

Private Pawn Institution in Antimonopoly Law in Indonesia

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Abstract

A new round has been started for the pawn business with the enactment of the Financial Services Authority Regulation Number 13/POJK.05/2016, About Pawn Business. The POJK 13/POJK.05/2016 complements the Regulation of Pawnshop / Staatsblad No. 81 Year 1928 on the Pandhuis Reglement Staatsblad that regulates the State Pawn Company. The theory used to analyze in this research was Law Development Theory. While the Research Methods used in this research was normative juridical, with statute approach, conceptual approach, and historical approach. The results of this study were, first, the development of law on pawn institutions so far only revolves around changes in the status of government pawnshop legal entity. This indicates that the pattern of development of a pawn institutions is still "centrally planned economics" by only authorizing PT Pegadaian (Persero) as the only state-owned enterprise to obtain the right to work in the pawning field. With the issuance of the Financial Services Authority Regulation Number 13/POJK.05/2016 Regarding the Pawn Business, the pattern of Pawn institutional regulation has shifted to "mixed planned economic", as the government has given private entrepreneurs the opportunity to engage in the management of the pawn business. Second, the involvement of the government in the practice of monopoly in Indonesia, at least in the concept of etatism, has a constitutional foundation in comparison with the market mechanism. This can be seen in Article 33 of the 1945 Constitution and Article 51 of Law no. 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, in which the Law mandates the Government to conduct a monopoly if the sector becomes an important production branch for the country and affects the livelihood of the many people.

Keywords : Legal Development Theory, Private Pawn Institution, Antimonopoly Law

1. Introduction

A new round has been started for the pawn business with the enactment of the Financial Services Authority Regulation Number 13/POJK.05/2016, About Pawn Business. POJK 13/POJK.05/2016 complements the Regulation of Pawnshop / Staatsblad No. 81 Year 1928 on the Pandhuis Reglement Staatsblad, and Government Regulation No. 51 Year 2011 on the change of Legal Entity of Pegadaian from a Public Corporation (*Perusahaan Umum*) into a Limited Corporation (*Perusahaan persero*). The enactment of POJK 13/POJK.05/2016 provides an opportunity for private entrepreneurs to establish a pawn business which previously had been monopolized by PT. Pegadaian (*Persero*). Based on the regulation prior to the enactment of POJK 13/POJK.05/2016, PT. Pegadaian (*Persero*) was the only business entity which officially conducted pawn business.

PT. Pegadaian (*Persero*) itself has undergone several institutional transformations since the Dutch colonial period which previously in the form of a Public Company (*Perusahaan Umum*). With the change of legal entity, there is a shift of management orientation in Pegadaian company which is more directed to commercial aspect and is profit oriented. But on the other hand there is a phenomenon of many private pawn businesses who do not have official permission. This has the potential to cause harm to the society, especially those related to the legal certainty of pawn institutions and legal protection for pawn customer.

The step of POJK 13/POJK.05/2016 enforcement, is an alternative in the form of opening the competition tap by providing opportunity for private parties to participate in the pawn business. This is different from the restructuring model that has been known as privatization of State-Owned Enterprises either through Initial Public Offering or Privat Placement. The restructuring effort through privatization was first initiated by Margaret Thatcher, the UK Prime Minister, that was known for the concept of There is No Alternative (TINA) for UK State companies privatized such as British Telecom, British Gas, Trustee Saving Bank and British Airways. The privatization program in the UK is known for the idea of Neoliberalism that has greatly influenced the concept of privatization of State-Owned Enterprises around the world to this day.

In the context of Indonesia, etatism has a constitutional basis compared to the market mechanism. This can be seen in Article 33 of the 1945 Constitution and Article 51 of Law No. 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition ("Antimonopoly Law") in which based on the article, the Law mandates the Government to conduct a monopoly if the sector becomes an important production branch for the State and affects the livelihood of the many people. Etatism is a notion of political thought that makes the

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State to be the center of all power. While the *Etatism Economic System* is an economy matter that wants the prosperity of society evenly without any economic oppression. To achieve equitable prosperity, the government must intervene in the economy. The question is whether the pawn company or pawn service are included in the production branches that are important to the country and in control of the livelihood of many people.

Based on that reality, it shows that the legal development and the law economic development, although not very progressive especially related to the pawn institution, has shown a quite constructive movement. Without efforts in the legal development especially related to the law economic development in relation to the pawn institution, it is possible that the pawn industry in Indonesia will be increasingly lagging behind the development of other financial institutions industry.

