

HOW SINGLE-MEMBER COMPANY IN INDONESIA SHOULD BE REGULATED? (MIXING GIERKE'S THEORY AND ISLAMIC LAW PERSPECTIVE ON LEGAL ENTITY)

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Abstrak: Tujuan dari penelitian ini adalah untuk mengevaluasi dan memberikan perbaikan terhadap regulasi yang mengatur tentang perseroan perorangan di Indonesia berkaitan dengan masalah pengawasan dan pembatasan dengan menggunakan teori Gierke dan perspektif hukum islam tentang badan hukum. Penelitian ini disusun sebagai penelitian hukum normatif dengan menggunakan pendekatan konsep, perundang-undangan, dan perbandingan. Hasil penelitian menunjukkan bahwa masih terdapat kekurangan di masalah pengawasan dan persyaratan pendirian perseroan perorangan di Indonesia, baik berdasarkan teori Gierke dan perspektif hukum Islam. Sehingga perbaikan terhadap ketentuan pelaporan, kewajiban mencatat segala keputusan di minuta, pembatasan pendirian, serta syarat pendiri diperlukan.

Kata kunci: Perseroan Perorangan; Teori Gierke; Perspektif Hukum Islam; Pengawasan; Pembatasan Pendirian.

Abstract: The purpose of this study is to evaluate and provide improvements to the regulations governing single-member limited liability companies in Indonesia, related to issues of supervision and restriction using Gierke's theory and Islamic law perspective on legal entity. This research is structured as a normative legal research using concept, legislation, and comparative approach. The results of the study indicate that there are still shortcomings in terms of supervision and requirements for the establishment of SMLLC in Indonesia both from Gierke's theory and Islamic law perspective. Thus, the improvements to reporting provisions, the obligation to record all decisions in the minutes, the restrictions on establishment, and the founder requirements are needed.

Keywords: Single-member Company; Gierke's Theory, Islamic Law Perspective, Supervision; Restriction.

A. INTRODUCTION

Provisions regarding the single-member limited liability companies in Indonesia were regulated for the first time after the enactment of Law Number 11 of 2020 concerning Job Creation (hereinafter referred to as the Job Creation Act). The preparation of Job Creation Act uses the omnibus law model, where one of the reasons for using the mentioned technique is to avoid political deadlocks and make it easier to reach agreements between legislators.¹ The needs to improve the ranking of ease for doing business in Indonesia is also one of the reasons the Government chooses to use omnibus law technique. Thus, through the Job Creation Act, several laws considered as obstacle would be amended. One of which is Law Number 40 of 2007 concerning Limited Liability Company (hereinafter referred to as the Limited Liability Company Act), amended.

Article 109 of Job Creation Act serves as the basis for the amendment of several provisions in the Limited Liability Company Act, one of which relates to Single-Member Limited Liability Company (hereinafter referred as SMLLC) as a new concept that has become a breakthrough by the Government. Like a limited liability company, a single-member limited liability company has the main characteristics of a business entity as a legal entity—which are limitation of liability and separation of assets. In practice, Indonesia recognizes the existence of sole proprietorship, where there is only one founder who will simultaneously manage business activity. Nevertheless, sole proprietorship has one weakness—its liability is unlimited, or, in other words, the founder can be held personally responsible.² Based on these characteristics, a sole proprietorship cannot be categorized as a legal entity, because the requirements for a legal entity are not fulfilled, both formally and materially.³

Due to these problems mentioned, some people will be afraid to form a business activity alone without a legal entity, because there will be a risk of personal liability if the company encounters a problem. On the other hand, establishing a limited liability company is not easy and requires no small amount of money. Thus, the birth of single-member limited liability company could be seen as a new hope for business actors who want to form a business activity with legal entity and limited liability. Hence, through Article 1, number 1 of the Limited Liability Company Act after amended by the Job Creation Act, the SMLLC is regulated. The mentioned article stated that:

1 B.D., Anggono, "Omnibus Law sebagai Teknik Pembentukan Undang-Undang: Peluang Adopsi dan Tantangannya dalam Sistem Perundang-undangan Indonesia", *Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional*, Volume 9, No. 1, (2020), h. 26.

2 Januarita, R., "The Newly Sole Proprietorship as Limited Liability Company in Recent Indonesian Company Law", *Mimbar*, Volume 37, No. 1, (2021) h. 222.

3 Mulhadi, *Hukum Perusahaan; Bentuk-Bentuk Badan Usaha di Indonesia*. (RajaGrafindo Persada, 2019).

“Limited Liability Company, hereinafter referred to as Company, is a legal entity which is a capital partnership, established based on an agreement, conducted business activities with authorized capital which is entirely divided into shares or individual legal entities that meet the criteria for Micro and Small Businesses as stipulated in the legislation regarding Micro and Small Enterprises.”

