

CHAPTER TWO

LITERATURE REVIEW

A. The Overview of Legal Protection

1. The Legal Protection Based on 1945 Constitution

In the preamble to the Constitution of 1945, the fourth paragraph mention that: To form a government of the state of Indonesia which shall protect all the people of Indonesia and all the Independence and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice.

Phillipus M. Hadjon stated the legal protection is purposed for the people as a preventive and repressive action of the government.⁷ Preventive Law Protection aims to prevent the disputes. The repressive is to make the government more aware in in decision-making based on discretion. Protection has purpose to prevent the disputes, including on court.⁸

⁷ Phillipus M. Hadjon, 1987, *Perlindungan Hukum bagi Rakyat Indonesia*, Surabaya: PT. Bina Ilmu, p. 2.

⁸ Maria Alfons, 2010, "Implentasi Perlindungan Indikasi Geografis Atas Produk-Produk Masyarakat Lokal Dalam Prespektif Hak kekayaan Intelektual", *Jurnal Fakultas Hukum Universitas Brawijaya Malang*, Vol. 1, 2010, p. 18.

According to Lili Rasjidi and I.B Wyasa Putra, law can be enabled to realize the protection that is not only adaptive and flexible, but also predictive and anticipative.⁹

Based on some explanations above, it can be said that the protection has same meaning, which is a protective action of certain parties intended for certain parties conducted with a certain way.

2. The Concept of Legal Protection

As a social being, the human always performs legal acts (*rechtshandeling*) and legal relations (*rechtsbetrekkingen*).¹⁰ A legal relationship will give the rights and obligations that have been determined by the laws and regulations, so that if violated will result in the violators that can be prosecuted in court.¹¹

Furthermore, each member of the community would have a different interests to reduce the conflict, so, there appears law that regulate and protect the interests called legal protection. Legal protection is a protection afforded to legal subjects in the form of legal instruments whether they are preventive or repressive, whether written or unwritten.¹²

⁹ Lili Rasjidi and I.B Wyasa Putra, 1993, *Hukum Sebagai Suatu Sistem*, Bandung: Remaja Rusdakarya, p. 118.

¹⁰ R. Soeroso, 2006, *Pengantar Ilmu Hukum*, Jakarta: Sinar Grafika, p. 49.

¹¹ Soedjono Dirjosisworo, 2001, *Pengantar Ilmu Hukum*, Jakarta: PT. Raja Grafindo Persada, p. 131.

¹² Anonim, 2015, "Perlindungan Hukum", taken from <http://statushukum.com/perlindunganhukum.html>, accessed on Friday, Desember 22nd, 2017 at 8.09 pm.

Satjipto Rahardjo said that, the existence of law in society is to integrate and coordinate the interests of society that can collide. To coordinate these interests is done by limiting and protecting those interests.¹³ The law protects somebody interests by giving them power to act in fulfillment of their interests. The giving of power, or often called as right, is performed measurably, breadth and depth.¹⁴

According to Paton, an interest is a target of rights, not only because it is protected by law, but also because there is recognition of it. Rights not only contain elements of protection and interests, but also will.¹⁵

Legal protection in Dutch is called as *rechtsbecherming*. Harjono tries to provide a definition of legal protection as a protection by law, with intention to give protection of certain interests, called as a legal right. Meanwhile, according to KBBI (Kamus Besar Bahasa Indonesia) protection is a shelter place. The meaning of the protection it has similarity with same elements, namely:

- a. Elements of Protection Action;
- b. Elements of Protection Parties;
- c. Elements of Protection Measures.

So the meaning of term refers to the meaning of protection is an act of protection or protective action of certain parties intended for a particular party by using certain means. When we talk about the law in

¹³ Satjipto Rahardjo, 2000, *Ilmu Hukum*, Bandung: Citra Aditya Bakti, p. 53.

¹⁴ *Ibid.*

¹⁵ *Ibid*, p. 54.

general, it is meant the whole collection of rules in life. The whole rules of conduct that apply to a common life, which can be enforced by a sanction.¹⁶

Legal protection is the main form of protection, because it is based on the idea that law is to accommodate the interests and rights of a person in comprehensively. In addition, the law has force power within recognized by the state, so it can be carried out permanently but, in contrast to protection through other institutions such as economic protection, or politics, which are temporary.¹⁷

Talcott Parsons a sociologist believes that legal norms can serve as a mechanism for socialization as well as a social control mechanism. Including controlling interest conflict that is occur in the interests of society.¹⁸

Legal protection may be interpreted as protection by law or legal means. Providing legal protection can be through certain ways, such as:

- a. Make the rules, aim to:
 - 1) Giving rights and obligations;
 - 2) Ensure the rights of legal subjects.
- b. Enforce regulations, through:

¹⁶ Sudikno Mertokusumo, 2003, *Mengenal Hukum Suatu Pengantar*, Yogyakarta: Liberti, p. 40.

¹⁷ *Ibid*, p. 60.

¹⁸ Wahyu Sasongko, 2007, *Ketentuan-Ketentuan Pokok Hukum Perlindungan Konsumen*, Bandar Lampung: Universitas Lampung, p. 31.

