THE CURRENT STATUS OF COMPANY LAW IN INDONESIA

A. Zen Umar Purba

Kitab Undang-undang Hukum Dagang (KUHD) Indonesia telah melalui perjalanan sejarah cukup panjang. Meskipun demikian, sebagai dasar kegiatan ekonomi dan perdagangan, ketentuan tentang PT dalam KUHD dan undang-undang perubahannya (Undang-Undang No. 4 Tahun 1971) belum dapat mengakomodir kegiatan bisnis modern dewasa ini yang berkembang pesat. Oleh karena itu untuk mengantisipasi ekonomi Indonesia yang semakin berkembang cepat diperlukan suatu kerangka hukum khusus yang mengatur kegiatan ekonomi-bisnis, yaitu hukum perusahaan modern.

I. INTRODUCTION

A. Historical Perspectives

The Indonesian Commercial Code, which is the basic rule for economic and commercial activities in Indonesia, has had a long historical journey. Starting with its codification on May, 1 1848 in the Netherlands, the provisions of the Indonesian Commercial Code (originally known as Wetboek van Koophandel, hereinafter referred to as the "ICC"), were, in principle, taken over from the Dutch Commercial Code (Nederland Wetboek van Koop-
handel). It was codified on October 1, 1838, and was very much influenced by the French Commercial Code of 1807.

Even though the Wetboek van Koophandel had been revised to suit the situation in Indonesia, its scope of applicability does not include the indigenous inhabitants. This came as a result of the concept of separate law made by the Dutch government during the Dutch colonial rule, which divided the population into groups. The indigenous inhabitants were subject to the laws of the natives which were primarily the adat laws. To provide legal security in business transactions to the indigenous inhabitants, the Dutch colonial government ratified a regulation/law, known as Indische Matschapij van Andil, to be applied specifically to this group of inhabitants.

The problem of legal diversity ceased to exist when Indonesia proclaimed its independence on August 17, 1945, followed by, on August 18, 1945 a declaration of its Constitution. At present, the validity of the Commercial Code is based on Article II of the Transitionary Regulation of the Constitution 1945. In the framework of renewing corporate law in Indonesia, the government c.q. Department of Justice had in 1974 drafted of a company bill. There had been no development about the bill until the public, including legal practitioners queried the follow up the bill.

Just a few months ago, the Department of Justice submitted a new company bill (the "Bill") to the Parliament which will in principle replace articles 36 up to 56 of the ICC and all their alterations, the last being made by Law No. 4 of 1971 concerning the Alteration and Increment of Article 54 of the Commercial Code. It is realized that the enactment of a new corporate law is necessary in the attempt to foster economic and commercial activities in this modern era.

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1 Prof. R. Soekardono, SH., Hukum Dagang Indonesia, (Dian Rakyat: Jakarta, 1983), p.9.

2 Prof. R. Subekti, SH and R. Tjitosudibjo, Kitab Undang-Undang Hukum Dagang dan Undang-undang Kepailitan (Pradnya Paramita: Jakarta, 1993), Introductory page.

3 See: "UU PT Harus Segera Disusun Untuk Mengantisipasi RUU Pasar Modal", Suara Pembaruan, May 10, 1993, p.4".

4 Staatsheld No. 23 of 1847.
B. The Role of Company Law in Business

Indonesia’s rapid economic growth and development in the last few years has resulted in its need to establish special legal frameworks. The business people have created certain sources of income which are beneficial not only for themselves but also for the public at large. In this respect company law plays an important role.

The company law can be defined simply as the law which regulates the activities of the company in the course of achieving its objective. The main purpose or objective of the establishment of a company is to make profit. The function of the law in the company’s business activities is equal to that of a compass, namely, in that provides guidance for anybody who is doing business and creates awareness of the rights and obligations, including the awareness of the obligation to conform to public order and good morals. A good company law will regulate not only the internal relationship between a company and its shareholders, officers, employees but also matters outside of the company such as the protection of creditors and tax obligations in addition to matters that would enhance.