Based on the provision above, it can be seen that currently, there are two types of limited liability companies in Indonesia; **First**, the ordinary limited liability company, as regulated in the Limited Liability Company Act, which previously amended by the Job Creation Act. This limited liability company has the following elements: a legal entity, a capital partnership, established based on an agreement, conducting business activities with authorized capital divided into shares. **Second**, a single-member limited liability company (SMLLC) established by one person by meeting the criteria for Micro and Small Enterprises (hereinafter referred to as MSEs). Therefore, the change in the definition of a limited liability company later became one of the foundations for the birth of a SMLLC in Indonesia. Based on previously stated provision, further regulation is obtained through several implementing regulations, which are:

1. Government Regulation Number 8 of 2021 that concerns about the Company’s Authorized Capital and Registration of Establishment, Amendment, and Dissolution of Companies that Fulfill the Criteria for Micro and Small Businesses (hereinafter referred to as PP 8/2021).
2. Regulation of the Law and Human Rights Minister Number 21 of 2021 that concerns about the Terms and Procedures for Registration of the Establishment, Amendment and Dissolution of a Limited Liability Company Legal Entity (hereinafter referred to as Permenkumham 21/2021).
3. Regulation of the Finance Minister Number 49/PMK.02/2021 that concerns about Types and Tariffs of Non-Tax State Revenue Applicable to the Directorate General of General Legal Administration, Law and Human Rights Ministry (hereinafter referred to as Minister of Finance Regulation 49/PMK.02/2021).

The government’s attention to Micro, Small and Medium Enterprises (hereinafter referred to as MSMEs) is not without a reason. Based on the data from the Ministry of Cooperatives and Small and Medium Enterprises, MSMEs have a high contribution for the growth of Indonesian economy. In March 2021, MSMEs in Indonesia contributed to a Gross Domestic Product (GDP) of 61.07% or Rp. 8,573.89 Trillion.⁴ The Coronavirus Disease 2019 (COVID-19) pandemic has significantly impacted MSMEs. Quoted from a press release conducted by the Coordinating Ministry for Economic Affairs of the Republic of Indonesia HM.4.6/88/SET.M.EKON.3/04/2021, that the COVID-19 pandemic

⁴ Kemenkeu, *Kementerian Keuangan RI Ditjen Perbendaharaan BLU Pusat Investasi Pemerintah*. Retrieved from Website BLU Pusat Investasi Pemerintah, Kemenkeu, (2022).

has had a negative impact on MSMEs in Indonesia, many MSMEs have difficulty paying off receivables to the point that they are forced to make difficult choices such as termination of employment. In line with this, the Katadata Insight Center (KIC) said that most MSMEs (82.9%) felt the negative impact of the pandemic, with only 5.9% experiencing positive growth.

Based on the problems mentioned, the government then introduced a new concept through the Job Creation Act, it is SMLLC. Similar to a regular company, a SMLLC is a limited liability company for MSEs by adopting the main characteristics of limited liability company itself. Where in the limited liability company, there is limited liability for the shares that shareholder own. The main purpose of applying the limited liability doctrine, it is to create a business-friendly legal environment and the expansion of national economy, by providing a sense of security for individuals to make investments. This sense of security can be created because in limited liability, individuals can invest without any potential loss of their personal property.⁵

Undeniably, even though the concept of SMLLC is a new concept introduced through the Job Creation Act, the regulation regarding SMLLC still leaves various disadvantages. Some of those, for example, can be found in the results of researches that specifically discuss SMLLC. Which will be discussed below.

The first is from the organ side. It can be seen in the research that conducted by Putu Devi Yustisia Utami and Kadek Agus Sudiarawan in their writing entitled “*Perseroan Perorangan Pada Usaha Mikro dan Kecil: Kedudukan dan Tanggung Jawab Organ Perseroan*” in 2021, discussing the differences in the position of the organs of an ordinary Limited Liability Company with an SMLLC, in addition to discuss the one tier system that has been adopted by Indonesia.⁶ In this study, it was shown that in terms of regulation, the provisions of SMLLC in Indonesia still experience inconsistencies with regard to corporate organs—it is because in the one tier system that has been adopted in Indonesia, the owners of SMLLC only hold concurrent positions as directors and shareholders, whereas, if SMLLC is the same as an ordinary company, the organ should not only consist of shareholders and directors, but also commissioners as supervisors.

The second is from the conceptual perspective of company. It can be seen from the research written by Anggraeny Arief in her writings “*Omnibus Law Cipta Kerja dan Implikasinya Terhadap Konsep Dasar Perseroan Terbatas*” in 2021 which examines the expansion of definition from the basic concept of limited liability company, the

5 Bite, V., & Jakuntaviciute, G., “Is The Limited Liability Doctrine Applicable To Company Directors?”, *European Scientific Journal*, Volume 10, No. 16 (2014), h. 109–128.