- 1) State administrative law that serves to prevent the occurrence of violations of consumer rights, with licensing and supervision;
- 2) criminal law that serves to overcome (repressive) violation of Consumer Protection Act, by imposing criminal sanction and punishment;
- 3) Civil law that serves to recover the rights (curative, recovery, remedy), by paying compensation.¹⁹

3. The Legal Protection Based on Civil Code

Legal protection under the civil code is a matter protected by law based on the engagement that occurs in the failed departure of *Jemaah Umrah*. Every engagement is born either because of approval or law.²⁰ According to Prof. Soediman Kartohadiprojo, alliances are all rules governing the rights and obligations of a person who are sourced from his actions in the legal environment of wealth.²¹

Based on this understanding, the existence of elements in an engagement is:²²

1. There is a legal relationship;

¹⁹*Ibid*, p. 32.

²⁰ Civil Code Article 1233.

²¹Wibowo Tunardy, 2012, “*Pengertian Perikatan*”, taken from <http://www.jurnalhukum.com/pengertian-perikatan/>, accessed on Monday, April 30, 2018 at 08.42 pm.

²²Komariah, 2002, *Hukum Perdata Perikatan*, Malang: Universitas Muhammadiyah Malang, pp. 138-139.

2. Two parties, namely the party having the obligation (First Travel) and the party who has the right (*Jemaah Umrah*);
3. Being in the field of wealth law;
4. The goal is accomplishments (*Prestasi*)

If the main objective of the elements is not implemented due to the error of the debtor either due to intent or negligence (*wanprestasi*). The legal consequences of a debtor (First Travel) who has committed a penalty is a penalty or sanction in the form of paying compensations suffered by the creditor in the form of reimbursement of costs, losses, and interest in accordance with the time period he promised.²³ Understanding the three elements of compensation are:²⁴

1. Fees shall be any expenditure or expense incurred by the creditor as used as a liability paid to the debtor.
2. Loss is a loss due to non-fulfillment of the rights of the creditor caused by the debtor's negligence.
3. Interest is a loss in the form of loss of profits that should be obtained by the creditor.

In the matter of indemnification, law provided restrictions on the indemnification of the indemnity. This Law provides protection for the debtor who is negligent towards the creditor asking for compensation. Even if the non-fulfillment of the agreement is due to

²³ Civil Code Article 1243.

²⁴ R. Subekti, 2002, *Hukum Perjanjian*, Jakarta: PT. Intermasa, p. 46

the trickery of the indebted party in the event of reimbursement of costs, losses and interest only on the losses incurred by the debtors and the profits lost to him, consists only of the direct result of non-fulfillment of the agreement.²⁵

4. The Legal Protection Based on Criminal Code

One of the most disturbing phenomena in social life is the occurrence of various crimes. Crime is a social reality that continues to grow with various types and various modes, and bring harm and even endanger the lives of the people. Therefore, a crime is a criminal law.

The definition of a criminal law is all aspects that can be criminalized by the ruling institution, and handed over to a police officer as a matter of non-abandonment. The nature of criminal law is a public law that regulates the relationship between individuals with public law community i.e. the state or regions within the country.

According to the philosophers from Germany in the 18th century , the purpose of the establishment of punishment is absolutely to punish or avenge one's evil deeds. In the development of the mindset of the community arose the opinion that the purpose of punishment is as retaliation in no way to give satisfaction for the interests of society. If the goal is just to scare the public and destroy

²⁵ Civil Code Article 1248

the criminals, it also does not provide a legal satisfaction for the community. So the law has two legal purposes must go hand in hand, namely:

1. Give priority to retaliation, but the retaliation must not exceed the limits of what is necessary and sufficient to maintain the order of society; and
2. Prioritize the protection of public order, but the suffering of the crime shall not be heavier than the act committed by the convicted person.

Understanding of crime is very much formulated by jurists who are all different in translating it about the crime of monitism and dualism. An act will become a crime if the act contains elements as follows:

- a. Human actions;
- b. Violate the rule of law;
- c. Unlawful;
- d. Conducted by a responsible person;
- e. Wrongdoing.

Regarding the meaning of the elements of the criminal act itself there is a difference among the experts, but in fact this is not so important because the problem is in the imposition of the criminal. In other words the problem is to hook legitimate techniques.

5. The Legal Protection Based on Law No 37 Year 2004 about Bankruptcy and Suspension of Payment Obligation

Law No. 37 Year 2004 concerning Bankruptcy and Suspension of Payment Obligation (PKPU) provides legal action for debtors, so that their assets are not liquidated when the debit is declared insolvent, aiming to restructure the unpaid debts. The legal effort is to propose a legal effort the Suspension of Payment Obligation (PKPU). In the debt agreement, there are 2 (two) parties namely the Debtor and the Creditors. The notion of a creditor is “a person who has a receivable due to an agreement or law whose repayment can be billed in court”.²⁶ While the Debtor is “a person who has a debt because of the agreement or the law that repayment can be billed in court”.²⁷

In the principles, there are two Suspension of Payment Obligation (PKPU) patterns. The first pattern is Suspension of Payment Obligation (PKPU) which is a debtor against the bankruptcy application filed by its creditors and the second pattern is Suspension of Payment Obligation (PKPU) filed by the creditor.²⁸

Another notion of the Suspension of Payment Obligation (PKPU) provided by Munir Fuady stated that another Suspension of Payment Obligation (PKPU) is a suspension payment or *Surseance*

²⁶ Law No 37 Year 2004 about Bankruptcy and Suspension of Payment Obligation (PKPU) Article 1 point 2.

