Hart's point of view, law has to be separated from non-law elements such as morals, history, social facts, and so forth. Nevertheless, when it comes to the connection between law and morality, he also argues that there is a 'necessary' connection between law and morality. However, the connection happens as a 'natural' contingent necessity of human beings. Hence, the legal systems contain rules that prohibit murder, theft, violence, protection of property, etc., and through the general characteristic of rules in the legal system, there can be found the element of justice and the notion of 'treating like cases alike'. These two elements are considered moral values which overlap with all legal rules. Further, Hart is known for the idea of 'soft positivism' which is the positivism that allows moral criterion as one of legal validity factors.[32] In his elaboration, Hart mentions that there are primary rules (the rules that govern our actions) and secondary rules or rules of recognition (the rules that determine which primary rules are binding) in the law. If the law wishes to be recognized as a law by society, making just the primary rules is not enough. It is the rules of recognition containing the society's ultimate criteria for what counts as a law that the lawmakers must consider so that society accepts the formulation as a law.[33]

Thirdly, the interpretivism. This philosophy of law schools emanates from Dworkin's response to Hart and Hart Proponent's argument. Shapiro said the Hart-Dworkin debate is basically looking for the answers to legal questions: "Should law be understood to consist in those standards socially designated as authoritative? Or is it constituted by those standards morally designated as authoritative? Are the ultimate determinants of law social facts alone or moral facts as well?".[34] Dworkin

[29] Pratama Herry Herlambang, "Positivism and Its Implications for Science and Law Enforcement", *State Law Review* 2, No. 1 (2019), p. 108.

[30] Soetandyo Wignjosoebroto, *Law: Paradigms, Methods and Problems,* Jakarta: ELSAM dan HUMA, 2002, in Muhammad Helmy Hakim, "Shifting Orientation of Legal Research: From Doctrinal to Socio-Legal", *Jurnal Syariah* 16, No. 2 (2016), p. 107.

[31] Shidarta, *The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots*, p. 200.

[32] Jason C. Glahn, "Is Hard Positivism too Hard to Swallow", *North Dakota Law Review* 3 (2006): p. 7.

[33] Caroline Stromberg, "Legal Positivism and The Use of Ethics in Legal Interpretation in A Swedish Case", *XXVII World Congress of the International Association for the Philosophy of Law and Social Philosophy* (2015), p. 5.

[34] Scott J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for The Perplexed", *Public Law and Legal*

himself answers that lawmaking should be based on moral standards accepted by society, which is quite similar to Hart's soft positivism. What differs between Hart and Dworkin's argument is that from the very beginning, Dworkin, as an interpretivist, believes, "The law and legal practice are, by their very nature, interpretative concepts and moral phenomenon[35]". Dworkin as the initiator of interpretivism comprehends that legal construction in its entirety has purposes and meanings. Thus the law practice, especially the adjudication, must become the medium to seek the purpose and meaning of the law.[36] The purpose and meaning of law will be found by practicing constructive interpretation, and if the rules as they exist now do not per se serve underlying interests, purposes[37], or principles, thus they must be interpreted differently.[38] Roughly speaking, the final goal of interpretation is to place the practice 'in the better light'.[39] To place the practice in a better light relies on what the interpreter thinks is best, meaning it is ultimately an instance of moral interpretation, it is all about the value all the way down.[40]

In Dworkin's view, the interpretation of the law is always an activity of interpreting based on moral values, primarily 'justice' as the main principle in the life of society. He stated, "A law must be assessed for its suitability with justice, and even the interpretation of the text of the law must also be based on the value of justice".[41] What Dworkin means by 'justice' is treating others properly.[42] Although, besides interpreting based on the value of justice, Dworkin also wants the legal judgment to be seen as an aesthetic object built on harmonious principles such as equality or honesty.[43] This is absolutely why Dworkin insists that law is beyond rules because there are principles within it. In order to embody a better practice, Dworkin mentions there will be three stages of interpretation, those are:[44]

1. The pre-interpretative stage: the stage where the rules and standards that form part of the practice to be interpreted have to be listed;
2. The subsequent interpretative stage: the stage where the interpreter has to settle on a general justification for the main elements of the practice that have been identified;

Theory Working Paper Series 77 (2007), p. 18.

[35] Nicos Stavropoulos, "Essays The Debate That Never Was. Harvard Law Review", available at https://harvardlawreview.org/wp-content/uploads/2017/06/2082-2095_ Hukum sebagai Interpretasi Stavropoulos_Online.pdf.

[36] Petrus CKL Bello, "Law as Interpretation", *Diskursus* 11, No. 1 (2012), p. 63.

[37] Dworkin explains that "the purpose of statutory interpretation very briefly in the abstract: the practice aims to make the governance of the pertinent community fairer, wiser, and more just. That description fits what lawyers and judges do when they interpret statutes; it justifies that practice, in a general way, and it suggests, also in a very general way, what standards are appropriate for deciding which interpretation of a particular statute is most successful". (see Lawrence B. Solum, "The Unity of Interpretation", *Boston University Law Review* 90, p. 559).

[38] Fanny de Graaf, "Dworkin's Constructive Interpretation as a Method of Legal Research", Boom Juridisch, available at https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/lawandmethod-D-14-00004.pdf,

[39] Lisa Van Alstyne, "Theory, Interpretation, and Law: Some Worries about Dworkin's Account of Their Relation", *Philosophical Topics* 44, No. 1 (2016), p. 265.

[40] Allison W. Scott, "Legal Interpretation: Taking Words Seriously", *CMC Senior Theses Paper* (2011), p. 42.

[41] Ronald Dworkin, *Taking Right Seriously,* London: Bloomsbury Academic, 2013, p. 121.

[42] Ronald Dworkin, *Justice for Hedgehogs,* Cambridge: The Belknap Press, 2011, p. 13.

[43] Urbanus Ura Weruin, "Legal Hermeneutics: Principles and Rules of Legal Interpretation", *Jurnal Konstitusi* 13, No. 1 (2016), p. 102.

[44] Graaf, "Dworkin's Constructive Interpretation as a Method of Legal Research", p. 3.

3. The post-interpretative stage: the stage the interpreter applies critical reflection about 'how does the rule really have to be interpreted to better serve the justification found in the previous stage?'.