6 Putu Devi Yustisia Utami dan Kadek Agus Sudiarawan, “Perorangan Pada Usaha Mikro dan Kecil: Kedudukan dan Tanggung Jawab Organ Perseroan,” *Jurnal Magister Hukum Udayana*, Volume 10, No. 4 (2021), h. 769-781, DOI: 10.24843/JMHU.2021.v10.i04. p08

conflicting doctrine in a limited liability company that should only be established by two people, the blurring of the concept of property in SMLLC.⁷

The third is in terms of abuse possibility. It can be seen from the research that has conducted by Shinta Pangesti in her writing entitled “*Penguatan Regulasi Perseroan terbatas Perorangan Usaha Mikro dan Kecil dalam Mendukung Pemulihan Ekonomi Masa Pandemi Covid-19*” in 2021, the company will focus on setting the criteria for micro and small businesses after the copyright law, legal loopholes, and proposed improvements. One of the legal loopholes found in the study is the possibility of changing the data of the founders, and the possibility of power abuse and corrupt behavior of the founders (its shareholders and directors).⁸

B. RESEARCH PROBLEMS

By referring to the disadvantages that have been conveyed through previous studies and the explanation in the previous chapter, the writer will examine two problems in this research, namely:

1. What improvement should be made regarding Single-Member Limited Liability company regulation in Indonesia?
2. How to prevent violation of Single-Member Limited Liability Company Entity?

C. RESEARCH METHODS

This research is normative legal research. As stated by Peter Mahmud Marzuki, “Legal research is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced”.⁹ This research uses three approach: conceptual approach, statute approach, and comparative approach. The conceptual approach is used to analyze the concept of company, SMLLC, and also various doctrines known in company law. Then, the statute approach is used to analyze the legal rules in Indonesia related to limited liability companies and SMLLC, and the comparative approach is used to evaluate and improve the provisions of SMLLC in Indonesia by comparing them with those in other countries. The authors use library research techniques to collect legal materials needed. Then, analyze it using deductive analysis.

7 Anggreany Arief and Rizki Ramadani, “Omnibus Law Cipta Kerja Dan Implikasinya Terhadap Konsep Dasar Perseroan Terbatas”, *Al-Adalah: Jurnal Hukum Dan Politik Islam*, Volume 6, No. 2 (2021), h. 106–120.

8 Shinta Pangesti, “Penguatan Regulasi Perseroan Terbatas Perorangan Usaha Mikro Dan Kecil Dalam Mendukung Pemulihan Ekonomi Masa Pandemi Covid-19”, *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, Volume 10, No. 1 (2021), h. 117-131.

9 Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media Group, 2010), h. 35.

D. RESULT AND DISCUSSION

1. A Single-Member Limited Liability Company Regulation in Indonesia: Conceptual and Improvements

a. Company and its Organs: Gierke and Islamic Law Perspective

Theoretically, one important feature that should exist in a company is the separation between the company entity as a separate legal subject and its owner who is also a separate legal subject. This notion was born due to the fact that a company is a legal subject which categorized as a legal entity (*rechtspersoon*). The legal entity itself, in the Black's law dictionary is defined as "an entity such as a corporation, created by law given certain legal rights and duties of human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being".¹⁰ Furthermore, even though black's law has provided a definition of legal entity, definition alone is not adequate to understand a company from a conceptual framework—especially if the original purpose of this research is to overcome the conceptual and organ problems of SMLLC. With that being said, the discussion will be conducted using a theory, namely the reality of organ theory, which was initiated by the German sociologist, Otto Van Gierke.

Gierke in his theory states that a legal entity as a separate entity is an abstract legal entity (intangible). Furthermore, he also stated that the state, government institutions, or legal entities (including corporations) are social organisms.¹¹ However, in the body of social organism mentioned, there are two wills, which are the collective will of a body or organization and the individual will—however, the will of individual, in the concept of a legal entity as a separate entity, should no longer exist, if a legal entity which is the separate entity, it is formed by law, then the body is a collective organism with the collective will of its organs consisting of many individuals.¹²

Gierke further states that if a social organism has been formed and becomes a legal entity, then it will be equated with humans as legal subjects (rights and duties bearer). As a legal subject, the rights and obligations of collective organism are separate from those of the individuals in it. Referring to this statement, Gierke further stated that although the social organism (legal entity) is a collective organism consisting of many individuals, but as a unit, it is only one organism that bears legal rights and obligations like humans. The rights and obligations of collective organism, in other words, are the rights and obligations of a legal entity, and not the individuals in it. From that statement, Gierke further stated that although a legal entity is a collective organism consisting of