²⁷ Law No 37 Year 2004 about Bankruptcy and Suspension of Payment Obligation (PKPU) Article 1 point 3

²⁸M. Hadi Shuban, 2008, *Hukum Kepailitan: Prinsip, Norma dan Praktik di Peradilan*, Jakarta: Kencana Prenada Media Group, p. 147.

van Betaling, which is a period given by the law through a commercial judge ruling in which to the creditor and the debtor is given the opportunity to consult his debt repayment method by giving the payment plan of all or part of the debt, including the need to restructure its debt.²⁹ Thus, it is expected that with the submission of the Suspension of Payment Obligation (PKPU) it can improve the economic situation in crisis and improve the ability of the debtor to make a profit, thus providing a considerable possibility for debtors to settle their obligations.

The objective is to propose a plan that includes a partial or total debt offer to the creditor, both the concurrent creditors and the creditor who takes precedence. Thus, the Suspension of Payment Obligation (PKPU) does not merely provide debt repayment to debtors, but the most important is the implementation of debt payments embodied in the peace plan.

The principle of Suspension of Payment Obligation (PKPU) is different from bankruptcy, the principal bankruptcy principle is to obtain a proportional repayment of debtor's debts by selling debtor's assets. Not only that, in the Suspension of Payment Obligation (PKPU), the debtor still has the authority to perform legal actions against his/her property, insofar as the approval of the Board

²⁹Munir Fuady, 1995, *Hukum Pailit dalam Teori dan Praktek*, Bandung: Citra Aditya Bakti, p. 15.

previously appointed by the court examining the Suspension of Payment Obligation (PKPU) application.

Submission of Suspension of Payment Obligation (PKPU) can be done by the debtor himself or not by the creditors. In the event that the creditor submits a bankruptcy request to the debtor, the debtor may apply for Suspension of Payment Obligation (PKPU) to the same court. In such case, the Suspension of Payment Obligation (PKPU) examination takes precedence and the bankruptcy petition is terminated. If the debtor voluntarily submits an application for PKPU, then during the proceedings, the creditors can not file a bankruptcy request.

Suspension of Payment Obligation (PKPU) in Indonesia is regulated in conjunction with the legislation of bankruptcy, starting from the provisions of *Faillissement Verordening* Stb.1905 No. 217 *juncto* Stb. No. 1906 348. After the economic crisis that occurred around 1998, the provision was amended through Government Regulation No. 1 of 1998 on amendment to the Bankruptcy Act dated September 9, 1998 (State Gazette of the Republic of Indonesia Year 1998 Number 135). The latest amendment to this provision is Law No. 37 Year 2004 about Bancruptcy and Suspension of Payment Obligation (PKPU).

6. The Regulation of Religion Minister No 8 Year 2018 about Implementation of *Umrah*.

Based on Article 1 Paragraph 1 of Implementation of *Umrah*, The Implementation of *Umrah* Travel is a series of *Umrah* activities outside the Haj season which includes guidance, service, and protection of *Jemaah*, conducted by the government and/or *Umrah* religious travel organizers. In the Implementation of *Umrah* Travel is a travel agency that has received permission from the Minister to organize the *Umrah* trip.³⁰ *Jemaah Umrah*, hereinafter referred to as *Jemaah*, is every person who is Muslim and has registered himself to perform *Umrah* in accordance with the requirements set.³¹

Implementation of *Umrah* Trip is implemented based on the principles of professionalism, transparency, accountability, and Shari'a.³² In that case aimed to provide guidance, service, and protection to *Jemaah*, so *Jemaah* can perform their worship in accordance with the provisions of the Shari'a.³³ In the implementation can be done by the government and/or travel agency *Umrah* conducted by the Minister of Religious Affairs.

³⁰The Regulation of Religion Minister No 8 Year 2018 about Implementation of *Umrah* Article 1 point 2.

³¹The Regulation of Religion Minister No 8 Year 2018 about Implementation of *Umrah* Article 1 point 3.

³²The Regulation of Religion Minister No 8 Year 2018 about Implementation of *Umrah* Article 2

³³The Regulation of Religion Minister No 8 Year 2018 about Implementation of *Umrah* Article 3

Bureaus who have obtained permission to perform *Umrah* services must meet the following requirements:³⁴

- a. has a notarial deed of incorporation of a limited liability company and/or its amendment as a travel agent having one of its business activities in religious affairs/worship journey which has been approved by the Ministry of Law and Human Rights;
- b. shareholders, commissioners and directors as stated in the notarial deed of a limited liability company are Indonesian citizens who are Muslims;
- c. shareholders, commissioners and directors have never been or are being sanctioned for violation of the *Umrah* Exhibition;
- d. having a service office proven by a company domicile certificate from the local government and attaching a proof of ownership or lease for a minimum of 4 (four) years as evidenced by the legalization or legalization of a Notary;
- e. has a token list of tourism businesses;
- f. has been operating for at least 2 (two) years as a travel agent as evidenced by the report of business activities;
- g. has a certificate of business travel services with categories of travel agencies are still valid;

³⁴The Regulation of Religion Minister No 8 Year 2018 about Implementation of *Umrah* Article 5 point 2.