These interpretation stages have to be implemented in every concrete legal case so that each of the cases will get 'fresh moral judgments'. It is just as what Dworkin said in his opinion about constitution interpretation, "lawyers and judges, in the day-to-day work, instinctively treat the constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments."[45]

Through the explanation of interpretivism characteristic above, the **ontology** aspect of interpretivism evinces that law is interpreted as principles, values, and purposes dug by the interpreter. The ontology aspect of this interpretivism is similar to the ontology aspect of natural law because as mentioned by Shidarta, Dworkin's opinion is a new variant of naturalism proponent who wants to test the validity of human-made legal products based on a moral criterion.[46] Next, the **epistemology** aspect of interpretivism is a combination of doctrinal deductive and non-doctrinal inductive, whereas the interpreter must be able to analyze the legal provisions and the phenomena in practice to determine the most appropriate rules to be applied. Finally, the **axiology** aspect of interpretivism puts the value of justice and utility as the objective of law because interpretivism believes the law should make the practice better.

All of the discussion above can be summarized in the table below:

Table 1: Summary of Moral Position in Naturalism, Positivism, and Interpretivism based on Ontology, Epistemology, and Axiology Perspective.

Philosophy of Law Schools	Ontology	Epistemology	Axiology	Position of Morals in The Law
Naturalism	The essence of law is the principle of justice and truth. Law as what ought to be in moral or ideal precepts	Doctrinal Deductive	Justice	● Moral and law can not be separated. ● Morals are recognized since the beginning of the lawmaking process. ● Moral values are abstract knowledge from God and other sources beyond a human sense that live eternally in the human mind. These moral values should be settled in man-made law. Otherwise, the law can not be called law.

[45] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, New York: Oxford University Press, 2005, p. 3.

[46] Shidarta, *The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots*, p. 189-190.

Positivism	Law is merely a positive legal norm. Or known as Law as what is written in the books	Doctrinal deductive	Certainty of law	● Moral and law should be separated. ● The moral values are recognized but must be separated, meaning if the law does not include moral values, then it is still a valid law. ● Moral values can be recognized in the lawmaking process because: there is a universal basic need of human that indirectly represent moral values and there is a rule of recognition whereby if the rule wants to be approved as a rule by society then it must conform the moral value upheld by the society.
Interpretivism	Law as interpretations or processes of interpreting	Doctrinal Deductive and Nondoctrinal Inductive	Justice and Utility	● Moral and law can not be separated. ● Morals are recognized from the beginning of the lawmaking process to the implementation of the rules. ● The moral values can be found through the interpretation of interpreters in the form of a court decision, new legislation, lawsuit application, and so on.

Source: Authors' discussion above.

Table 2 simply depicts that either naturalism, positivism, or interpretivism has its own argument on how morals are found and why morals are essential to be incorporated in the law. However, it is noteworthy that no school can refuse the importance of morals in the law.

2. The Position Of Morality in Indonesia's National Legal System

A legal system is a unit consisting of the spirit of the nation component; the structural component; the substantial component; and the legal culture component which functionally connect each other to achieve certain goals.[47] In Indonesia, all of the components mentioned before are established by the lodestar of Indonesia's national spirit embodied in 'Pancasila'. Pancasila is a set of values that is discovered in Indonesian personality and culture in everyday life. The content of Pancasila consists of five principles, among others:

1. Belief in one and only God;
2. Just and civilized humanity;
3. Unity of Indonesia;
4. Democracy led by the wisdom of people representatives; dan
5. Social justice for all Indonesian people.

The Pancasila with five principles provides direction and goals to be taken where the Indonesian nation and state are, including inspiring the legal system in Indonesia. The Pancasila principles have reflected the recognition of morals and the ideals of the Indonesian people. The founding fathers hoped Pancasila would be used as the fundamental basis for the implementation of various state activities and affairs in

[47] Paisol Burlian, *Legal System in Indonesia,* Palembang: Fakultas Dakwah dan Komunikasi UIN Raden Fatah, 2015, p. 1-2.

Indonesia.[48] The founding father's will to make Pancasila as the basis of the state can be found in the fourth paragraph of the Indonesia Constitution year 1945 Preamble, which states:

> *"[...] the national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia which is* **based on** *the belief in the One and Only God, just and civilized humanity, the unity of Indonesia, democracy led by the wisdom of people representatives and the realization of social justice for all Indonesia people."*

The words "[...] based on [...]" in the fourth paragraph cited above show the intention of Indonesia to assign Pancasila as an absolute principle of Indonesia's legal order that must be realized in Indonesia's state administration.[49] According to Notonagoro, this position of Pancasila posits it as the basis of state philosophy (*philosofische grondslag*), which becomes the source of all law sources.[50]

One of the consequences of Pancasila as a state philosophy basis that becomes the source of all law sources is that Pancasila must be concretized in the various legal products in Indonesia. Shidarta says the ideal reasoning model for contextualizing Pancasila principles in Indonesia legal products is as follows:

Table 2: The Ideal Reasoning Model to Contextualize Pancasila Principles In Indonesia Legal Product By Shidarta.

Perspective	Explanation
Ontology	The suitable legal reasoning pattern regarding the Indonesian situation is when the law is interpreted as a positive legal norm. The reason is that it is consistent with the civil law legal system adopted by Indonesia, and it is aimed to avoid the disregard of the law either by the enforcers or those who have to obey the law.
Epistemology	Intuitive deductive and empirical (simultaneously) doctrinal deductive. The pattern of reasoning in the legal product's formulation starts from a simultaneous intuitive-deductive and empirical approach, whereas the legislators will examine religious provisions or Pancasila principles that can be found in the Indonesian people's lives, then formulate them in the written rules afterward. Meanwhile, the pattern of reasoning carried out by judges also shows the same characteristic, whereby there is a process of back-and-forth analysis between facts-rules and rules-system of rules called the context of the discovery process and then ends with the judge's judgment or so-called context of justification.
Axiology	The pattern of legal reasoning in accordance with Indonesian legal ideals placed the value of justice and utility simultaneously and subsequently followed by the value of legal certainty.

Source: Shidarta, The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots, 395, 408, 411, 434, 435.

[48] Seno Wibowo Gumbira, I Gusti Ayu Ketut Rachmi Handayani, and Kukuh Tejomurti, "The Urgency of Presidential Policy to Revitalize and Maintain the Existence of Cooperatives Based on Pancasila", *Sriwijaya Law Review* 3, Issue 2 (2019): p. 200.

[49] Kaelan, *Pancasila National State: Cultural, Historical, Philosophical, Juridical, and Its Actualization,* Yogyakarta: Paradigma, 2013, p. 52.

[50] Kaelan, *Pancasila National State: Cultural, Historical, Philosophical, Juridical, and Its Actualization, p.* 50-51.