The existing Indonesian company law as contained in the ICC is admittedly not sufficient in accommodating today’s business problems, issues and interest. The activities of a business may take various legal form such as foreign joint venture-companies, public companies and State-owned enterprises, in addition to common companies. Although the ICC requires that a company has to be established by a minimum of 2 persons, after its reception as legal entity, the company belongs only to one shareholder. Different types and classes of investors also require different categories of shares. In addition, a clear definition and description of the responsibilities and liabilities of the shareholders as well as those of the management are also required. Finally, just to mention a few other aspect of the business, is the legal framework for a merger, consolidation and acquisition, as well as their internal and external implications.

The main focus of this paper is to describe briefly the current status of the existing company law as found in the ICC and its development in practice, for the purpose of presenting to the readers a fresh overview of the matters. Eventhough the topic is related to the current status of the company, the paper also refers to certain provisions of the Bill for comparison.
II. OVERVIEW OF VARIOUS PROVISIONS OF THE ICC

1. Basic Concept

One main objective in the establishment of a company is the accumulation of funds for the purpose of enabling the business people to expand their business activities. It is common perception that the funds which come from a number of persons are considerably larger than the funds that originate from one source only. The multinational corporation is an extreme example of how capital is accumulated in one corporate entity. However, at the national level, there is possibility that the funds which are owned by one very rich individual are considerably larger in amount than the funds that are jointly owned by several people. As mentioned above, in practise we see that a number of companies are in fact owned by a single individual although in the initial formation, there were more than one shareholder.

In this respect, the ICC adopts the concept that a company can only be established by at least 2 persons or legal entities. This concept is also adopted by the Bill with the exception to a State-owned enterprise. More stringent than the concept in the ICC, the Bill stipulates that in the event that there is only one shareholder, then some of the shares must be transferred to another new shareholder. Experience proves that to conform with the requirement of having another partner or shareholder in a company is not a big matter. The nominee arrangement seems to have become a common practice. However, in the Bill’s elucidation, another requirement is added namely, in that the transferee of the share must not be affiliated with the initial shareholder. The term which is used in the Bill is "ter-affiasi", but no definition of this term is given. The term "affiasi" could refer to various kinds of relationship, including marital, familial and controlling relationship. It is worth nothing that the Bill allows a State-owned enterprise to be

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3 The Bill, Art. 7 (3). This has been criticised by Ms. Hajati Suroredjo ("HS"), as in contradiction with the principles of agreement as the basis for the existence of PT as defined in the Bill itself, see HS, "Beberapa Catatan Mengenai RUU Tentang Perseroan Terbatas", Suara Pembaruan, June 9, 1994, p.2. The writer of this paper agrees with HS, but this can be solved through the rewording of Art. 1 point 1 of the Bill.

4 The Bill, Art. 7 (2).

5 See HS, loc. cit.

6 See, Decree of Minister of Finance No. 1548/KMK.013/1990 ("Decree 1548"), Art. 1 point 1.

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owned only by one shareholder.

Another primary objective in the establishment of a company is, subsequent to the fulfilment of certain requirements, the acquisition of the status of a limited liability, as reflected in the "Limited" or "Ltd", word following the name of the company, and "PT" or "Perseroan Terbatas" preceding the name of the company in the case of Indonesia. The PT is thus an independent entity, free from its shareholders, and, the liability of the shareholders on the other hand, are limited only to those in respect of their subscribed shares. This has become a common concept that applies in various jurisdictions.

At this stage, two elements need to be observed thoroughly. The first concerns the inherent legal characters of the PT itself, and the second concerns the shareholder.

As regards the first element, it is understood that the limited liability status of the PT only applies as long as the PT carries out its business within the scope and objectives which are specified in its articles of association ("A/A") which are set forth in a Deed. Other acts which deviate from the acts specified in the scope and objectives of the A/A are void (see further discussion on the power of the Direksi at Section 4, of this Chapter infra). It is interesting that the Bill, in addition to adopting the common concept of PT as a legal entity, introduces a concept of piercing the corporate veil or disregard of the corporate fiction. In this concept, the liability of the shareholders is not limited if they are known, directly or indirectly, to have committed an act in bad faith, of benefitting the PT’s assets for their own interests. The shareholders will, in this case, be personally and individually liable for their acts.