- h. has the technical capability to organize the *Umrah* trip which includes human resource capability, management, and facilities and infrastructure;
- i. has a financial report of the company in the last 2 (two) years and has been audited by a public accountant registered with the Ministry of Finance with an unqualified opinion;
- j. attach a fiscal certificate and a copy of the taxpayer's principal number on behalf of the company and the head of the company;
- k. has original recommendation letter from Regional Office with validity period of 3 (three) months; and
- l. surrender guarantee in the form of deposit/bank guarantee on behalf of travel agency issued by sharia bank and/or national commercial bank having sharia service with validity period of 4 (four) years.

Based on operational permit which has been stipulated by Decree of Minister of Religious Affairs signed by Director General of *Hajj* and *Umrah* Organizer. Further provisions concerning collateral in the form of deposit/bank guarantee are stipulated by the decision of the Director General of *Hajj* and *Umrah* Organizer.

Based on Article 20 Paragraph 1 of Implementation of *Umrah*, *Jemaah's* shelter service and *Umrah* officers as the implementation shall be carried out by the Implementation of *Umrah* Trip, including:

- a. life, health and accident insurance;
- b. the handling of documents of *Jemaah* who were lost during the journey of worship; and
- c. the maintenance of separate *Jemaah* and/or lost during the trip and in Saudi Arabia.

Based on Article 20 Paragraph 2 of Implementation of *Umrah*, the amount of insurance coverage / benefit value as referred to in life, health and accident insurance in accordance with the provisions of travel insurance.

B. The Overview of Consumers Protection

1. The Definition of Consumers Protection

Consumer Protection Act provides a more explanation to the consumer about things that must be noticed by consumers in doing legal relationships with business actors. The legal relationship created between consumers and business actors is a legal relationship that can give benefits for both parties. In general, consumers should be able to know about a consumer, business actor, and the rights owned by consumers and business actors. Consumer Protection Act is also part of consumer law which contains regulatory principles, and protects the interests of consumers of arbitrary and irresponsible business actors who place the consumer's position as the object of his business, means

that as efforts to give legal protection for consumers that are conduct in Consumer Protection Act.³⁵

In so many literatures, we can find at least two terms about consumers in the business law of consumer law and Consumer Protection Act, from these two terms we often hear and even say in the world of lectures every day. But there are those who distinguish the meaning of both, as mentioned by A.Z Nasution.

According to A.Z Nasution, consumer law is all legal principles and rules that regulate the relationship and problem between one party with other parties related to consumer goods or services in the social life. Whereas Consumer Protection Act is part of consumer law governing the principles of regulating and also contains nature that protect consumer interest.³⁶

Issue with the understanding of consumer law and Consumer Protection Act that has been mentioned above, it can be concluded several principal thoughts as follows:³⁷

- a. Consumer law has broader scope than Consumer Protection Act;
- b. The existing subjects in consumer protection are the people as consumers, on the other hand there are business actors, or other

³⁵Ahmadi Miru and Sutarman Yodo, 2004, *Hukum Perlindungan Konsumen*, Jakarta: PT Raja Grafindo Persada, p. 9.

³⁶ Ade Maman Suherman, 2005, *Aspek Hukum Dalam Ekonomi Global*, Bogor: Ghalia Indonesia, p. 104.

³⁷ Susanti Adi Nugroho, 2011, *Proses Penyelesaian Sengketa Konsumen Ditinjau dari Hukum Acara Serta Kendala Implementasinya*, Jakarta: Kencana, p. 58.

related parties such as distributors, producers, bases, agents, the Indonesian Consumers Foundation (YKLI), the Food and Drug Supervisory Agency (BPOM) and so forth;

- c. The regulated object is goods, and/or services that the offender is offered and sold to the consumer or the community;
- d. The inequality between the customers and the business perpetrators resulted in the government issuing rules that can guarantee and protect the rights and obligations of consumers.

The definition of Consumer Protection Law is not in the Consumer Protection Act, but the Consumer Protection Act only lists the definition of consumer protection. The definition is contained in Article 1 Paragraph 1 of the Consumer Protection Act which contains all measures that ensure the existence of legal certainty to provide protection to consumers.

The definition of consumer protection that mentioned in Article 1 Paragraph 1 of Law No 8 Year 1999 about Consumer Protection. The sentence which states “any attempt to guarantee the existence of legal certainty” is expected to give legal certainty for businesses and consumer.³⁸

In the order hand, consumer protection implies a preference to the interests of consumer law. Consumer interests according to United

³⁸ Ahmadi Miru and Sutarman Yodo, *op. cit.*, p. 1.

Nations Resolution 39/284 on Guidelines for Consumer Protection are as follows:³⁹

- a. Consumer protection from hazards to health and safety;
- b. Promotion and protection of consumers' social and economic interests;
- c. Availability of sufficient information for consumers to provide their ability to make the right choice according to personal will and needs;
- d. Consumer education;
- e. The availability of effective remedies;
- f. The freedom to form relevant consumer organizations or other organizations and provide an opportunity for such organizations to voice their opinions in the decision-making process that concerns their interests.