Table 2 above shows that Indonesia also values morals within the law, although at some points the reasoning patterns are slightly different from naturalism, positivism, and interpretivism (compare it with Table 1). Interestingly, despite the distinctions, Indonesia's reasoning pattern exhibits the combination of multiple philosophies of law school characteristics, which will be further explicated in Table 3 below:

Table 3: The Similarity of Ontology, Epistemology, Axiology Perspective, or Moral Position Among Naturalism, Positivism, Interpretivism, and Indonesia Legal Reasoning.

Perspective	Explanations
Ontology	It is similar to positivism because the law is best seen as a positive legal norm.
Epistemology	It is similar to interpretivism because the legal products (legislation and/or court decision) are done by back-and-forth analysis between fact-rules and rules-system.
Axiology	It is a combination of naturalism, positivism, and interpretivism axiology perspectives because the ultimate goals of Indonesian law are to realize justice, utility, and legal certainty.
Position of Morals in The Law	It is similar to naturalism and interpretivism because morality and law can not be separated. It must be incorporated from the law-making process up to the law implementation

Source: Authors' discussion above.

In regards to the explanation in Table 4 above, there are some examples to better comprehend Indonesia's legal reasoning and how Indonesia incorporates moral values in the law-making process up to the law interpretation. Firstly, in the Indonesia law-making process as explained in table 4 below.

Table 4: The Evidence of Indonesia's Legal Reasoning in the Law-Making Process.

Perspective	Explanations	Evidence
Ontology	It is similar to positivism because the law is best seen as a positive legal norm.	There are some Articles in the Indonesia Constitution that state the arrangement of positive legal norms, among others: a. Article 5 (2) of the Indonesia Constitution, "The President may issue Government regulations as required to implement **laws**" b. Article 25 of the Indonesia Constitution, "The appointment and dismissal of judges shall be regulated by **law**" c. Article 26 (1) of the Indonesian Constitution, "Citizens shall consist of indigenous Indonesian peoples and persons of foreign origin who have been legalized as citizens in accordance with **law**". d. Article 28J of the Indonesian Constitution states, "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by **law** for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security, and public order in a democratic society"

Epistemology	It is similar to interpretivism because the legal products (legislation and/or court decision) are created by back-and-forth analysis between fact-rules and rules-system.	There are guidelines that require the legislator to do comprehensive research and review before issuing the legislation, such as: a. the Annex II page 11, Law number 12 of 2011 jo. Law number 15 of 2019 on The Establishment of Legislations (hereinafter The Establishment of Legislations Law) stated that the main ideas in the law, provincial regulation, or regency/municipal regulation consideration must contain, among others: 1) Philosophical background It outlines that the regulations consider the way of life, legal awareness, and ideas, including the psychological condition and philosophy of the Indonesian nation under Pancasila and the Preamble of the Indonesian Constitution of 1945. 2) Sociological background It outlines that the regulations fulfill the public needs in all aspects. 3) Juridical background It outlines that the regulations are made to address legal issues or fill the legal vacuum by considering the existing rules to be amended or repealed to ensure that legal certainty is upheld and public justice is served. b. Article 11 (2) alphabet h of Presidential Regulation number 87 of 2015 on The Implementing Regulation of The Establishment of Legislations Law (hereinafter The Implementing Regulation of The Establishment of Legislations Law) stated that the preparation of national legislation programs in the form of draft laws or the regulatory framework direction must be based on, one of which, the aspirations of the community c. Article 71 The Implementing Regulation of The Establishment of Legislations Law stated that the preparation of provincial regulations drafts might invite researchers and/or experts from universities or community organizations as needed. Indeed, the presence of this article is to gather more comprehensive research or expert studies on Indonesian society's real social phenomena. d. Article 188 The Implementing Regulation of The Establishment of Legislations Law states that the public has the right to suggest any input or recommendation in the lawmaking process orally or in writing. All of these guidelines are a back-and-forth process between fact rules and the rule system because they not only have to set the rules but also discern the public needs and synchronize all of them with the Indonesian legal system.
Axiology	It is a combination of naturalism, positivism, and interpretivism axiology perspectives because the ultimate goals of Indonesian law are to realize justice, utility, and legal certainty.	There are some guidelines such as: a. The elucidation of Article 2 The Establishment of Legislations Law stated: "[...] Placing Pancasila as the basis and ideology of the state as well as the philosophical basis of the state so that any material contained in the laws and regulations must not conflict with the values contained in Pancasila."; b. Article 6 paragraph (1) of The Establishment of Legislations Law stated that the material content of Indonesia legislation must reflect the following principles, among others: 1) protection; 2) humanity; 3) nationality; 4) brotherhood; 5) archipelagic nationhood; 6) unity in diversity; 7) justice; 8) equality before the law and in the government; 9) legal order and certainty; and/or 10)balance, orderliness, and harmony.

Source: summarized based on various sources.

Secondly, the implementation of law in Indonesia. In this case, which will be elaborated in Table 5 below. Table 5 mainly delineates the example of law implementation in a judge's interpretation and decision.

Table 5: The Evidence of Indonesia's Legal Reasoning in the Implementation of Law.

Perspective	Explanations	Evidence
Ontology	It is similar to positivism because the law is best seen as a positive legal norm.	Article 1 paragraph (1) Law number 48 of 2009 on Judicial Power (hereinafter Judicial Power Law) stated: "The judicial power is an independent power of the state to organize the judiciary process in order to enforce the law and justice based on Pancasila and Indonesia Constitution year 1945 [...]";
Epistemology	It is similar to interpretivism because the legal products (legislation and/or court decision) are created by back-and-forth analysis between fact-rules and rules-system.	Article 5 paragraph (1) of The Judicial Power Law stated, "The constitutional judges and judges are obliged to explore, follow, and understand the legal values and sense of justice that live in a society".
Axiology	It is a combination of naturalism, positivism, and interpretivism axiology perspectives because the ultimate goals of Indonesian law are to realize justice, utility, and legal certainty.	Article 2 paragraph (1) of The Judicial Power Law stated, "The judiciary process is done 'For The Sake of Justice and The Almighty God'". Therefore the phrase 'For Justice and The Almighty God' becomes the title of the court decision.

Source: summarized based on various sources.

The ontology, epistemology, and axiology context could also be seen in judge decisions. Some instances from the constitutional court decisions are as follows:

Table 6: The ontology, epistemology, and axiology of Indonesian Legal Reasoning in several judge decisions.