2. Formation

a. Deed of Incorporation

As has been mentioned above, the ICC requires that the founders of a

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9 ICC. Art. 40.

company consist of at least 2 persons and as such there should be an agreement between these founders, which should be contained in the company’s deed of incorporation (the “Deed”). Unlike in the Anglo Saxon countries, in Indonesia the Deed includes the A/A of the PT. This Deed must be made in a notarial form, otherwise it will be void.

The A/A consist of among others provisions pertaining to: name and domicile, duration, purposes and objectives, capitalization, shares and shares certificate, duplicates of share certificates, register of shareholders, transfer of right on shares, management, power and meetings of the Direksi and DK, financial year and accounting, general meeting of shareholders, distribution of profits, reserve fund, amendments to the A/A, liquidation and closing stipulation\(^\text{11}\). In the current practice, all and any changes to the A/A must be submitted and approved by the Minister of Justice.

The Bill only stipulates that the A/A must be a least include the following matters: name and domicile, purposes and objectives, duration, capitalization, shares and shares certificate, composition of the management, place and notice of the general meeting of shareholders ("GMS") and the procedures for the appointment of the management.\(^\text{12}\) The Bill also requires that only certain matters that need to be approved by the Minister, namely changes of name, purposes and objectives, and the company, change of the capitalization, changes of the company’s status, changes in connection with mergers and acquisitions.\(^\text{13}\)

b. Validation, Registration and Announcement

The next step is the processing of the pengesahan (validation) of the Deed of the Minister of Justice. This is an important step in the establishment process of a PT because after at the completion of this step, the liability of the shareholders is limited.

Under the scheme of the ICC, the validation of the Deed is dependent on the conformity of its provisions with the ICC. Public order is one of the elements to be considered in the assessment of the Deed. Even after its vali-

\(^{11}\) This was taken from standardized from of the A/A as stipulated in letter of the Minister of Justice dated August 21, 1991. The form is designed for ordinary PTs. There is no standardized from the A/A for joint venture and public PTs.

\(^{12}\) The Bill, Art. 12.

\(^{13}\) The Bill, Art. 15(2).
dation, the Minister of Justice could request the PT to be wound up if it is deemed necessary from the point of view of the public interest. Furthermore, protection for the public is made through a provision that stipulates that the authorization to dissolve a PT could only be given when the Supreme Court has been consulted.\textsuperscript{14}

The Deed has to be registered in the public register at the district court, and subsequent to that be announced in the State Gazette. It is understood that until the process of the registration and announcement have been completed the directors of the PT are severally and jointly liable for their acts to third parties.\textsuperscript{15}

The above procedural steps are most of the time time-consuming, and the processing is cumbersome; and these have been viewed as negative aspects by investors doing business in Indonesia. Efforts have been made to overcome this problem, one of them being the preparation of a standardized form of the A/A of the PT. There have ever been a discussion on whether the validation or approval of the public authority could be replaced by a registration at the same office, which, in the argumentation of the proponents, will materially reduce the duration of the process. The problem in the processing of the validation or approval is actually a technical problem which can be solved by an increase in the numbers of personnel handling the matter in the respective agency. Replacement of the validation or approval by a registration would reduce the meaning of a PT as a legal corporate entity capable of acting for itself, and this might affect the public at large, including creditors.\textsuperscript{16}

In practice, we find that the processing of the validation of foreign joint companies ("JVC") are faster than that of non JVCs. But the fastest is the processing of the validation of PTs which will go public.

The Bill contains similar procedures and requirements in respects of validation, with some differences: The Deed needs the "pengesahan"\textsuperscript{17}

\textsuperscript{14} ICC, Art. 39.

\textsuperscript{15} ICC, Art. 39.

\textsuperscript{16} It might be worth noting the opinion of William Cary that: "The classical theory of corporate existence assumed that a corporation was a fictitious person, endowed with life only in" so far as the state had granted to it powers in its charter. op.cit, p.51; cf. Steven R. Schuit, op.cit, p. 9-30.

\textsuperscript{17} The Bill, Art. 7 (4).