10 Bryan A. Gardner, *Black's Law Dictionary*, 8th edition, (West, 2004), h. 1178.

11 Wolff, "On the Nature of Legal Persona", *Law Quarterly Review*, 54 (1938), h. 494.

12 Maximilian Koessler, "Recht Person in Imagination or Persona Ficta of the Corporation", *Louisiana Law Review*, Volume 9, No. 4 (1949), h. 448.

many individuals, but as a unit, it is an organism that bears rights and obligations, just like humans.¹³

Gierke's view then becomes more interesting after he combines his realism view with biological metaphors to describe legal entities.¹⁴ The existence of individuals in a legal entity then analogized by Gierke as organs in the human body—In other words, Gierke combines the realism approach in his theory with biological metaphors to explain further about legal entities. The biological metaphor is then used by Gierke to describe the individual (structural) roles that exist in the body of a legal entity. In the torso, there is something that functions like the brain to produce thoughts that control what will be done, eyes to monitor, and accomplices to carry out these thoughts.¹⁵— in modern times, this is the same as the role of the general meeting of shareholders (GMS), commissioners, and directors.

Referring to Gierke's theory, it is simple to say that indeed, the company and its owner ergo structurally should be viewed as separate legal subjects—as separated legal subjects, the organs and the company have different liability, thus the limited liability doctrine can be applied.¹⁶ The application of limited liability on legal a company as a legal entity, thus, becomes the reason why each organ in a company have different roles and one should function as a 'brain' to control and ensure that the company will remain as a separated entity. However, Gierke has never specifically stated that a company (or collective organism) must consist of many individuals—the biological metaphor (which he described with many individuals as structural in a company) at that time was very possible because at that time, there was no concept of SMLLC. On the other hand, Gierke makes clear that there must be a separation of will between the collective organism (the company) and the individuals within it (structural)—without it the company is not a company and a legal entity is not a legal entity.

Contrary to Gierke's theory, even though Islamic law realized the very existence of a legal entity and its organs¹⁷, the limited liability concept that followed the separation of entity is not recognized within the Islamic law perspective. Furthermore, while both Gierke's theory and Islamic Law perspective have a similar ideas that a legal entity is an artificial human who will act as a subject of law and is authorized to perform the rights

13 *Ibid.*

14 Otto Von Gierke, *Political Theories of the Middle Age*, Translated by F.W. Maitlan (Cambridge University Press, 1927).

15 Hans Kribbe, *Corporate Personality: a Political Theory of Association* (London School of Economic and Political Science, 2014), h. 15.

16 Muhammad Sadi Is, *Hukum Perusahaan di Indonesia* (Prenada Media, 2016), h. 103.

17 Fiqh recognized the term legal entity as *shakhsyah i'tibariyah* (شخصية إبتارية) as opposed to humans in real terms (*shakhsyah haqiqiyah*/شخصية حقيقية). Muhammad Hasbi Ash-Shiddiqy, *Pengantar Fiqh Muamalah*, Pustaka Rizki Putra, Semarang, 2001), h. 197.

and obligations of the business activity¹⁸, Islamic law views the liability of the company and its organ as inseparable, thus, it is contradict the limited liability concept. With that being said, however, even among Islamic scholars, the debate on the existence of limited liability remains to exist. One of which is Mustafa Ahmad al-Zarqa opinion on the existence of limited liability in Islamic doctrine—in his book, he stated that, “When we referred to the original texts and sources of the Shari’ah, we found in it legal provisions which in substance propounds the concept of juristic person and its legal status. And, also, we found the legal provisions which personify the juristic person (legal entity) with all its principles and characteristics which are attributed to it by the latest (modern) law.”¹⁹

Contrary to al-Zarqa opinion, Imran Ahsan Khan stated that the liability of partner for the debts of partnership owner is unlimited, and thus, it can be stated that Islamic law never acknowledge the very existence of limited liability in the first place.²⁰ While both opinions have their own reasons, Imran Ahsan opinion can be concluded as more suitable to Islamic doctrine than al-Zarqa opinion. This due to the fact that, Imran Ahsan Khan based his opinion in the Islamic principle regarding debt responsibility (*al-dayn*).²¹ However, despite the Imran Ahsan Khan opinion regarding limited liability in Islamic doctrine, in real legal case, Justice Usmani acknowledge the very existence of limited liability in Islamic doctrine from his legal and Islamic scholar perspective—in his opinion he stated that:²²

“Once the concept of a juridical person is accepted and it is acknowledged that, despite its fictive nature, a juridical person can be treated as a natural person in regard to the legal consequences of the transactions made in its name, we will have to accept the concept of limited liability, which will follow as a logical result of the former concept. This is because the latter concept is a logical consequence of the former concept. The rationale is clear. The creditors of a real person, i.e., a person who passes away while insolvent, have no claim beyond the value of the

18 Isa Abduh Stated that, “It is agreed upon that fictitious personality (legal entity) does not find support from Islamic heritage. Despite this, the texts of Arabs as well as Muslims convey the Idea that it can be established” Isa Abduh, *Al-Uqud al Syari’iyah al-Hakimah*, Dal al-I’tisam, Kairo, 1977), h. 25.