Quotation	Perspective	Explanation
The Constitutional Court Decision Number 46/ PUU-XIV/2016 about the criminalization of LGBT	**Ontology** It is similar to positivism because the law is best seen as a positive legal norm.	The positive legal norms used here are written in the Indonesian constitution and Indonesian criminal law.
	Epistemology It is similar to interpretivism because the legal products (legislation and/or court decision) are created by back-and-forth analysis between fact-rules and rules-system; and **Axiology** It is a combination of naturalism, positivism, and interpretivism axiology perspectives because the ultimate goals of Indonesian law are to realize justice, utility, and legal certainty.	There is a quotation of Constitutional Court Judges' dissenting opinion that illustrates how the judges consider the rules as well as Indonesian living law to make the decision. This quotation will also show the combination of axiological aspects. The quotation is as cited below: "Based on Article 1 paragraph (3) [...] of the Indonesian constitution, it can be understood that Indonesia is a "legal state based on the One Supreme God [...] and recognizes customary law community units and their traditional rights throughout in accordance with the development of Indonesian society and principles which are regulated in law. This concept emphasizes that legislation in Indonesia must always be in line with [...] religious values and living law [...]. Related to this context, Article 28D paragraph (1) states that one of the constitutional rights of every person is "fair legal certainty", so if there is a legal certainty in a legal norm that reduces, narrows, exceeds, and/or is contrary to the basis of the Supreme God [...] as well as a living law, then it is not a fair legal certainty."

The Constitutional Court Decision Number about the Job Creation Law procedure and content	**Ontology** It is similar to positivism because the law is best seen as a positive legal norm.	In his dissenting opinion, Justice Arief Hidayat stated that Indonesia actually adheres to the mixed system (he means positivist-nonpositivist) which under certain conditions, Indonesia could break the rule to meet the people's needs. In this case, he opined the Job Creation Law which was made using the omnibus method might not have any legal basis in the Establishment of Legislations Law, but it is needed to overcome the overlapping law that causes uncertainty and unfairness.
	Epistemology It is similar to interpretivism because the legal products (legislation and/or court decision) are created by back-and-forth analysis between fact-rules and rules-system; and	There is a quotation from the decision that represents the back-and-forth analysis of the judges to see Indonesian citizens' complaints due to not being able to participate in the law-making process. In the consideration, judges state: "... public participation is guaranteed as a constitutional right in Article [...] Indonesia Constitution. If the legislators in the process and mechanism actually prevent or distance the community from participating in discussions and debating its contents, then the legislators have violated the principle of people's sovereignty".
	Axiology It is a combination of naturalism, positivism, and interpretivism axiology perspectives because the ultimate goals of Indonesian law are to realize justice, utility, and legal certainty.	There is a quotation from the decision that represents the axiology context. The quote is as follows: "The Constitutional Court choice to detemine Law Number 11 Year 2020 regarding Job Creation Law as conditionally unconstitutional is because the Court must balance between the formal requirement for the formulation of law to obtain legal certainty, utility, and justice.".

Source: summarized based on various sources.

III.CONCLUSION

Ultimately, through the explanation above, it can be concluded that : (1) Each naturalism, positivism, or interpretivism has its own argument on how morals are found, why morals are important to be incorporated in the law, and what legal goals they must uphold. Firstly, the naturalists believe that law and morality can not be separated. It is abstract knowledge from other resources beyond the human sense that must be implemented in man-made law. The legal goal to uphold is justice. Secondly, the positivists see the law as merely a positive legal norm. Clearly, morality and law should be separated. The positivist adherents uphold the certainty of law as the goal of the law. Last but not least, the interpretivists see justice and utility as legal goals that must be unearthed by the interpretation process. All of the explanations have been summarized in Table 2. (2) In Indonesia, moral values have been recognized as a fundamental element of every legal product ever since Indonesia declared its independence. The moral values adhered to by Indonesian people are embodied in Pancasila principles and religious values as the basis of state philosophy. Thus, these values must always be incorporated into the lawmaking and judicial judgment process. In regards to concretizing the values in the legal product, Indonesia's reasoning pattern exhibits the combination of multiple philosophies of law school characteristics. Firstly, the ontology aspect is similar to positivism because the law is best seen as a positive legal norm. All of the product and judge decisions must conform with the regulation. Secondly, the epistemology aspect is similar to interpretivism

because of the back-and-forth analysis between fact-rules and rules-system. Lastly, the axiology is a combination of justice, certainty, and utility. The position of morality in Indonesia has a similarity to naturalism and interpretivism because from the very beginning of the law-making process up to the implementation, Indonesia can not separate morality from the law. The summary of conclusion number two has been displayed in Table 3.

We realize that there are still many shortcomings and limitations in the study of morality in law against legal philosophy and the national legal system in Indonesia. We hope that further researchers will explore morality in particular legislation to be studied and developed more deeply.

BIBLIOGRAPHY

Burns, Tony. Aristotle and Natural Law. London: Continuum International Publishing Group, 2011.

Aburaera, Sukarno. Theoretical and Practical Legal Philosophy. Jakarta: Kencana, 2013.

Ali, Achmad. Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence) Termasuk Interpretasi Undang-Undang (Legis Prudence). Jakarta: Prenada Media Group, 2012.

Alstyne, Lisa Van. "Theory, Interpretation, and Law: Some Worries about Dworkin's Account of Their Relation". Philosophical Topics 44, No. 1 (2016).

Bello, Petrus CKL. "Law as Interpretation". Diskursus 11, No. 1 (2012).

Burlian, Paisol. Legal System in Indonesia. Palembang: Fakultas Dakwah dan Komunikasi UIN Raden Fatah, 2015.

Darmodiharjo, Darji dan Shidarta. Pokok-pokok Filsafat Hukum : Apa dan Bagaimana Filsafat Hukum Indonesia, Edisi ke-6,. Jakarta: PT. Gramedia Pustaka Utama, 2006.

Dworkin, Ronald. Freedom's Law: The Moral Reading of the American Constitution. New York: Oxford University Press, 2005.

Dworkin, Ronald. Justice for Hedgehogs. Cambridge: The Belknap Press, 2011.

Dworkin, Ronald. "Overview Ronald Dworkin". Oxford Reference. Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095737269.

Dworkin, Ronald. Taking Right Seriously. London: Bloomsbury Academic, 2013.

Faisal, Emil El dan Mariyani. Legal Philosophy Textbook. Palembang: Bening Media Publishing, 2020.

Finnis, John. "What is the Philosophy of Law". The American Journal of Jurisprudence 59, No. 2 (2014).

Glahn, Jason C. "Is Hard Positivism too Hard to Swallow". North Dakota Law Review 3 (2006).