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(validation), whereas the amendment to the A/A needs the "persetujuan" (validation), both by the Minister of Justice. No conditions for validation by the Minister are stipulated.

c. Pre-Incorporation Transactions

No provisions exist in the ICC with regard to the pre-incorporation transactions of a PT. However, it is a common practice that the founders of the PT agree that all the costs and obligations with regard to the incorporation of the PT carried forward for the included accounts of the PT after it legally exists. To the advantages of the founders, the Bill adopts this concept. 19

3. Capital, Shares and Voting Rights

a. Capital

The ICC literally stipulates that the PT capital must be divided into shares20, and that the validation will only be given if 20% of the PT capital has been subscribed. Furthermore, the PT may start its operation only if, at least 10% of the subscribed capital has been paid-up. 21 It may be worth mentioning that the 10% is of each of the subscribed shares, indicating that it is the debt of the concerned shareholder for the 90% of the price of each of its shares.

The provisions in the Bill, in respect of the capital of the PT are clearer in their specification. Twenty-five percent out of capital must be placed for subscription, on condition that 50% of this amount must have been paid up at the time of the PT’s incorporation. The remaining amount (of the subscribed capital) must be fully paid at the time the Deed is approved.

18 The Bill, Art. 15 (1).
19 The Bill, Art. 11 (1).
20 ICC, Art. 40.
21 ICC, Art. 50.
b. **Purchase and Payment of Shares by the PT**

The ICC is silent on the share payment methods. In practice the payment for the shares is made either in cash or in kind, but this is a matter which is to be agreed in the contractual arrangement between the founders, which is subsequently laid out the A/A. The Bill stipulates clearly that the shares payment may be made in cash or in kind provided that in the latter, the value of the goods has to be appraised by an independent expert. The clarity of the stipulation should provide investors, both foreign and local, with more certainty. Another important ruling here is that the payment of the shares can not be made by way of setting off the price of the shares against the shareholder’s credit to the PT, unless such arrangement is provided for in the A/A. An exclusion of this, however, is the conversion of shares to bonds as in the case of convertible bonds.  

As briefly discussed above, the prime essence of a PT, in addition to its limited liability status, is its function as a vehicle for the accumulation of capital. Viewed from this perspective, a PT is not supposed to buy its own shares. In the absence of the ruling in the ICC, the Capital Market Supervisory Agency ("BAPEPAM") has issued a regulation which enables the issuer to buy its own shares in certain circumstances.

The Bill has a provision that overcomes the problem, that stipulates that a PT may purchase its shares on condition that the purchase will not cause the net worth of the company to become smaller than the accumulation of the subscribed capital and reserved funds. Furthermore, the nominal value of all the shares owned by the PT and its subsidiaries plus the shares as the pledge may not exceed 10% of the whole subscribed capital.

c. **The Shares and the Votes**

In the absence of regulations in the ICC the classes of shares have been determined through common practice. Certain PTs issue preferred shares in addition to common shares. The Bill gives full authority to the parties in the PT to determine the PT’s classes of shares and stipulate them in the A/A. Certain classes of shares may vest special rights to their holders, and certain other classes of shares may be classified as shares which do not have voting-

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rights.\textsuperscript{23}

The ICC adopts the principle of "one share one vote".\textsuperscript{24} As has been discussed in Chapter I, the principle of "one share one vote" was an amendment to the previous ruling in the ICC that one share may bring to the holder up to 6 votes. Under the Bill, the parties are permitted to set forth limitations of the voting rights.

d. Transfers of Shares

Under the ICC, transfers of shares must be executed physically by a statement from the PT and the shares transferee, with a notice to the management.\textsuperscript{25} This requirement may create obstacles for the capital market because the transfer requires physical delivery of the shares. This matter had been considered by the Bill, as shown in that the Bill contains a special paragraph which states that the procedure for the transfer the shares of a public company will be governed by laws and regulations that specifically pertain to the capital market.

4. Management and Supervision

The ICC adopts a two-tiered system of management, consisting of the \textit{Direksi}\textsuperscript{26} and the \textit{Dewan Komisaris} ("DK")\textsuperscript{27}. This two-tiered system would probably be of interest to investors from Anglo-Saxon countries, since it is a system that is different from their management system. In fact that the members of the \textit{Direksi} are appointed by the General Meeting of Shareholders ("GMS").

The members of the \textit{Direksi} are not responsible further for the proper

\textsuperscript{23} The Bill, Art. 46 (4).
\textsuperscript{24} ICC, Art. 54 (1).
\textsuperscript{25} ICC, Art. 42.
\textsuperscript{26} ICC, Art. 44.
\textsuperscript{27} ICC, Art. 52.