19 Burhanuddin Susanto, “How Should Shari’ah Principles be Applied in Modern Company?”, *Jurnal Hukum Syariah De Jure*, Volume 4, No. 1, (2012), h. 82. DOI: <https://doi.org/10.18860/j-fsh.v4i1.2156>

20 *Ibid*.

21 In Islamic terminology, the word “*dayn*” depicts anything payable by a person either to another person, or to God, based on a commitment towards that person or God. Furthermore, while the word *dayn* can be seen as having the same meaning as ‘debt’ in english word, Islamic Doctrine have different view than the western company law in term of debt as stated in QS Al-Muddatsir 38, which stated that, “every soul is responsible for what he/she done”. In this sense, the one that responsible for the company debt is not the company, but the organ as *shakhshiyah haqiqiyah* that established and/or operate the company. Raed El-Saadouni, *The Liabiliry of Groups of Companies in Islamic Law (a Comparative Study with Common Law)*, Doctoral Thesis, University of Stirling Law School, 2013, h. 225.

22 *Ibid*, h. 246.

assets he left behind. If his debts are greater than his assets, the creditors will undoubtedly suffer, as there will be no way to compensate them after the debtor passes away. The same principle will apply to an insolvent company if we accept that a company, in its capacity as a juridical person, has rights and responsibilities comparable to those of a natural person. Since a company ceases to exist upon its liquidation, it is inevitable that it will be liquidated after becoming insolvent. A company's liquidation is analogous to a person's death. If a real person's creditors can suffer when he dies insolvent, a legal person's creditors may also suffer when its legal life is ended by liquidation."

Based on the explanations above, both Gierke's theory and Islamic law perspective proved to acknowledge the existence of legal entity and its wills. Furthermore, while limited liability that followed the existence of separated legal entity remains as a debate among Islamic scholars, clear separation of entity also emphasized in Islamic doctrine on legal entity as implicitly depicted in Justice Usmani opinion (his opinion on limited liability depicts clear separation between organs of the company and the company itself). Even so, the separation of wills with only one individual who exists as a corporate structure is very difficult. In a well-known case, the inseparable will can be seen in the case of *Solomon A. v Solomon Co.ltd*—in that case, even though the company consists of many individuals as its structure, Aaron Solomon as the largest shareholder (20001 of 20007 shares) makes Solomon Co.ltd as his agent—after all, the owners of the remaining shares and the structure are Solomon's wives and children, respectively. To prevent this from happening again, the regulations governing the company will generally divide the company's organs. This can be seen, for example, in Article 1 point 1 of Limited Liability Company Act which states that the company's organs consist of the General Meeting of Shareholders (hereinafter referred to as GMS), the Board of Directors, and the Commissioner. In simple terms, the structural composition of an ordinary company can be described as follows:



Figure 1 structural composition of an ordinary company

Each organ of the company in the picture has its own duties and roles. Where the GMS as the highest organ in the Limited Liability Company play a role in matters that are not owned by the Board of Directors or Commissioners. It also play a role in determining the general policies of company, appointing and dismissing the Directors and Commissioners, and also ratifying the annual reports of Directors and Commissioners.²³

The second organ is Board of Directors, the Board of Directors (BoD) in a Limited Liability Company is simply likened to a pawn of Company, where it is tasked with carrying out the management of company for the benefit of company itself, it is also representing the company inside and outside the court as stated in the articles of company association. The last organ owned by a Limited Liability Company is the Commissioner. Article 1 number 6 of Limited Liability Company Act defines the duties of Commissioners Board as supervising, it is as stated in the articles of association and providing advice to the Board of Directors, both in general and in particular. In connection with this task, it is reaffirmed in Article 108 paragraph (1) of the Limited Liability Company Act.