Golding, Martin P. Philosophy of Law. New Jersey: Prentice-Hall, Inc., 1975.

Graaf, Fanny de. "Dworkin's Constructive Interpretation as a Method of Legal Research", Boom Juridisch, available at https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/lawandmethod-D-14-00004.pdf,

Green, Leslie, and Thomas Adams "Legal Positivism", The Stanford Encyclopedia of Philosophy, 2019, Available at https://plato.stanford.edu/archives/win2019/entries/legal-positivism/.

Gumbira, Seno Wibowo, I Gusti Ayu Ketut Rachmi Handayani, and Kukuh Tejomurti. "The Urgency of Presidential Policy to Revitalize and Maintain the Existence of Cooperatives Based on Pancasila". Sriwijaya Law Review 3, Issue 2 (2019).

Hakim, Muhammad Helmy. "Shifting Orientation of Legal Research: From Doctrinal to Socio-Legal". Jurnal Syariah 16, No. 2 (2016).

Harman, Gilbert. "Moral Reasoning". Princeton University Papers. Available at https://www.princeton.edu/~harman/Papers/Moral_Reasoning_Current.pdf.

Helmanida. "School of Natural Law in Legal Philosophy". Jurnal Simbur Cahaya 44, XVI (2011).

Herlambang, Pratama Herry. "Positivism and Its Implications for Science and Law Enforcement", State Law Review 2, No. 1 (2019).

Indart, Erlyn. "Discretion and Paradigm: A Study of Legal Philosophy". Inauguration Speech of Professor in Philosophy of Law at the Faculty of Law, Diponegoro University. Semarang, 4 November 2010.

Indonesia Constitution year 1945

Kaelan. Negara kebangsaan Pancasila : Historis, Kultural, Filosofis, Yuridis, dan Aktualisasinya. Yogyakarta: Paradigma, 2013.

McConnell, Donald R. "The Nature in Natural Law". Liberty University 2, 3 (2008).

Miller, Fred D. "The Rule of Readon in Cicero's Philosophy of Law". Available at http://classic.austlii.edu.au/au/journals/UQLawJl/2014/19.pdf.

Murphy, Jeffrie G. dan Jules L. Coleman. Philosophy of Law an Introduction to Jurisprudence, Edisi Revisi. London: Westview Press, 1990.

Mustofa, Imron. "Window of Logic in Thinking: Deduction and Induction as the Basis of Scientific Reasoning". Jurnal El-Banat 6, No. 2 (2016).

Patterson, Dennis (Ed.). A Companion to Philosophy of Law and Legal Theory. United Kingdom: Blackwell Publishers, 1999.

Prasetyo, Teguh dan Abdul Hakim Barakatullah. Philosophy, Theory and Legal Studies (Thoughts Towards a Just and Dignified Society). Jakarta: Raja Grafindo Persada, 2013.

Rumble, Wilfrid E. "Legal Positivism of John Austin and the Realis Movement in American Jurisprudence". Cornell Law Review 66, Issue 5 (1981).

Scott, Allison W. "Legal Interpretation: Taking Words Seriously", CMC Senior Theses Paper (2011).

Shapiro, Scott J. "The 'Hart-Dworkin' Debate: A Short Guide for The Perplexed". Public Law and Legal Theory Working Paper Series 77 (2007).

Shidarta. The Law of Reason and Legal Reasoning: Book 1 Philosophical Roots, Yogyakarta: Genta Publishing, 2013.

Solum, Lawrence B. "The Unity of Interpretation", Boston University Law Review 90.

Spaak, Torben. "Kelsen and Hart on the Normative of Law", Stockholm Institute for Scandinavian Law 1957-2010.

Stavropoulos, Nicos. Essays The Debate That Never Was. Harvard Law Review. [Online] Available from: https://harvardlawreview.org/wp-content/uploads/2017/06/2082-2095_Stavropoulos_Online.pdf (retrieved February 24, 2021).

Stromberg, Caroline. "Legal Positivism and The Use of Ethics in Legal Interpretation in A Swedish Case", XXVII World Congress of the International Association for the Philosophy of Law and Social Philosophy (2015).

Sumbu, Telly, Ralfie Pinasang, dan Frans Maramis, Legal Philosophy Textbook, Manado: Universitas Sam Ratulangi, 2016.

The Constitutional Court Decision Number 46/PUU-XIV/2016

The Constitutional Court Decision Number 91/PUU-XVIII/2020

The Presidential Regulation Number 87 of 2015 on The Implementing Regulation of The Establishment of Legislation Law

Umaru, Aisha U-K. "On the Place of Morality within Natural Law: A Critical Examination of John Finnis' Divergence from Traditional Natural Law Theory in Natural Law and Natural Rights". ResearchGate. Available at https://www.researchgate.net/publication/339365814.

University, Cambridge (2021). "Prescriptive", Cambridge Dictionary, Cambridge University Press, 2021, available from: https://dictionary.cambridge.org/dictionary/english/prescriptive.

Wacks, Raymond. Philosophy of Law, A Very Short Introduction. New York: Oxford University Press Inc, 2006.

Weruin, Urbanus Ura. "Legal Hermeneutics: Principles and Rules of Legal Interpretation". Jurnal Konstitusi 13, No. 1 (2016).

Legal Documents

Indonesia, Undang-Undang tentang Kekuasaan Kehakiman (Law regarding Judicial Power), UU No. 48 Tahun 2009 (Law Number 48 Year 2009)

Indonesia, Undang-Undang tentang Pembentukan Peraturan Perundang-Undangan (Law regarding on The Establishment of Legislations) UU No. 12 Tahun 2011 jo. UU No. 15 Tahun 2019 (Law Number 12 Year 2011 jo Law Number 15 Year 2019)

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Is the Use of Nominees in Any Form Illegal?

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ABSTRACT

The use of nominees in investment has occurred in daily business activities. The nominee is deemed to have violated the existing regulations. Several incidents of the use of nominees have taken the world by storm. The use of nominees has involved several world leaders. The purpose of this study is to ascertain the history of the use of nominees in investment and to determine whether the use of nominees can be classified as money laundering or tax evasion. This study employs a normative juridical methodology. This study concludes that the use of nominees is motivated by money laundering and tax evasion. A nominee may be a trustee or a special purpose vehicle. However, using nominees may result in criminal sanctions if the funds are obtained through criminal acts. Investors and the names used can be considered perpetrators of criminal law violations. The resolution of nominee and money laundering problems must accompany the standardization of population data and tax data. Banning the use of nominees does not solve the problem.