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execution of the tasks assigned to them by the PT,\textsuperscript{28} since they are, collectively, the representatives of the PT. However, the PT is protected from the acts of the Direksi which violate the Deed.\textsuperscript{29} If the members of the Direksi commit \textit{ultra vires} acts, they are jointly and severally liable for the damages to third parties which occur as a result of those actions. The \textit{ultra vires} acts do not consist only of the acts of the Direksi that overstep its powers, but also the acts of the PT itself that are in gross violation of the PT’s own objectives or interests.\textsuperscript{30} The concept of \textit{ultra vires} have not been properly understood by the majority business people, especially the local business entrepreneurs, as shown by their attitude of disregarding warnings by legal counsels in respect of \textit{ultra vires acts}.

An article in the ICC which has direct relevance on with the duties of the Direksi is as regards Article 47 of the ICC. The article in essence regulates two matters, namely: (1) the obligation of the Direksi if it has become known to the Direksi that the PT has suffered a loss of 50% of its capital to register the loss at the registrar’s office of the district court and to announce it in the State Gazette, and (2) if the above loss amounts to 75%, the PT is by operation of law dissolved after the loss is known or ought to have been known by the Direksi and in this case the members of the Direksi are jointly and severally liable towards third parties for all the obligations resulting from all the contracts they have concluded.

In practice these provisions have not become effective. There has been no record of a Direksi performing its obligation under Art. 45 (1), and of a PT known being dissolved as the consequence of Art. 47 (2). In fact, this matter was recognized by the Department of Justice as stated in its publication by naming Art. 47 (2) as \textit{een dode letter}.\textsuperscript{31}

The Bill regulates in detail this aspect of the PT’s management, by setting forth provisions as a matter of fact being practised at present. Some notes are necessary in respect of other important matters:

Types of PT’s which are required to have a minimum number of mem-

\textsuperscript{28} ICC, Art. 45.

\textsuperscript{29} ICC, Art. 45 (2). See William L. Cary, \textit{op.cit}, p.50.

\textsuperscript{30} Cf. Steven R. Schuit \textit{et.al.}, \textit{loc.cit.}

bers of the Direksi.
- Criteria for the appointment of members of the Direksi.
- The Direksi, or any member of the Direksi can be sued by the shareholders representing at least 10% of all shares, if there is evidence that the Direksi, or the concerned member, has caused losses to the PT.
- The Direksi may file a request to the district court to declare the PT bankrupt.

As regards the DK, under the ICC its existence is optional. In consequence there of, the ICC only contains 3 provisions regarding it. Art. 44 provides that the main function of the DK is to supervise the management of the PT by the Direksi. Based on Art. 52, in the implementation of its duties, the DK is entitled for and on behalf the shareholders to evaluate the performance of the Direksi and to approve its acts. In practice, certain acts by the Direksi could be made only with the approval of by the DK. However, it should be kept in mind that the power of the DK to validate the Direksi's acts is merely a delegation of power by the shareholders. The power is not inherent in the position of DK as management over the Direksi. As such, since both the DK and the Direksi are appointed by the GMS and accordingly responsible to the GMS, the Direksi does not function under the authority of the DK.

Although the ICC does not require a PT to have a DK, in some instances, the DK is compulsory. The Capital Market Supervision Agency (Badan Pengawas Pasar Modal or "BAPEPAM"), for example, has a policy that requires all companies that intend to go public to have the DKs. As regards PT-Persero, Government Regulation No. 3 of 1983 stipulates all PT-Persero have DKs.32

The requirement for the existence of a DK in the above situations could be understood. BAPEPAM’s view is that the existence of a DK in the issuer company is good for the public shareholders’ interests. The existence of a DK will also considerably assist the Minister of Finance in representing the State as the shareholder of the PT-Persero.