Based on the explanations above, commissioner has an important role in maintaining the rhythm of running for the company, so it runs according to the goals and articles of association of the company. Furthermore, it has an obligation to remind and give advices to the Board of Directors in making choices when running the company, and prevent such choices to cause losses for the company. The following are the obligations that must be carried out by the Commissioner:²⁴:

1. Supervise the Board of Directors
2. Provide advice to the Board of Directors
3. Provide a report on the ownership of shares that he or his family owns

Meanwhile, SMLLC, based on article 7 paragraph (1) of Government Regulation Number 8 of 2021 concerning the Authorized Capital of Company and the Establishment, Amendment, and Dissolution of Companies that Meet the Criteria for Micro and Small Businesses (hereinafter PP 8/2021), can be described as follows:

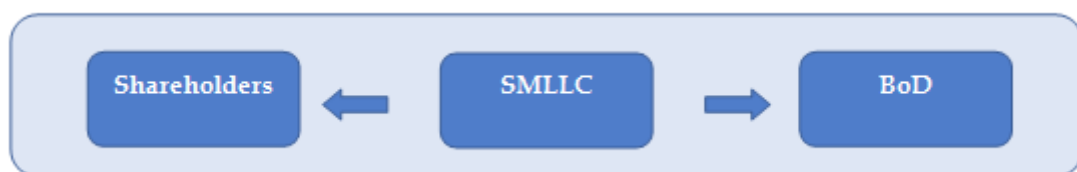


Figure 2 SMLLC's structural composition

23 Zainal Asikin dan Wira Pria Suhartana, *Pengantar Hukum Perusahaan* (Kencana, 2020), h. 82.

24 Op. Cit Zainal Asikin dan Wira Pria Suhartana, *Pengantar Hukum Perusahaan*, h. 96.

Referring to the previous explanation, it is clear that there are organ differences between an ordinary company and an SMLLC. The difference lies in the absence of supervisory organ (in this case the commissioner) in SMLLC. One problem that arises in this regard is related to the impact of absence for a commissioner on the supervision of SMLLC. The question is, does the absence of a commissioner mean that an SMLLC can be carried out without supervision? How about the theory that stated the shareholders, BoD, and the Commissioner are the necessary organ to distinguish between collective will of the company and individual will exist within it²⁵? Or is supervision such as the existence of a board of commissioners are not necessary in SMLLC?

b. Problems and Improvements to SMLLC in terms of Concepts and Organs in Indonesia

Based on the previous discussion, although an important point of corporate entity conceptually is not the number of structures in it, but the clear separation between the structural will and the company, one important problem that exists in the concept of SMLLC in Indonesia is the absence of oversight over the actions of shareholders who also concurrently directors in SMLLC. It is different from an ordinary company which has a commissioner whose function is to supervise and provide advice to the Board of Directors, so the company can run according to the objectives and articles of association from the company to minimize the risk of loss. Unlike a regular company, SMLLC does not have a commissioner. Such notion can be concluded through the meaning of phrase “Founder is also a director and shareholder from the SMLLC” in Article 7 paragraph (2) letter g PP 8/2021, thus, in SMLLC there are only directors and shareholders.²⁶ It creates problems over who will supervise the Board of Directors in an SMLLC in carrying out the goals and articles of association of the company without mixing it with personal will.

The problem is, the current law in Indonesia that regulates SMLLC (PP 8/2021) does not provide any regulation on the supervision of such SMLLC. The only legal provision that may be considered as a form of supervision is only in the provisions stated in Article 10 PP 8/2021. In that article, it is regulated that the company is obliged to make financial reports to the Minister electronically no later than six months after the end of the current accounting period. The report contains a statement of financial position, income statement, and notes to the current year’s financial statements. Then the sanctions imposed if the SMLLC does not report, is regulated in Article 12 PP 8/2021, where the SMLLC that does not report will be subjected to administrative sanctions:

25 Siti Hapsah Isfardiyana, “Tanggung Jawab Direksi Perseroan Terbatas dalam Pelanggaran Fiduciary Duty”, *Padjajaran Jurnal Ilmu Hukum*, Volume 2 No. 1 (2015), h. 171.

26 Putu Devi Yustisia Utami, Kadek Agus Sudiarawan, “Perseroan Perorangan Pada Usaha Mikro dan Kecil: Kedudukan dan Tanggung Jawab Organ Perseroan”, *Jurnal Magister Hukum Udayana*, Volume 10 No. 4 (2021), h. 775, DOI: 10.24843/JMHU.2021.v10.i04. p08

- a. written warning;
- b. Termination of access rights to services; or
- c. Revocation of legal entity status.

One big question that arises, is such a provision sufficient to protect creditors if a SMLLC entity is abused?