Keywords: *Investment, Money Laundering, Nominee*

1. PREFACE

The Panama Papers scandal rocked the world in 2016. The Panama papers are a collection of 11.5 million classified documents that are the property of a Panama-based law firm called Mossack Fonseca [1]. This document contains data on shell companies and their owners located in tax haven jurisdictions. Shell companies are owned by elites from a variety of countries [2].

The Pandora Papers shocked the world once more in 2021. The Pandora Papers contains 2.95 terabytes of information on the businesses of 200 of the world's elites. The information is available on the International Journalists of Investigative Consortium's official website (IJIC). The Pandora Papers contain the names of several world leaders, including Pakistani Prime Minister Imran Khan; Czech Prime Minister Andrej Babus; and Russian President Vladimir Putin [3]. IJIC compiles data on tax haven jurisdictions, including the British Virgin Islands, Seychelles, Hong Kong, Panama, and South Dakota [4].

This study discusses the use of nominees in investment. Research is unique in discussing the nominees. The discussion of this research focuses on the source of funds, not only on the nominee structure. Research contributes in a different way from the others. Research with a focus on funding sources is still rare. The source of investment is funds. The fund that created the idea of using nominees.

The source of funds is the source of the nominee structure in business investment. Business investment is the takeover of shares by investors. Funds are a source of violation of state law. This fund must be regulated, not the nominee structure that is regulated. Funding should be the key to problem solving, not the nominee structure.

Following that, governments in a number of countries implemented new policies aimed at combating money laundering and increasing the transparency of controlling shareholders [5]. Between the controlling shareholder and the party whose name is used as the shareholder is a nominee agreement [6] [7]. In a nominee agreement, the controlling owner or controlling shareholder does not have complete ownership rights. Owners of control may reap financial rewards [8]. Nominee agreements can also cause complications during the inheritance process [9]. On the other hand, Presidential Regulation Number 10 of 2021 does not prohibit the use of nominee shareholders (PP) [10]. The Presidential Regulation merely restricts the beneficiary's ability to take certain actions [11]. On the other hand, shareholders must be held accountable for criminal violations committed by corporations in accordance with the corporate veil piercing principle [12].

Foreign investors' use of nominees can result in an increase in national assets held by foreign parties [13]. Foreign investors are permitted to invest in sectors that are off-limits to them [14]. The prohibition of foreign investors from entering specific industries is intended to protect domestic businesses [15],[16]. National businesses have been unable to compete with the multinational corporation [17].

A private equity firm or equity holding is another type of nominee agreement [18]. Private equity or equity holding has not been extensively regulated in China [19]. Private equity or equity holding is a new form of investment [20].

The corporate world also recognizes nominee directors in addition to nominee shareholders [21]. Numerous legal issues confront the nominee directors. Before being appointed, nominee directors must be aware of their responsibilities and obligations. [22]. The nominee director has a corporate governance issue. If the shareholders are involved in managing the company, then the company owners have a potential conflict of interest [23].

The purpose of this research is to examine the history of investors' use of nominees in investment. Using nominees entails numerous risks. There have been few discussions about the use of nominees, particularly when it comes to money laundering and tax evasion.

The research questions are as follows: What is the rationale for investing through nominees? Why is the use of nominees classified as a money laundering and tax evasion criminal act?

3. RESEARCH METHODS

The research methodology used is either normative legal or literature research, depending on the research questions. This research analyzes primary and secondary sources of information [24]. Legal research on legal literature or normative law encompasses examination of contemporary legal philosophies and standards. PThe statutory method is used in this study. Additionally, the systematics of prevailing rules and policies are investigated [25].

The terms "critical legal resources," "supplementary legal resources," secondary and tertiary resources, and other supplementary resources refer to research materials that employ a normative legal methodology. Supplemental legal resources include book reviews, methodical law journals, seminar/proceedings conclusions, and other methodical articles. These supplementary resources include online news coverage and freely accessible additional resources [26], [27]

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4. RESULTS AND DISCUSSIONS

Nominee Practice

Nominees are used by investors for a variety of reasons. If regulations permit, investors will use their own names directly. The decision to use nominees has a number of unintended consequences.

Investors, on the other hand, are compelled to use nominees because laws and regulations prohibit them from investing directly. Furthermore, the source of investor funding is unknown.

Regulators, particularly the Financial Services Authority (FSA), have requested an explanation of the funding source and tax returns demonstrating that the funding source is properly reported. Regulators keep an eye on this in order to prevent money laundering and tax evasion. The regulator will request that the investment include the ultimate shareholders or shareholders with individual names.

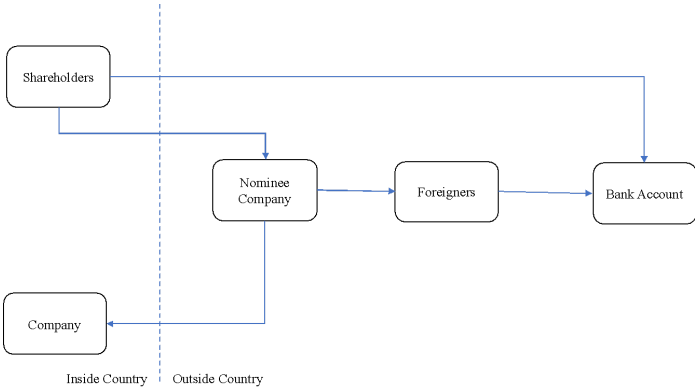
Numerous funds are derived from money laundering in various countries. Money laundering is inextricably linked to tax evasion. Money laundering funds are funds originating from business activities that are prohibited by the government. Business activities that are prohibited by the government such as trading on the black market or trading in goods are prohibited by the government. Apart from business activities, funds resulting from corruption are also classified as money laundering.

Revenues originating from business activity without paying taxes can also be used for investment, in addition to funds arising from illicit business activities and funds resulting from corruption. Using the nominee, these monies are invested in the firm. For example, a company's sales are not disclosed to the regulators. The selling earnings are placed in international banks. The assets are re-invested in the name of someone else.

Another scheme is that the company owner uses a nominee company. The owner of the company places the company's nominees abroad. Nominee sales companies do not need to report to the regulator. So the company's sales are not subject to tax. This is explained in Figure 1.