In the Bill, like the provisions on the Direksi, those concerning the DK are in fact set forth based on the current practice. In brief, some of the important principles are as follows:
- The DK’s existence is not compulsory but certain PTs must have more

32 Government Regulation No. 3 of 1983 (State Gazette 1983 No. 3), Art. 34. Further discussion on PT-Persero, see Chapter IV. 4, infra.
than one Komisaris (Supervisor).
- There are criteria for the eligibility to be a Komisaris.
- The DK is to supervise and give advice to the Direksi.
- The Komisaris can be sued by shareholders representing at least 10% of the total shares if there is evidence that the Komisaris has caused losses to be incurred by the PT.
- The A/A provide the Komisaris with an authority to approve certain legal acts by the Direksi.

5. Liquidation and Settlement

The Bill differs from the ICC with regard to liquidation, mainly in the provision concerning the initiative as regards the liquidation. Article 47 of KUHD provides that the liquidation of a PT is caused by: (a) the operation of law, if the financial loss of the company totals to 75% or more of its subscription shares capital (compulsory liquidation; therefor initiative is not on the part of the company), or (b) the decision of the shareholders of the PT, due to certain reasons, to liquidate the PT (voluntary liquidation); accordingly initiative is on the part of the management or the shareholders of the PT), violates the law, may request a district court to issue a merit for the liquidation of a PT. As a consequence of the difference, the liquidation procedures under the ICC are different from those stipulated in the Bill.

In substance, the liquidation procedures under the Bill do not differ very much from the procedures in the ICC. However, the Bill sets forth in detail the liquidation process to be followed and transparency of liquidation process to third party. The details provide liquidators and auditors and other related parties with a legal basis for their actions.

III. SOME CURRENT ISSUES

1. Company Restructuring

It is the very nature of business that entrepreneurs work fast and imaginatively. It is also due to the nature of law, if law in some instances is left behind. Merger, consolidation and acquisition ("MCA") are examples of

The Bill, Art. 117.

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types of company restructuring which have become a need of the business community and which the ICC has not yet accommodated in its provisions. MCA are legal instrument to expand a business, to save a target company from a financial crisis, to acquire an available business license, or to acquire the current assets of a target company.34

Since the ICC does not include any special provisions dealing with MCA, it has become common practice to follow the procedures for MCA in other fields, notably the field of banking. Here the Minister of Finance has set a rule that for an acquisition a bank shall first obtain an initial validation from the Minister of Finance.

An acquisition license will be given to an acquiring bank by the Minister of Finance, if the acquisition causes the ownership of shares to become more than 50% of the target bank.35 For a public company wishing to acquire its subsidiary, to take another example in the field of capital markets, validation from the majority independent shareholders is required.36

In general, in order to grant license to the company to conduct MCA, the respective government agency usually observes the interest of shareholders, creditors, labor and its impact on the mechanism of competition.

The Bill contains provisions concerning each of these three kinds of company restructuring. As a basic law, it has responded to the needs of business. In this respect, it is worth nothing that the decisions to merge, consolidate and take over must consider the interests of the company, minority shareholders, and the public at large and must not detract from healthy competition in business. The Bill grants rights to minority shareholders to sell their shares at reasonable price market if they cannot accept an MCA.

Principles on MCA found in the Bill also reflect current practise, namely:
- Merger is the process of merging one PT in to another PT, and consolidation is two or more companies consolidating, dissolving and establishing a new PT.
- The Direksi of the concerned PTs are excepted to prepare a merger or


35 Article 17 of Decree of Minister of Finance No. 222/KMK.017/1993.

36 Decree of Minister of Finance No. 04/1994.

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consolidation proposal.

- Acquisition can be executed by way of acquisition of all the shares of another PT.
- Resolutions of the GMS for MCA must be done following certain procedures.
- Announcement in 2 newspapers with in a certain deadline is compulsory.
- Proposals for merger and consolidation must be submitted along with the proposal for the amendment to the A/A of the respective PT (in the case of merger) and the draft A/A of the new PT (for consolidation), both for Government validation and for shareholder ratification.

2. Protection of Minority Shareholders and Other Interests

a. Minority Shareholders

The question of minority shareholders has become a heated issue recently. As stated in Section 1 above, in the field of capital markets, minority shareholders have been granted special protection in the case of an acquisition by a public company of a subsidiary company.