To answer that question, the only way that makes the most sense is to make a comparison between provisions of SMLLC the supervision in Indonesia and other countries. In this context, the first country to compare is China—it is because China’s supervision of private companies is more stringent, even than the European Union directive on SMLLC. Some of these supervisory provisions are further regulated in Chapter 3 of the Company Law of the People of the Republic of China 2006 (RRC Company Law). Some of these provisions include:

1. Article 60: A one-person company with limited liability shall clearly indicate whether it is of the sole investent of a natural person or of a legal person in its registration, and shall have it stated clearly as such in its business lincense.
2. Article 63: A one-person company with limited liability shall, at end of each fiscal year, draw up its financial and accounting report and have it audited by an accounting firm.
3. Article 64: Where the shareholder of a one-person company with limited liability cannot prove that the property of the company is independent of his own property, he shall assume the joint and several liability for the debts of the company.

Based on the provisions mentioned above, The supervision provisions of SMLLC in Indonesia have two drawbacks: the first is the audit of financial statements, and second is the burden of proof in certain cases to the owners of SMLLC to prove that the assets in the company are separate from their personalities. Of course, in addition to these two problems, the provisions of article 60 of the RRC Company Law may include the shortcomings of SMLLC regulations in Indonesia. However, this provision cannot be applied because Indonesia and China have different legislative ratios for the formation of arrangements regarding SMLLC - in China this is due to the fact that there are many SMLLC in China but do not get regulation,²⁷ Meanwhile, in Indonesia the regulation of SMLLC is based more on the state’s intention to help MSEs get capital (as reflected in the preamble to the Job Creation Act) and due to the fact that the financial condition of MSEs is still limited.²⁸ With the obligation in article 60, it is very likely that creditors will find it difficult to provide credit to SMLLC - so article 60 is unlikely to be adopted

²⁷ *Ibid*, h. 10.

²⁸ Lia Arliani, “Pengaruh Perilaku Usaha dan Modal Usaha Terhadap Keberhasilan UMK di Desa Tukad Sumaga Kecamatan Gerokgak Kabupaten Buleleng”, *Jurnal Pendidikan Ekonomi*, (2019).

in Indonesia. Furthermore, because article 60 has been excluded, improvements to the provisions on supervision of SMLLC in Indonesia can refer to the provisions of article 63 and article 64.

First, article 63 is important because even though the provisions of Article 10 PP 8/2021 have required financial reporting, the truth of the reporting cannot be guaranteed. Therefore, additional arrangements for financial reporting audit obligations before submission to the Minister must be regulated. Moreover, the absence of an audit report would be detrimental to creditors, and it is possible that limited liability would be violated. This is because the concept of limited liability can transfer the risk of failure from shareholders to creditors, especially in bankruptcy cases.²⁹

The second and last is article 64. This provision is the most important to be adopted because it is a form of affirmation for the separation of SMLLC entity and its owner. As mentioned above, one of the problems that will arise due to limited liability is when bankruptcy occurs. In this context, bankruptcy cases in Indonesia involving limited liability companies almost never use the veil piercing doctrine, even though the company's assets are not sufficient to pay off the company's debts. This can be seen in the bankruptcy case of PT. Artika Optima Core. In that case, it is clear that the company concerned has been delaying the payment of income tax for years until the assets of the bankrupt company are far below the amount owed to the detriment of creditors.³⁰ However, despite this fact, the Supreme Court still does not use the veil piercing doctrine in the bankruptcy case. That is why article 64 is important because the separation of the SMLLC entity from its owner is very blurred. Thus, supervision must be added that in the case of bankruptcy, the owner of the SMLLC must prove the separability of the company's assets and himself so that limited liability can apply. If not, it is very likely that veil piercing will not be applied by the judge, even though the Limited Liability Company Act through Article 3 regulates this.

Based on these explanations, the adoption of articles 63 and 64 of the RRC Company Law becomes an urgency to provide supervision to SMLLC. Such supervision is important, because the absence of a commissioners board and the fact that SMLLC has only one structure that doubles as shareholders and directors. With these two articles, it is very possible that the separation of the will of the individual and the company (as stated by Gierke) realized and can protect creditors.

In addition to improvements in terms of reports, improvements can also be made by requiring all decisions taken by SMLLC (by shareholders who are also directors) to be included in the minutes. This is as stipulated in Article 4 Paragraph (2) Directive

²⁹ J.M Landers, "A Unified Approach to Parent, Subsidiary, and Affiliates in Bankruptcy", *Chicago Law Review*, (1976), h. 589.

³⁰ Putusan Mahkamah Agung Republik Indonesia No. 070 PK/Pdt.Sus/2009, h. 7-8.

2009/102/EC of the European Parliament and of the Council in the area of company law on single-member private limited liability companies which stipulates that “Decisions taken by the sole member in the field referred to in paragraph 1 shall be recorded in minutes or drawn up in writing.” This is in accordance with Maxim of Law which states Scripta Literae Manet or The Written Word Endures.