Figure 1

Nominee as Shareholder



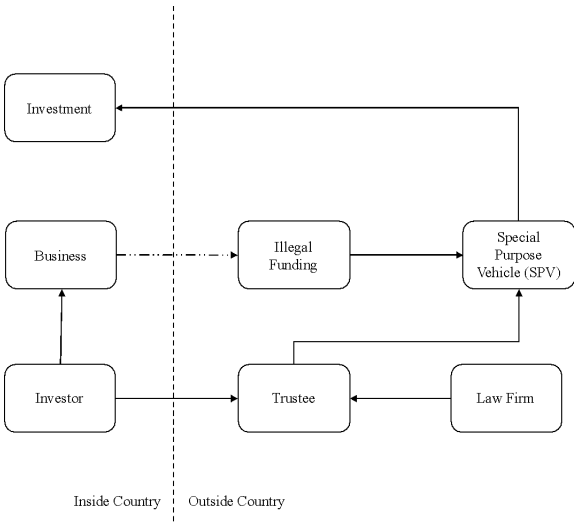
Additionally, several countries' regulators impose limits on foreign investment. Foreign parties invest through nominees. Although the nominee is the party permitted to invest, the foreign party is the controller. Because certain sectors of a country are not open to foreign investors, foreign investors must register as investors in the nominee's name.

Additionally, certain investors are prohibited from investing in certain sectors. Regulators have prohibited or blocked specific investors' names from being listed. As a result, these investors require nominee names in order to invest. Indonesia once published a list of dishonorable individuals who were barred from investing in the financial sector in the aftermath of the Asian economic crisis of 1998. These investors were prohibited from investing in the financial industry for a specified period of time. Investors require a variety of factors that can result in nominee names. However, the primary reason is the regulator's prohibition on investor investments. Investors continue to seek specific industries to invest in, and as a result, they are looking for nominees to assist them in making investments.

Nominee Use Scheme in Trustee

Investors who obtain illicit funds may invest through the use of a trustee. This trustee forms a corporation in the form of a special purpose vehicle (SPV). A law firm owns or manages the trustee.

Figure 2
Nominee Scheme



***Source**: Research Results*

This SPV is owned by the trustee using funds raised from investors. The trustee, acting as a nominee, acquires ownership of the SPV. However, the funds are raised through investors. SPV invests in sectors where investors have expressed an interest. This SPV acquires ownership of the businesses in which it invests. This SPV is not registered in the name of its true owner. Rather than investors, this SPV may invest in the country of origin.

The investor's investment funds are derived from his or her business income. This business is derived from domestic activities. Due to the fact that these investment funds are located outside

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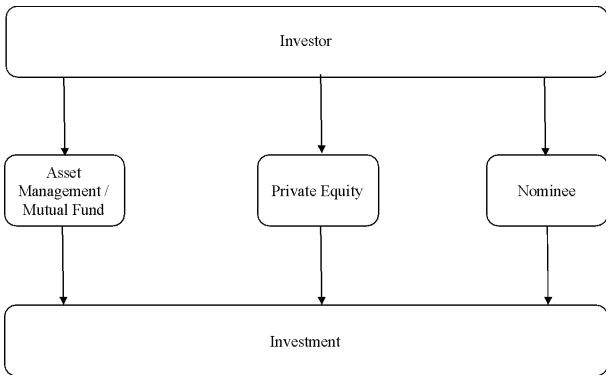
of the country, the funds are not returned to the country. These funds are used exclusively for international investment. Figure 2 illustrates this scheme.

The law firm's role is to appoint a Trustee and form a SPV. Trustees are looked after by law firms. The trustee is responsible for the SPV. The trustee is the SPV's owner.

Figure 3
Investment Using Nominee



Source: Research Results

According to the 1995 Capital Markets Law No. 8, investors may invest in mutual fund companies or asset management firms. Asset management firms or mutual fund companies invest in accordance with the investor's risk tolerance. Numerous wealthy investors are also investing in private equity firms at the moment. Private equity firms invest in early-stage businesses. Asset management companies, mutual funds, and private equity firms are all examples of nominees. The open source nature of investment funds is what differentiates nominees in a special purpose vehicle from the other three types. The scheme is shown in Figure 3.

Fund owners can entrust their funds to an asset management firm or fund manager. The capital owner data is owned by this investment firm. The asset management firm or fund manager will invest in accordance with the agreed policies. In addition, investors can also entrust their funds to private equity firms. The manager of the private equity firm will determine the investment. The owner of the fund is unknown to the public or regulators. The regulator only knows the fund manager. The investment structure with a fund manager, asset management firm or private equity has the same structure as the nominee form. So, the nominee structure is not the main issue in preventing money laundering.

The Use of Nominees is a Criminal Act of Money Laundering if The Source of Funds Comes from Criminal Acts

The incorporation of an entity for investment purposes is expected. However, using an entity whose ownership and funding are unknown presents a problem. Uncertain funding sources will raise concerns with regulators. Regulators will also look at unaccountable owners or shareholders. This regulation is applicable to the financial services sector. The Financial Services Authority (OJK) regulates all financial transactions, including the controlling owner of a publicly traded company

Suspicious financial transactions include investments with unknown sources of funding, as defined by the Republic of Indonesia's Law No. 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering (UU TPPU). The second point is that if the investment is made through criminal acts such as corruption, bribery, narcotics, human trafficking, illegal weapon trafficking, kidnapping, embezzlement, fraud, kidnapping, counterfeit money, or gambling, it is classified as a criminal act under the Money Laundering Law.

If the investment funds originate from one of the prohibited sources listed in the Money Laundering Law, the perpetrator or investor may be charged with a criminal act. Similarly, if the purpose is tax avoidance, the same thing will occur. Transferring funds from one country to another or to another territory in order to avoid taxes creates a new issue of tax evasion.

Regulators focus on illegal business activities. Regulators focus on funds originating from illicit business activities. The nominee is a derivative structure of the illicit fund. If there are no illicit funds, the nominees will not be an issue. Nominees have no impact as long as the funds are funds from the right business activities.

In addition to business activities, regulators need to have complete tax reporting data and citizen funds. With complete data, the source of the funds will be easily traced. If any funds transferred do not match the owner's profile, the regulator can track it down. The Know Your Customer (KYC) Banking system needs to be socialized to the public [28].

In addition, this supervision can function as a control over terrorism funds. Terrorism funds are also an issue of funds from illicit business activities. Funds originating from illicit business activities such as gambling proceeds, human trafficking and narcotics trafficking [29].