2. The Definition of Consumers

Consumers in general are those who consume a product. The term consumer comes from a foreign language is “consument” (Netherland). According to the legal dictionary in Dictionary of Law Complete Edition consumers are parties who use goods and services,

³⁹ Celina Tri Siwi Kristiyanti, 2009, *Hukum Perlindungan Konsumen*, Jakarta: Sinar Grafika, p. 115.

both for self-interest and for the benefit of others.⁴⁰ In English-Indonesian Dictionary, the word of consumer as the user.⁴¹

The consumer's understanding is contained in Article 1 Paragraph 2 of Law No 8 Year 1999 about Consumer Protection; hereinafter abbreviated Consumer Protection Act is “Consumer is every user of goods and/or services available in society, whether for self-interest, family, other people and other living beings and not to be trafficked “. In the book A.Z. Nasution entitled legal aspects of consumer protection issues; the term consumer comes from the word “consument” (Netherland). The literal meaning of the word consumer is the opposite of the manufacturer, or any person who uses the goods.⁴² Understanding consumers in the general sense is the user of the user goods and services for a particular purpose.⁴³

Based on the understanding that the author has described above the meaning of consumer subject is the person that has status as a users goods and services. According to A.Z. Nasution, consumer is a person and/or a legal entity, for those who use, utilize goods and services for the benefit of themselves, family, other persons or other living beings and not to be trafficked.⁴⁴ Consumers are generally

⁴⁰ M. Marwan and Jimmy. P, 2009, *Kamus Hukum*, Surabaya: Reality Publisher, p. 378.

⁴¹ Jhon. M. Echols and Hasan Sadily, 1986, *Kamus Inggris-Indonesia* , Jakarta: Gramedia, p. 124

⁴² A.Z. Nasution, 2002, *Hukum Perlindungan Konsumen*, Jakarta: Diadit Media, p. 3.

⁴³ *Ibid*, p. 6.

⁴⁴ *Ibid*, p. 7.

defined as the last user of the product delivered to them and not to be traded again.⁴⁵

Hondius the expert of consumer problems in the Netherlands, concluded, that in generally the legal experts. Agree to interpret the consumer as the last user of the product of goods and services. With that formula, Hondius wants to differences between temporary consumers and last consumers. Consumers in a broad sense encompass both these criteria, while the consumer user in the strict sense refers only to the last consumer user. To avoid confusing the use of the term “consumer” that obscures from the real intention.⁴⁶

3. The Definiton of Business Actor

Producers are often interpreted as entrepreneurs who produce goods and services. In this sense includes manufacturers, wholesalers, suppliers and professional retailers is every person/body that is followed and in the provision of goods and services up to the hands of consumers.⁴⁷

While the definition of Business Actor is contained in Article 1 Paragraph 3 of the Consumer Protection Act, which reads “any individual or business entity, whether in the form of a legal entity or non-legal entity established and domiciled or conducting activities

⁴⁵ Janus Sidabalok, 2010, *Hukum Perlindungan Konsumen di Indonesia*, Bandung: Citra Aditya Bakti, p. 17.

⁴⁶ Susanti Adi Nugroho, *op. cit.*, pp. 61-62.

⁴⁷ Sri Redjeki Hartono, 2007, *Hukum Ekonomi Indonesia*, Malang: Bayumedia Publishing, p. 140.

within the territory of the Republic of Indonesia, individually through agreements to conduct business activities in various fields”. From the understanding above, business actors may be individuals or business entities that conduct business activities in the economic field. Business actors included in this definition are companies, corporations, BUMN, cooperatives, importers, traders, distributors, and others.⁴⁸

4. The Principles of Consumers Protection

In Article 2 of Law No 8 Year 1999 on Consumer Protection, it is explained that consumer protection is organized as a joint effort on five principles relevant to national development, namely:

a. Benefit Principle

This principle implies that the Consumer Protection Act should be applied to provide benefits to consumers and business actors. So there is no higher party position, between consumer and business actor.

b. The Principle of Justice

This principle can be seen in the application of Article 4 to 7 of the Consumer Protection Act which regulates the rights and obligations of consumers and business actors.

c. The Balance Principle

⁴⁸ Rachmadi Usman, 2000, *Hukum Ekonomi Dalam Dinamika*, Jakarta: Djambatan, p. 207.

From the application of this principle, it is expected that the interests of consumers, business actors and government can be realized in a balanced way, meaning that no party is more protected.

d. Consumer Safety and Security Principles

With the application of Consumer Protection Act is expected to provide security and safety of consumers in the sale and purchase, use, and utilization of goods and/or services consumed or used.

e. Principle of Legal Certainty

The purposes of this principle is to make consumers and business actors obey the law and get justice in the application of consumer protection and state guarantee the legal certainty.