Under the Bill the minority shareholders that do not agree with the PT’s plan to conduct an acquisition may ask the PT to buy their shares at a reasonable price. The provisions concerning the protection of minority shareholders are a reflection of a paramount effort to equalize the results of national development. Nevertheless, it is also believed that these draft clauses need clear implementing legislation, so that they will benefit the real minority shareholders. Protection of minority shareholders is a concept of balance in a proportionate way in the sense that the majority and the minority will be hand in hand in achieving the objectives of the PT. Protection of minority shareholders is not created by an a priori attitude that big is always bad, and that small is always weak.

b. Healthy Competition

In addition to the interests of minority shareholders, the Bill also refers to the public interest and the maintaining of healthy competition in business. This clause emphasizes the concept of the social-orientation of a PT. As a legal subject, like a natural person, a PT should also behave well and respect...
the rights of other legal subjects in a civilized society. Fair competition is understood to be *a conditio sine qua non* to achieve the best results of national development. 37

3. The Role of the Courts

Based on the ICC, if a PT's Deed has been validated, the PT may only be wound up at the recommendation of the Supreme Court. Under the Bill, the role of district courts becomes significant because they are called upon to deal with various events. For example, any shareholder is entitled to sue the PT through the district court if such a shareholder suffers as a result of a PT action which is deemed to be unfair and unreasonable. There is no specific explanation attached to this provision. It is understood that detailed implementing legislation will follow after the Bill becomes a law, otherwise judges will not have any guidance on the meaning of "unfair" and "unreasonable".

4. State-owned Enterprises

Based on Law No. 9 of 196938, a State may establish a limited liability company as it is governed in the ICC, commonly known as "PT-Persero". There has been much discussion about the PT-Persero, especially relating to its business spirit and ambition. Critics say that the PT-Persero cannot be efficient and active in business since it act more as a government agency, rather than as a state owned business entity which would be expected to make a profit and distribute the dividends to its shareholders, the State. Other critics are of the opinion that such an attitude is the result of the protection given by rules and regulations although in some instances the protection may only be a matter of the interpretation of certain rules and regulations. The Bill does not specially accommodate the problem of PT-Persero, except one provision dealing with the single-shareholder matter as discussed above.

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37 To the best of the writer's knowledge, more than one academic draft on fair competition have ever been prepared by the UI and EKUIN teams respectively.

38 State Gazette of 1969 No. 16.
5. Capital Market Regulations

The soaring Indonesian capital market over the last 6 years has given a meaningful supplement which may enrich Indonesian company law. This supplemental contribution comes from a number of capital market regulations issued by the capital market and stock exchange authorities. The main objectives of the capital market regulations are: (a) to protect the public interest in companies which offer equity or debt instruments, and (b) to promote the smooth and active functioning of capital markets. The followings are examples of such supplemental contributions to Indonesian company law from capital market regulations:

- The two tiered system has been adopted in the A/A of public PTs. It means that a public PT must also have a DK in addition to the Direksi. The members of the Direksi and the DK should be at least 3 persons on each board.
- The amount of subscribed and paid-up capital must be the same.
- The nominal value for each share is Rp. 1,000.
- The pre-emptive right of the shareholders upon their shares can be transferred directly to a third party.
- The minimum authorized capital is in accordance with requirements issued by the stock exchanges; for instance, the Jakarta Stock Exchange requires that the minimum authorized capital be Rp. 7,5 Million.
- The public company is allowed to purchase its own shares.

From a legal point of view, some of these supplemental contribution deviate from the provisions of the ICC.

The Bill tries to anticipate the future progress in the capital markets and to accommodate the growing complexity of business transactions. As indicated, certain provisions of the Bill adopt some of the capital market regulations, but in general the Bill stipulates that all matters pertaining to capital markets are referred to as lex specialis that are to be regulated under the law on capital markets.

The event of having both the Bill and the capital market bill being considered at the same time are remarkable in the history of economic and commercial law in Indonesia.