1.1. Problems

1. How is the existence of private Pawnshops with the enactment of the Financial Services Authority Regulation Number 13/POJK.05/2016 in the context of development law in Indonesia?
2. How the existence of PT. Pegadaian (Persero) in its position as a State Enterprise in relation to Antimonopoly Law?

1.2. Research Objectives

The purpose of this research is to obtain the concept of the economic law development that is in harmony with Indonesian philosophical values and the demands of economic globalization and the model picture of the legal regulation of pawn institution in relation to business competition. Specific targets of this research are;

1. To understand and analyze the existence of private Pawnshops with the enactment of the Financial Services Authority Regulation Number 13/POJK.05/2016 in the context of economic law development in Indonesia; and
2. To understand the existence of PT. Pegadaian (Persero) in its position as a State Enterprise in relation to Antimonopoly Law.

1.3. Theory Framework

To discover the legal issue or the legal regulation in more depth, it is not enough to do the research only up to the legal dogmatic space, that is to research the content of the articles on related legal issues, but it is also needed to work into the theoretical level of law. According to Peter Mahmud Marzuki, for the research on the level of legal theory, legal issues must contain the concept of law. By conducting a study of the concepts of law, it is hoped to further enhance the interpretation and able to explore the theories contained in the legal requirements.¹

The legal theory focuses on practical legal issues but is approached from outside the legal discipline by using other disciplines. Researching the legal issues requires legal theory, whose usefulness is as Posner says, the use of legal theory are first, the legal theory has succeeded in revealing the "dark corners" of a legal system and leading the way into constructive change which has great value in the elements of concept of law. Second, legal theory has helped to answer the fundamental question of the legal system that essentially is the knowledge of the system, which is different in meaning and just to know how to run it in a system where the legal practitioners has been used to do it.²

This research will analyze the legal regulations relating to the pawn institutions, legal theories relating to the law of development theory and the law of economic development theory, the theory of business competition, theories relating to State-Owned Enterprises, and the authorities that manage, supervise and conduct the development related to the pawn institutions and business competition. Attempts in analysing legal regulations relating to the regulation of pawn institutions using the law of development theory and the law of economic development theory are expected to find the legislative ratio related to the legal development of pawn institutions in Indonesia.

The legal theory that will be used in this research is the law of development theory initiated by Mochtar Kusumaatmaja and the law of economic development theory initiated by Sunaryati Hartono. Nevertheless it can not be denied that the law of economic development theory is an advancement of the law of development theory. The essence of the development law theory is to place the law as a means of the renewal of society and law as an indispensable system for Indonesia as a developing country. This theory is adopted and modified from the Roscoe Pound theory known for "Law as a tool of social engineering." But Mochtar Kusumaatmaja perceived the term "tool" as a tool to build society not as a tool to engineer society.

The law of development theory, which was introduced by Mochtar Kusumaatmaja, developed in the 1970s and was the result of a deep reflection on the reality of Indonesian society. Mochtar intelligently and critically formulated the function and role of law in development laid on the premise which is the core of thought or

¹ Peter Mahmud Marzuki, *Legal Research (Penelitian Hukum)*, Kencana Prenada Media Group, Jakarta, 2005 : 17

² Romli Atmasasmita, *Integrative Legal Theory, Legal Development Theory and Progressive Legal Theory Reconstruction (Teori Hukum Integratif, Rekonstruksi Terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif)*, Genta Publishing, Yogyakarta, 2012 : 31

principle:

1. All developing societies are always characterized by changes and law is functioned to ensure that the changes occur in an orderly fashion. Regular change can be assisted by legislation or court decisions or a combination of both.
2. Both change and orderliness are the initial goals of a developing society, then law becomes a means (not a tool) that can not be ignored in the development process.
3. The legal function in society is to maintain the order through legal certainty and law (as a social rule) should be able to organize (assist) the process of change in society.
4. A good law is a law that is in accordance with the law living in the society (the living law), which, of course, also corresponds or is a reflection of the values prevailing in that society.
5. Implementation of the aforementioned legal functions can only be realized if the law is governed by a power, but the power itself must run within the limits specified in the law.¹

Furthermore, according to Mochtar, adequate law not only sees the law as a set of rules and principles governing human life in society, but also includes the institutions and processes necessary to actualize the law in reality. Departing from the law of development theory, Sunaryati Hartono developed a new theory, the law of economic development theory. Although there are pros and cons to the concept developed, it can not be denied that the theory is based on the theory of development law that specializes in the economic development. As the flow of thought in theory framing developed is that in a country, there are three areas that are interconnected with each other namely: law, economy and politics. The need for a stable legal system, economic system and political system is a main requirement in building a country with a strong economy, especially for a developing country like Indonesia.