The five principles in this Article 2 when considered the substance can be grouped into three principles namely the principle of benefit that includes the principle of security and consumer safety, the principle of justice includes the principle of balance, benefit aligned with the principle of maximization and legal certainty and the principle of legal certainty aligned with the principle of efficiency.⁴⁹ According

⁴⁹ Ahmadi Miru and Sutarman Yodo, *op. cit.*, p. 26.

to Himawan: “Authoritative law is an efficient law, under the name of a person can carry out its obligations without deviation”.⁵⁰

5. The Goal of Consumers Protection

The purpose of consumer protection itself is in Article 3 of Law No 8 Year 1999 on Consumer Protection, namely:

- 1) Increase awareness, ability, and independence of consumers to protect themselves;
- 2) To raise the dignity of consumers by avoiding them from negative access to the use of goods and/or services;
- 3) Increasing the empowerment of consumers in choosing, determining and demanding their rights as consumers;
- 4) Creating a consumer protection system that contains elements of legal certainty and information disclosure and access to obtain information;
- 5) To grow the business consciousness about the importance of consumer protection so as to grow an honest and responsible attitude in the business;
- 6) Improving the quality of goods and/or services that ensure the continuity of production of goods and/services, health, comfort, safety, and consumer safety.

⁵⁰ Ahmadi Miru, 2011, *Prinsip-Prinsip Perlindungan Hukum bagi Konsumen di Indonesia*, Jakarta: Raja Grafindo Persada, p. 34.

Consumer protection is the goal of protecting consumers. Therefore, consumer protection must be implemented in everyday life. The purpose of consumer protection is arranged gradually, from awareness to empowerment. In fact, the achievement of consumer protection objectives does not have to go through the phases based on the arrangement but by looking at his interests. For example the purpose of improving the quality of goods (goal number six), the achievement does not have to wait for the first goal is to increase consumer awareness. Ideally, the achievement of consumer protection objectives is done as a whole.⁵¹

6. The Right and Obligation of consumers and business Actors

The legal relationship raises the possibility of recognizing rights due to law in the form of rights and obligations relationship between consumers and business actors. Consumer rights stipulated in the Consumer Protection Act are open, meaning that in addition to the consumer rights set forth in the Consumer Protection Act, it is possible to recognize other consumer rights not covered by the Consumer Protection Act but regulated in other legislation in certain sectors.⁵²

Historically the basic rights of consumers were first raised by the President of the United States J.F. Kennedy. Which J. F Kennedy was the first President to raise the dignity of the consumer while

⁵¹ Wahyu Sasongko, *op. cit.*, p. 41.

⁵² Janus Sidabalok, *op. cit.*, p. 23.

delivering a revolutionary speech before the congress (US Congress) on March 15, 1962 on consumer rights.

In Congress entitled *A Special Message of Protection of Consumer Interest*, President J.F. Kennedy explained four consumer rights as follows:

1. the right to safety;
2. the right to choose;
3. the right to be informed;
4. the right to be heard.

These four rights are part of the Declaration of Human Rights declared by the United Nations on December 10, 1948, respectively in Articles 3, 8, 19, 21 and 26, which the Organization of Consumer Union (IOCU) added four other basic rights of consumers, namely:⁵³

1. the right to obtain the necessities of life;
2. the right to indemnification;
3. the right to obtain consumer education;
4. the right to a clean and healthy environment.

⁵³ Ahmadi Miru and Sutarman Yodo, 2010, *Hukum Perlindungan Konsumen*, Jakarta: Rajawali Pers, p. 39.

In addition, the European Community (*Europese Economische Gemeenschap* or *EEG*) has also agreed on the five basic rights of consumers as follows:⁵⁴

1. right to health and safety protection (*rechttop bescherming van zijn gezondheid en veiligheid*);
2. protection of economic interests (*rechttop bescherming van zijn economische belangen*);
3. right to receive compensation (*rechttop schadevergoeding*);
4. right to enlightenment (*rechttop voorlichting en vorming*);
5. right to be heard (*rechtom te worden gehord*).

Some formulas on consumer rights that have been outlined can be divided into three rights which become the basic principle, namely:⁵⁵

1. rights intended to prevent the consumer from harm, either personal loss or loss of property;
2. the right to obtain goods and/or services at a reasonable price;
and
3. the right to obtain an appropriate solution to the problems faced.

Therefore, these three basic rights principles constitute the set of some consumer rights as stipulated in the Consumer Protection Act,

⁵⁴*Ibid.*

⁵⁵*Ibid*, p. 47.

and then it is essential for the consumer, so that it can be used as the principle of consumer protection in Indonesia.

Prosperity is the objectives of national development that are the responsibility of all to make it happen. Producer/business actor is one component that is responsible in trying to achieve the people's prosperity. The business world must be able to produce various goods and/or services that can improve the welfare of the community with the assurance of quality, sufficient quantity, and security of the consumer goods and/or services distributed to the market.

In the general sense the definition of a right is a legal interest protected by law, while interest is the expected demand to be fulfilled. The interests essentially contain the power that is guaranteed and protected by law in carrying it out.⁵⁶

Consumer Protection is closely related to legal protection, so consumer protection must have legal aspects. In the Consumer Protection Act Article 4 concerning consumer rights, namely:

- 1) Right to comfort, security and safety in consuming goods and/or services;
- 2) Right to obtain correct, clear, and honest information about the conditions and warranties of goods;

⁵⁶ Sudikno Mertokusumo, *op. cit.*, p. 43.