6. PP No. 20 and Company Law

One current heated issue is on Government Regulation (Peraturan Nomor 6 Tahun XXIV)
Pemerintah) No. 20 of 1994 regarding Share Ownership in Foreign Joint Venture Companies ("PP No. 20") as further described in the Decree of the Minister for the Mobilization of Investment Funds/Chairman of Investment Coordinating Board No. 15/SK/1994 ("BKPM Decree"). Some provisions of PP 20 which might be of interest in this session relate to the acquisition of share ownership of an existing PT by foreign investors, particularly by foreign nationals/legal entities. The question is that based on Article 9 of PP No. 20 jo. Article 17 (3) of the BKPM Decree, such foreign investors may hold up to 95% of the shares, whereas on one hand the status of the PT is not affected by the acquisition, but on the other hand the acquisition can be affected only if the field of the business of the PT is open for foreign investors. There seems to be contradiction in determines in this matter. Further, this hybrid nature could create problems, for instance, if as a result of this acquisition the majority shareholders of the acquired PT are foreign investors, may they hold the position President Director or any other member of the Direksi, or become members of the DK? Similarly, if the status of the company does not change, are the foreign shareowners afforded any protection against nationalization or any repatriation guarantees?

7. Company Registration

A part from the requirement to register at the district court and to announce in the State Gazette in the Formation phase (see Chapter II.2), there is no requirement under the ICC to make the PT open to public. Law No. 3 of 1982 on Company Registration was launched to serve this purpose. The shareholders or the Direksi of all PTs are required to register their Pts in the Company Register. Unfortunately, up to date the Law has not been properly respected. One can not rely on the completeness and reliability of the information at the Department of Trade, where the registration must be centralized. This is regardless of criminal sanction imposed by the Law against its offenders, which is imprisonment of 3 months or a fine of Rp. 3 Million. It is also difficult in practice for the public to make use of the

39 The BKPM Decree, Art. 19 (1).
40 The BKPM Decree, Art. 17 (2).
41 State Gazette of 1982 No. 7.

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information contained in the Company Register.

The Bill provides that the Direksi is obligated to register the Deed and any amendments to the A/A in the Company Register pursuant to Law No. 3. Failure to accomplish this duty will result in the Direksi being jointly liable for all actions taken by the PT.

V. CONCLUSION

1. This paper has tried to disclose various matters as a result of the implementation of the existing company law and other relevant laws and regulations. It is clear that a clear and effective company law is needed as it serves business community. Its function is not only to provide legal certainty, but also to provide legal protection to business people in taking the risks that are a part of any business enterprise.

2. The present Indonesian company law has been left far behind, increasingly unable to accommodate rapid business transactions. Furthermore, it has also been left behind by the company law in Netherlands, which has changed significantly from the version inherited by Indonesia.

3. In the absence of complete rulings on certain matters in line with business needs, regulations from various governmental agencies have contributed to the development of company law from the practical point of view. Merger, consolidation and acquisition are examples of legal devices which have become popular among business people and are common in practice. Minority shareholders should have proper place in a company law, provided that their presence and the protection towards them will not be misused with the result of damaging the interests of the PT itself.

4. It also appears however, that in some instances, the rulings from certain agencies are not in line with provisions of the ICC on the PT.

5. In addition to rulings in certain sectors, company law has developed through contractual arrangements, the principles of which in turn are followed as a matter of practical guidelines.

6. A part from the function of serving the business interests, a company

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42 The Bill, Art. 21.

43 The Bill, Art. 23.

Nomor 6 Tahun XXIV
law should also be devoted to the public at large. A company in its nature as a "person" lives in a society which requires it to act and behave like other persons. As such the PT is prohibited from taking actions which might harm the public, including the business community itself. A good company law should consider that the actions of the PT will not jeopardize the business climate where fair competition must be guaranteed.

7. Law enforcement has undoubtedly a significant role in the implementation of a good law.

8. There is today no more important matter in the field of economic law than the passage of the Bill to become a law. This is regardless of the fact that the Bill will need in-depth comments and remarks. It is suggested that the Parliament should initiate a nation-wide discussion about the Bill to obtain inputs from the public, including academic and practical experts. The writer of this paper has intentionally limited his observations on the Bill, because the topic entrusted to him to discuss only related to the current status of a law.

9. It is a remarkable event in the development of economic law in this country that the bill on limited liability companies and the bill on capital market will be enacted into law at almost the same time in history.

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Our object in the construction of the state is the greatest happiness of the whole.

Tujuan kita mendirikan negara ialah untuk kebahagiaan yang sebesar-besarnya dari seluruh rakyat bukan kebahagiaan dari satu golongan.

Plato (Aristoteles)