Sunaryati Hartono in his book Law Economic Development states that the law in development has the following roles:

1. Law as a means to educate the public;
2. Law as a means to maintain order and security;
3. Law as a means of social change; and
4. The law serves for social justice.²

In the context of economic development in a developing country, the law must play an optimal role. But in order to run optimally, it requires a law that is systematic, which means a developing country need a systematic legal system.³

2. Analysis

2.1. Overview of the Pawn Institutions

Considering that the previous pawn institutions regulation is as the legacy regulation of the Dutch colonial as stipulated in the Regulation of Pawnshop / Staatsblad of 1928 Number 81 on *Pandhuis Reglement Staatsblad*, therefore it requires a systematic effort to build a modern system of pawn institutions with regard to the concept of business competition.

Until this far the efforts in pawn institution legal development are not completely absent. Legal development efforts related to pawn institutions have also been conducted through the National Legal Development Board (*Badan Pembinaan Hukum Nasional*) by constructing the Academic draft of a bill concerning Pawnshop.⁴ In the academic draft, the authors use Steven Shavell's view especially in the use of an economic analysis of law approach. According to Steven Shavell, the use of an economic analysis of law approach is to answer two things: positive analysis and descriptive analysis. Positive analysis is an analysis of how the influence of the legal rules on the behavior of the actors concerned. Descriptive analysis is about whether the influence of the legal rules is indeed desired by the society.⁵

Furthermore the approach to the Economic Analysis of Law in general, is to describe the behavior, both of individual and enterprise, that is forward-looking and rational, and to adopt the framework of economic welfare to test the wishes of society.⁶ Besides, according to Steven Shavell, the descriptive analysis can be said to be rational, when people act to maximize goals or benefits that are expected.⁷ Thus if a person or legal entity acts in order to maximize the objectives and benefits expected by them, it can be said that the person or legal

¹ Op.cit, 33

² Sunaryati, Hartono, Law Economic Development of Indonesia (*Hukum Ekonomi Pembangunan Indonesia*), Bina Cipta. Bandung, 1982 : 8

³ Novi Nur, The Role of Competition Law in National Economic Development, State and Market within Competition Policy Framework Indonesia (*Peran Hukum Persaingan Usaha Dalam Pembangunan Ekonomi Nasional, Negara dan Pasar Dalam Bingkai Kebijakan Persaingan*), The Commission for the Supervision of Business Competition of Indonesia (*Komisi Pengawas Persaingan Usaha Republik Indonesia*), 2011:18.

⁴ Academic draft of a bill concerning Pawnshop, the National Legal Development Board (*Badan Pembinaan Hukum Nasional*), 2011 : 5.

⁵ Op.cit, 7

⁶ Op.cit, 7

⁷ Op.cit, 8

entity is rational in the act.

In relation to pawn institutions in Indonesia, the regulation of pawn service business has been referring to the Dutch colonial rule based on *Pandhuis Reglement Staatsblad* or Regulation of Pawnshop Number 81 of 1928. Under the regulation, the only institution allowed to run the pawning services is the government. The existence of a pawn institution in Indonesia was adopted from pawn institutions which had developed in Italy and branched out to the England, the Netherlands, and also developed in Indonesia during the Dutch Colonial Government through *Vreenigde Oostindische Compagnie (VOC)* by establishing *Van Leening Bank* as a financial institution providing credit with Pawn system.

Pawn Shop in Indonesia changed its legal status several times as State Enterprise since January 1, 1961, then based on Government Regulation No. 7 Year 1969 changed into Services Corporation (*Perusahaan Jawatan*) and based on Government Regulation No. 10 Year 1990 changed into Public Corporation (*Perusahaan Umum*). And then, based on Government Regulation No. 51 Year 2011, the current form of business entity *Pegadaian* has been transformed into a Limited Corporation (*Perusahaan Persero*).

The purpose of PT. Pegadaian (*Persero*) is to conduct business in the field of pawning and fiduciary, both conventionally and by sharia, and other services in the field of finance in accordance with the provisions of legislation, especially for lower middle class of society, Micro, Small, Medium Enterprises, As well as optimizing the utilization of Company's resources.