- 3) Right to select and obtain goods in accordance with exchange rates and conditions and guarantee of goods;
- 4) Right to be heard of opinions and complaints on the goods used;
- 5) Right to adequate protection and dispute resolution efforts on Consumer Protection;
- 6) Right to get the necessities of life;
- 7) Right to get compensation;
- 8) Right to get a clean and healthy environment;
- 9) Right to obtain consumer education.

Consumer liability in Article 5 of the Consumer Protection Act, namely:

- 1) Read or follow instructions on information and procedures for the use of goods for security and safety;
- 2) Good faith in buying goods transactions;
- 3) Paying in accordance with the agreed exchange rate;
- 4) Following appropriate dispute resolution measures for consumer protection.

Concerning the obligation of the consumer in good faith is only directed to the purchase transaction of goods and/or services. Due to the consumer the possibility to harm producers is happened when transactions with producers started for business actors the

possibility of loss for consumers is happened from the goods designed/produced by the producer (business actor).⁵⁷

Another obligation that needs further clarification is the obligation of the consumer to follow the appropriate dispute settlement of the consumer protection dispute. This obligation is considered a new thing, because before the enactment of the Consumer Protection Act, there was almost no specific obligation like this in a civil case, while in the criminal case the suspect/defendant was more controlled by the police and/or prosecutor.⁵⁸

The existence of such obligations under the Consumer Protection Act is deemed appropriate, since this obligation is to offset the consumer's right to obtain an appropriate consumer protection dispute settlement effort. This right will become easier to obtain if the consumer follows an appropriate dispute resolution. But the consumer liability not enough for that purpose if not followed by the same obligations of the business actors.⁵⁹

Right of Business Actor in Article 6 of Consumer Protection Act, namely:

⁵⁷ Ahmadi Miru and Sutarman Yodo, *op. cit.*, p. 49.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, p. 50.

- 1) Right to receive payment in accordance with the agreement on the conditions and exchange value of goods and/or services traded;
- 2) The right to legal protection from the actions of a good-faith consumer;
- 3) The right to self-defense should be appropriate in the settlement of consumer disputes law.

The obligations of business actors in Article 7 of the Consumer Protection Act are:

- 1) Good faith in doing business;
- 2) Treat or serve consumers properly and honestly and not discriminatively;
- 3) Ensure the quality of goods and/or services produced or traded under the provisions of the applicable quality standards of goods and/or services;
- 4) Provide compensation if goods and/services received or utilized by consumers are not in accordance with the agreement.

Futhermore, has been regulated in legislation regarding the subject of producing and distributing good food for health.

Obligations of producers/business actors, among others, are the duty of care in the production and distribution of food.⁶⁰

7. The Body of Consumers Dispute Resolution

Provisions on the Consumer Dispute Settlement Agency are described in Article 49 of the Consumer Protection Act as follows:

- (1) The Government shall establish a Consumer Dispute Settlement Body in the second level area for the settlement of consumer disputes outside the court.
- (2) In order to be eligible to become a member of the Consumer Dispute Settlement Board, A person must meet the following requirements:
 - a. Citizens of the Republic of Indonesia
 - b. Healthy
 - c. Be well behaved
 - d. Never penalized for crime
 - e. Have knowledge and experience in the field of consumer protection
 - f. Aged at least 30 years
- (3) Members referred to in Paragraph (2) shall consist of elements of government, consumer elements, and business elements.

⁶⁰ Janus Sidabalok, *op.cit.*, p. 131.

- (4) Members of each element as meant in Paragraph (3) shall be at least three persons, and as many as five persons.
- (5) The appointment and dismissal of members of the Consumer Dispute Settlement Body shall be determined by the Minister.

8. The Consumers Dispute Resolution

Disobedience to the content of consumer transactions, obligations and restrictions on how to be regulated in the Consumer Protection Act may result in a dispute between business actors and consumers. The dispute could be either party not getting or enjoying what should be his right because the opponent does not fulfill his obligations. For example the buyer does not get the goods in accordance with the order or the buyer does not get the service as agreed or the seller does not get the payment in accordance with his rights. The disputes that arise between business actors and consumers originated from consumer transactions are called consumer disputes.⁶¹ Consumer disputes can come from two things:⁶²

- a. Business actor does not fulfill its legal obligation as regulated in law. That is, business actors ignore the provisions of the law on its obligations as a business actor and the restrictions imposed on him in running his business. Such disputes may be called disputes sourced from the law;

⁶¹*Ibid*, p. 154.

⁶²*Ibid*.

- b. Business actors or consumers do not comply with the contents of the agreement, which means both business actors and consumers do not obey their obligations in accordance with contracts or agreements made between them. Such disputes may be called disputes sourced from contracts.

The Consumer Protection Act provides two kinds of space for consumer dispute resolution, namely consumer dispute resolution through courts and out-of-court settlements. Consumer Protection Act Article 45 Paragraph (1) states: “Any disadvantaged consumers may sue business actors through an agency in charge of resolving disputes between consumers and business actors or through courts within the public court.”