5. CONCLUSION AND RECOMMENDATIONS

The use of nominees by investors is intended to conceal the true identity of the fund's owner. Investors retain legal counsel to establish nominee companies. Trustees can be established by legal advisory firms. This trustee is involved in the investment of Special Purpose Vehicles. SPV will invest in accordance with the investor's instructions. Using nominees may be considered a crime if the investment funds were obtained through criminal activity in violation of the Money Laundering Law. Regulators need to regulate regulations regarding population data and tax reporting data. With neat population data and neat tax reporting, transactions using nominees or illicit funds will be easy to track. This study has a limitation in that it does not discuss the normative qualitative approach in detail. Additional research can be conducted by interviewing business owners, regulators, and legal counsel. Additionally, additional research can be conducted to determine the nominee's economic impact on a country.

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REFERENCES

Cruz L. M. M, (2020), "After the Panama Papers... a More Transparent Corporate Business Model?," *Asian J. Lat. Am. Stud.*, vol. 33, no. 3, pp. 135–259.

Erturk I, Froud J, Johal S, Leaver A, and Williams K, (2010). "Ownership matters: Private equity and the political division of ownership," *Organization*, vol. 17, no. 5, pp. 543–561.

Fauzia M, (2021). "Daftar 35 Pemimpin Negara Yang Disebut Di Pandora Papers."

Fitzgibbon W, (2021). "The Panama Papers: Exposing the Rogue Offshore Finance Industry."

Harding L, (2016). "Panama Papers."

Hardianti W. M and Setyowati M. S, (2019). "Implementasi Kebijakan Tax Allowance Dalam Upaya Peningkatan Iklim Investasi Pada Sektor Kelautan Dan Perikanan," *J. Manaj. Pelayanan Publik*, vol. 2, no. 2, p. 144.

Indrawan A, (2017). "Implementasi Prinsip Know Your Customer Dalam Mencegah Money Laundering di Industri Perbankan," *J. Manaj. Bisnis dan Kewirausahaan*, vol. 1, no. 2, pp. 1–9.

Indriani I, (2017). "Perkembangan Hukum: Perseroan Terbatas Dan Praktik Penggunaan Nominee Oleh Investor Asing," in *Membangun Pardigma Kehidupan Melalui Multidisiplin Ilmu*, vol. 7, no. 1, pp. 249–264.

Johan S and Ariawan A, (2021). "Consumer protection in financial institutions," *Leg. J. Ilm. Huk.*, vol. 29, no. 2, pp. 173–183.

Johan S and Ariawan A, (2021). "Keterbukaan Informasi UU Pasar Modal Menciptakan Asymmetric Information Dan Semi Strong Form," *Masal. Huk.*, vol. 50, no. 1, pp. 106–118.

Johan S, (2021). "Knowing Company Secrets Through Employee Posts on Social Media," *Diponegoro Law Rev.*, vol. 6, no. 2, pp. 203–216.

Marzuki M, (2017). *Penelitian Hukum: Edisi Revisi - Prof*, Revisi. Jakarta: Kencana Prenada Media Grup.

Maharani D. N and Santiago F, (2021). "Legal Smuggling of Share Ownership Using Nominee Arrangements Associated with a Violation of the Negative Investment Lists," *Adv. Soc. Sci. Educ. Humanit. Res.*, vol. 605, pp. 70–73.

Masulist R. W and Thomas R. S, (2009). "Does Private Equity Create Wealth? The Effects of Private Equity and Derivatives on Corporate Governance," *Univ. Chicago Rev.*, vol. 219, pp. 219–332.

Musyafaah N. L, Darmawan, Muwahid, and Syafaq H, (2021). "Islamic community organization collaboration in rejecting presidential regulation on alcohol investment," *J. Drug Alcohol Res.*, vol. 10, no. 9, pp. 1–7.

Pradana A. N and Mulyanto, (2019). "Beneficial Owner Rights in Nominee Agreement," *Int. J. Bus. Soc. Sci.*, vol. 10, no. 8, pp. 122–127.

Pranita N. K. P and Suardana I. W, (2021). "Perlindungan Hukum Terhadap Nasaba Pengguna Layanan Fintech (Financial Technology)," *Kertha Semaya J. Ilmu Huk.*, pp. 2013–2015.

P. P. R. T. BBC, (2021). "Pandora Papers: Secret wealth and dealings of world leaders exposed."

Rosada A, (2021). "The Effect of Good Corporate Governance Implementation on Islamic Bank Financial Performance," *Manag. Anal. J.*, vol. 10, no. 1, pp. 55–61.

Sancaya I. W. W and O'Leary N. H, (2019), "The Nominee Agreement in Bali," *Sosiological Jurisprud.*, vol. 2, no. 1, pp. 26–31.

Saypan S, (2019). "Legal Problems Concerning Nominee Arrangements in Relation To Foreign Business Under Thai Laws.," *Thammasat Bus. Law J.*, vol. 10, pp. 80–94.

Salleh K, (2021), "The Duties and Conflicts of Nominee Directors: the Legal Position in Malaysia," *Psychol. Educ. J.*, vol. 58, no. 2, pp. 1577–1583.

Suardana I. M. B and Wiryawan I. W, (2020). "Kepastian Hukum Usaha Mikro Kecil dan Menengah Dalam Pola Kemitraan Sebagai Penerima Waralaba," *J. Magister Huk.*

Udayana (Udayana Master Law Journal), vol. 9, no. 3, p. 547.

Tang H and Hou D, (2021). "Research on Legal Issues of Chinese Equity Holding," *Proc. 1st Int. Symp. Innov. Manag. Econ. (ISIME 2021)*, vol. 185, no. Isime, pp. 74–79.

Wibowo A. T and Prihartinah T. L, (2020). "The Law Impact on the Inheritance of Nominee Arrangement in Indonesia to the Third Party of Share Buyers," *Adv. Soc. Sci. Educ. Humanit. Res.*, vol. 499, no. Icolgas, pp. 1–7.

Wibowo A. T and Prihartinah T. L, (2020). "The Law Impact on the Inheritance of Nominee Arrangement in Indonesia to the Third Party of Share Buyers," in *2nd International Conference on Law, Governance and Social Justices (ICOLGAS, 2020)*, vol. 499, pp. 1–7.

Widijowati R. D and Darmawan H, (2020). "Criminal Liability of Corporate Shareholders," *Int. J. Law, Gov. Commun.*, vol. 5, no. 20, pp. 69–79.

Yanuar M. A, (2021). "Legal Review of Nominee Shareholders Agreement of Foreign Direct Investment In The Form of Joint Venture Company," *Maj. Huk. Nas.*, vol. 51, no. 1, pp. 107–125.

Yoshikawa T and Phan P. H, (2005). "The effects of ownership and capital structure on board composition and strategic diversification in Japanese corporations," *Corp. Gov. An Int. Rev.*, vol. 13, no. 2, pp. 303–312.

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