Thus, it can be said that the pawn business is only normatively organized by one state company or monopolized by State-Owned Enterprises (*BUMN*) that is *PT. Pegadaian (Persero)*. In addition to the monopoly of pawn institution in becoming *persero*, then it is possible to shift the function of public services that originally conducted by *PT. Pegadaian* as public company. Lastuti Abubakar more clearly explain the loss of public service function, with the issuance of Government Regulation No. 51 Year 2011 as follows:

1. The change of legal status of *Pegadaian* from Public Corporation into a Limited Corporation also changes the motive of public service to become profit oriented;
2. Pawn business is intended for middle-income societies. It means that the Low-income societies and small-scale enterprises are no longer accommodated in the regulatory setting;
3. The main activities of *PT. Pegadaian* that are disbursing loans under the law of pawnshop including securities pawn; Disbursing loans under fiduciary guarantees, and providing deposit services, estimate services, certificates and noble metals and precious stones trading, clarify the market share of the pawnshops shifting from the lower middle to the upper middle class; and
4. Zoning or distribution of market share of financing institutions becomes increasingly blurred with the possibility of *PT. Pegadaian* entering the business that was originally managed by banks, i.e. money service business, payment transaction services and loan administration services.¹

In the context of the economic law politics and economic system, on the case of the government's involvement in the economic activities of a country, W. Friedman introduces the concept of mixed-economy, which classifies four functions:

1. *The state as provider;*
2. *The state as regulator;*
3. *The state as entrepreneur; and*
4. *The state as umpire.*²

Furthermore, W. Friedmann states that in a country that enforce mixed economy systems, the economic activities are carried out jointly between the public sector and private sectors. In other words, economic activity in a country is parallel between state enterprises and private business activities.³

In simple terms, Rudhy Prasetya divides the state's role in economic activities, where Philosophically, the economic activity of a country is divided into 2 (two); first, all economic activities, or at least most of the economic activities must be controlled by the State. This notion is called "*centrally planned economics*" which is commonly adhered by socialist countries. The second is known as the "*mixed-planned economic*" where the state has equal status with the private sector and they work together in developing the state economy, or at least adopt a mixed system of state and private roles.⁴

Related to the form of state-owned enterprises in Indonesia based on the Government Regulation in-Lieu-of-Law (*Perppu*) No. 19 Year 1981 that there is only 1 (one) state business entity namely State Company. However, with the enactment of Law No 9 Year 1969, state companies are divided into 3 (three), They are

²¹ Lastuti Abubakar, *Pawn Institution as a Power-Based Alternative Fund (The notions for the Formulation of the Pawnshop Legislation) (Pranata Gadaai Sebagai Alternatif Pembiayaan Berbasis Kekuatan Sendiri (Gagasan Pembentukan UU Pegadaian))*, Research Result of Faculty of Law, Padjadjaran University, Bandung, 2011: 7-8.

² Aminuddin, Ilmar, *Right to Control The State, In Privatization of State-Owned Enterprises or BUMN (Hak Menguasai Negara, Dalam Privatisasi BUMN)*, Kencana Prenada Media, Bandung, 2012: 13.

³ *ibid*

⁴ Rudhi Prasetya and Neil Hamilton, *The Regulation of Indonesian State Enterprise*, *Malaya Law Review*, Volume 16, Nomor 2, 1974: 294.

Public Corporation (Perum), Services Corporation (Perjan) and Limited Corporation (Perusahaan Persero). Each has different characteristics and missions. However, all three can be grouped into 2 (two) characteristic of business forms that are subject to public law and a form of "subject to the commercial and civil law". In the context of the form of state enterprise, it is in line with Friedmann's opinion :

A comparative analysis will show that public enterprise falls essentially under three types: first, the departementally controlled general administrative structure; second, the public corporation, ie, a corporate public authority established by statute or charter, generally as an institution of public law; third, the commercial company with state control, indistinguishable in from any other business enterprise, and subject to the commercial and civil law the country.¹

The legal development effort of a pawn institution, whose existence began since Staatsblad. No. 81 Year 1928 on *Pandhuis Reglement Staatsblad*, is proceeded slowly. The legal development of pawn institutions only revolves around the change in the legal status of the State Pawnshop. This indicates that the pattern of development of a pawn institution is still "centrally planned economics" by only authorizing *PT Pegadian (Persero)* as the only state-owned enterprise that gets the right to work in the pawning field. With the issuance of the *Financial Services Authority Regulation No. 13/POJK.05/2016, Regarding the Pawn Business*, the regulation pattern of the pawn institution has shifted into a "mixed planned economic" concept, this is because government has given private entrepreneurs the opportunity to engage in the management of the pawn business.

4.2. Overview of the Business Competition

After the collapse of the economic planning system in Eastern Europe some decades ago, countries began to choose new economic policies. Some countries made use of price and competition instruments to improve development dynamics in their respective countries. Those countries have adopted the anti-monopoly law instruments as an effort to lay the groundwork for the legal rule to conduct regulation to create business competition climate. Fair competition is one of the requirements for countries in managing a market-oriented economy.