Dispute Resolution through Courts. The settlement of disputes through courts is conducted in the District Court using the applicable law procedure, generally bringing consequences to the consumer. In accordance with the provisions of the procedural law, such as the example is the Civil Procedure Code, the plaintiff must prove that the defendant has caused a major disadvantage to the plaintiff.

According to Article 48 of the Consumer Protection Act, the dispute resolution of consumers through the courts refers to the provisions of the general court. This means that the procedural law used in court proceedings is based on the *Herziene Inlands Regeling* (HIR) applicable to Java and Madura, or *Rechtsreglemen*

Buitengewesten (RBg) applicable to areas outside Java and Madura. Both do not have a basic difference (principle).⁶³

The consumer as a plaintiff must prove the mistake that the business actor has committed if a loss arises. With regard to consumer position as explained earlier, of course this concept is burdensome. Consumers who should be weaker than business actors plus their burden with obligations must prove the business actor's mistake.

Consumers must also bear the administrative burden that arises when filing a lawsuit to court. In addition, the Consumer Protection Act is also known as 3 processes of law. First is the small claim, is a type of lawsuit that can be filed by consumers even if seen economically the value of the lawsuit is very small. Second, the class action, namely the class action lawsuit which is a legal institution derived from the common law system, but currently has been accepted almost in all countries tradition civil law. Last is the legal standing, this is a class action, but different from the class action. Legal standing is known as the right of an NGO lawsuit.⁶⁴

Dispute Resolution Outside the Court. A person who is harmed for wearing or consuming a defective product will only be reimbursed when making a request or claim on it. The request or prosecution of the indemnification is absolutely done by the person who feels entitled to get it. There shall be no compensation other than for being firstly

⁶³ *Ibid*, p. 160.

⁶⁴ Shidarta, 2006, *Hukum Perlindungan Konsumen Indonesia*, Jakarta: PT. Gramedia Widiasarana Indonesia, p. 64.

requested to the court on certain conditions. The Consumer Protection Act provides an alternative to resolving disputes through courts, namely dispute resolution through talks between the parties and through institutions specially established by law. The institution in question is the Consumer Dispute Settlement Agency (BPSK).⁶⁵

Article 49 Paragraph (1) of the Consumer Protection Act mandates that BPSK is established in the Second Level Regions to resolve consumer disputes outside the court. An out-of-court dispute resolution can be done by arbitration.

On the settlement of such nature, the losses which may be prosecuted in accordance with Article 19 Paragraph (1) of the Consumer Protection Act concerning indemnification consisting of loss due to damage, pollution and other loss resulting from the consumption of goods and/or services. The form of remedial compensation is the refund of goods and/or services purchased the replacement of goods and/or services of the same or equivalent value, health care and appropriate compensation. The choice of form of indemnity depends on the actual loss suffered by the consumer and is adjusted to the legal relationship between them.

⁶⁵*Ibid*, p. 175.

C. The Overview of First Travel

First Travel is owned by married couple Andika Surachman and Anniesa Desvitasari Hasibuan. The young couple managed to rise from adversity and full of deficiencies to become rich in wealth. In less than five years First Travel managed to become a big bureau.

In fact, within a year, it can fly 52 thousand *Jemaah* with profit of nearly a trillion. Jawa Pos has conducted a special interview with the young entrepreneur about his success in building First Travel. This recognition Andika and Anniesa as contained in the newspaper Jawa Pos on January 16th, 2015. Religious travel business still has a large market opportunity. One of the successful one is First Travel.

The success story was built by married couple Andika Surachman and Anniesa Desvitasari Hasibuan. Starting from the death of Anniesa's parents in 2008, as a young couple who only graduated from high school, they are confused.

The lack of skill makes the business not grow. In the end, the house confiscated by bank. With minimal return capital remaining by bank, they opened a CV engaged in the field of travel. There is no capital expertise, they rely on yellow pages and phones. Until 2011, there has been no bright spot about the travel business. During the stand, they become travel odds. School children or people who just want to buy tickets are all undertaken.

Their fortunes change when there is someone from Bank Indonesia (BI) who wants *Umrah*. Since there was no job, they confirmed the request. During the presentation, they both only deepen knowledge through the internet. Understandably, neither Andika nor Anniesa have ever gone to the Holy Land. The presentation was successful, 127 people are departed.

The first experience is evaluated. They also make improvements. Clients from BI then introduce them to employees of PT Pertamina. Their service proved to be good and contagious. Service users flow. They also dispatched 800 *Jemaah* in 2012.

The following year, they managed to dispatch 3,600 *Jemaah*. In 2014, the number increased sharply to 13 thousand worshippers. This year, the First Travel departs as much as 35 thousand people. Turnover is USD 40 million (about IDR 500 billion). Even can reach is USD 60 million (approximately IDR 750 billion).

Anniesa claimed never to use special marketing tricks to improve their *Jemaah*. For example, inviting the famous artist or ustadz in group. In a short time, travel continues to grow and now has a branch in London, England. In the near future, they open a new branch in Saudi Arabia. The move is important so that the *Umrah* business they knit is getting stronger and gets good prices for accommodation and other needs.⁶⁶

⁶⁶ Salman Toyibi, "Saldo First Travel Tinggal 1,3 Juta", august 11, 2017, *Jawa Pos*, p. 14