One of the important part of free market implementation is the competition of businesses in meeting the needs of consumers. In this case, business competition is a process whereby businesses are forced to become efficient companies by offering product and service options at more competitive prices. Competition can only occur when there are two or more businesses offering appealing products and services, both in terms of price, quality and service.

Indonesia started a new economic policy since the enactment of Law no. 5 Year 1999 concerning the *Prohibition of Monopolistic Practices and Unfair Business Competition*. Nevertheless, the economic aspect has not been fully aligned with the new economic policy with market and competition based. One of them is because *PT. Pegadian (Persero)* is still the only business entity in the pawning field that has official permission. Eventhough the management of *PT. Pegadaian (Persero)* still use the provisions of Dutch colonial law *Pandhuis Reglement Staatsblad* or Regulation of Pawnshop no. 81 Year 1928. And from the institutional side, *PT. Pegadaian (Persero)* is regulated under *Government Regulation No. 7 Year 1969 on the change of Pegadaian (Pawnshop) into a Service Corporation (PERJAN)*, *Government Regulation no. 10 Year 1990 on the change of Pegadaian into Public Corporation (PERUM) and Government Regulation no. 51 Year 2011, concerning the change of Pawn institution into a Limited Corporation (Persero)*. Thus it can be said that the regulation of Pawn institutions is still monopolistic and not in accordance with the spirit of anti-monopoly as mandated by Law no. 5 of 1999.

The spirit of business competition and anti-monopoly in relation to the pawn institution has changed with the enactment of the *Financial Services Authority Regulation No. 13/POJK.05/2016, About the Pawn Business*, in which POJK provides the opportunity for the private sector business to establish a pawn business. Especially when referring to Preamble "Considering" of POJK 13/POJK.05/2016 where the spirit to improve financial inclusiveness and access to capital, the existence of private pawn business is more oriented to micro, small and medium enterprises. Besides, it further emphasizes the legal foundation for pawn business supervision and efforts to create a healthy pawn business, providing legal certainty for the pawn business, and consumer protection to be the background of POJK 13/POJK.05/2016.²

¹ W. Friedman, *The State and The Rule of Law in a Mixed Economy*, Steven And Son, London : 1971 : 5.

² In Preamble "considering" of POJK 13 / POJK.05 / 2016 elaborated some new spirit in supporting the development of the pawn business such as:

1. in order to improve financial inclusion for the lower and middle segments of society and micro, small and medium enterprises, therefore it is necessary to extend financial services through the operation of the pawnshop;
2. in the framework of the administration of the pawnshop which facilitates access to loans, particularly for the lower and middle segments of society and the micro and small and medium enterprises, there is a need for a legal foundation for the Financial Services Authority in supervising the pawn businesses in Indonesia;
3. the legal foundation for pawn businesses supervision is necessary to create a healthy pawn business, providing legal certainty for pawn businesses and consumer protection.

Nonetheless, the involvement of the government in the practice of monopoly in Indonesia, at least in the concept of etatism has a constitutional foundation in comparison with the market mechanism. This can be seen in Article 33 of the 1945 paragraph (2) of the Constitution 1945¹, in which the Law mandates the Government to conduct a monopoly if the sector becomes an important production branch for the country and affects the livelihood of the many people. The question is whether the pawn company or pawn service are included in the production branches that are important to the country and in control of the livelihood of many people.

3. Conclusion

From the previous discussion can be drawn the conclusions; first, the development of law on the institution of pawn so far only revolves around changes in the status of legal entities of the state pawnshop. This indicates that the pattern of development of a pawn institution is still centrally planned economics by only authorizing *PT Pegadian (Pese)* as the only state-owned enterprises to obtain the right to work in the pawning field. With the issuance of the Financial Services Authority Regulation No. 13/POJK.05/2016, Regarding Pawn business, the pattern of Pawn institutional arrangements has shifted to "mixed planned economic", this is because government has given private entrepreneurs the opportunity to engage in the management of the pawn business.

Second, the involvement of the government in the practice of monopoly in Indonesia, at least in the concept of etatism has a constitutional foundation in comparison with the market mechanism. This can be seen in Article 33 of the 1945 Constitution and Article 51 of Law no. 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, in which the Law mandates the Government to conduct a monopoly if the sector becomes an important production branch for the country and affects the livelihood of the many people.

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¹ Article 33 of the Constitution of 1945

1. The economy shall be organized as a common endeavor based upon the principle of family system.
2. Production branches which are important for the state and which affect the livelihood of the people at large shall be controlled by the state.
3. The land and water and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people.
4. The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainable and environmental perspective, independence, as well as by maintaining balance between progress and unity of the national economy.
5. Further provisions concerning the implementation of this article shall be regulated in law.

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