2. Prevention against Violation of SMLLC Entity in Indonesia

Prevention of violation for the establishment of SMLLC in Indonesia must begin by understanding the legal ratio of two regulations that cover SMLLC in Indonesia—the Job Creation Act. It is important because the ratio legis is an essence that has two dimensions, they are the past dimension as the legal basis and the future dimension as the expected result of the law.³¹ Without that understanding, it is very likely that the regulations made will not be right on target and the solutions made will end up the same. As mentioned above, one of the legislative ratios contained in the preamble to the Job Creation Act is an effort to support the implementation of convenience and empowerment for cooperatives and micro, small and medium enterprises, the government makes legal breakthroughs to solve problems in several provisions of the law. Giving the problems that are often faced by MSEs related to capital and partnership mechanisms.³² That is why then, the implementing regulations of the Job Creation Act provide changes to the capital criteria of the MSE, as shown in the following table:

Table 1. MSME criteria based on Government Regulation Number 7 of 2021

Criteria	Before Job Creation Act	After
Micro	< Fifty Million Rupiah	< One Billion Rupiah
Small	Fifty Million Rupiah to Five Hundred Million Rupiah	One Billion Rupiah to Five Billion Rupiah
Medium	Five Hundred Million Rupiah to Ten Billion Rupiah	Five Hundred Million Rupiah to Ten Billion Rupiah
Big	> Ten Billion Rupiah	> Ten Billion Rupiah

Source: Government Regulation Number 7 of 2021

Now, with the existence of a legal entity in the form of an SMLLC, many MSEs are interested in changing the status of their business activities to become an SMLLC. Based on the terms and mechanism, the establishment of an SMLLC is very easy. Where in terms of establishment requirements only need to meet the following:

³¹ Adam Dyrda, e. a., *Ratio Legis; Philosophical and Theoretical Perspectives*, (Springer International Publishing, 2018).

³² Laode Abdul Gani, “Tanggung Jawab Negara Membangun Ekonomi Kerakyatan dalam Menghadapi WTO (World Trade Organization)”, *Jurnal Penelitian Hukum*, Volume 1, No. 2 (2012), h. 318.

1. Meet the MSE criteria (maximum capital of five billion)
2. Founded by one person (Indonesian citizen who is legally capable and at least 17 years old)
3. Statement of establishment in Indonesian

In addition to the aspect of easy requirements, the scheme provided by the Job Creation Act is also faster, because there is a change in the scheme for granting legal entity status. Previously, in Article 7 paragraph (4) of the Limited Liability Company Law, it was stated that “the Company obtains the status of a legal entity on the issuance date of the Ministerial Decree concerning the legalization of the Company’s legal entity”. Then, based on the Job Creation Act it is changed to “The company obtains the status of a legal entity after being registered with the Minister and obtaining proof of registration.” This would be done as a form of government attention in supporting the ease of doing business, especially in terms of starting a business.

Every policy taken will not be separated from the risks that may arise, therefore related to the ease of establishing an SMLLC, it is very likely that it will cause certain risks. One of the possible risks is the violation of the establishment of SMLLC for certain purposes (such as establishing multiple SMLLC and cumulatively exceeding the MSE category capital limit). It is very possible, because the regulations governing the establishment of SMLLC in Indonesia do not concretely limit this, or there are no limitations for people as legal subjects in establishing SMLLC. This limitation is only provided through the provisions of Article 153E paragraph (2) of Limited Liability Company Act amended by Job Creation Law, which states that “Company founders can only establish the Limited Liability Company for Micro and Small Enterprises in the amount of 1 (one) Company for Micro and Small Enterprises in 1 (one) year”. Based on the article, it can be understood that one person can establish more than one SMLLC, as long as it is not established in the same year.

It would need to be given a limitation, because if it is only limited to one SMLLC per year, without any concrete limitations. Then the value of the development of the MSE itself will be harmed. As written in table 1, the maximum MSE capital is 5 billion rupiah, if every year someone establishes a company for five years, then one person can manage an SMLLC with a total capital of 25 billion rupiah. Where with a capital of 25 billion rupiah, a person can establish an ordinary limited liability company and can increase state income through taxes. So that the provision of clear boundaries is very necessary to control the possibility of violation of the establishment of SMLLC.

Regarding this limitation, the RRC Company Law through Article 59 has a different approach from Indonesia, namely that one person can only provide one SMLLC. However, the RRC Company Law does not regulate the maximum amount of capital for SMLLC, but only regulates the minimum amount of 100,000 yuan. Such provision however, can only

be adopted partially in Indonesia due to the fact that both RRC Company Law and Job Creation Act have different ratio legis.

Other restrictions on incorporation may be granted with reference to the Thai SMLLC Law draft. As described in the previous discussion, one of the problems that will arise in SMLLC is if the company entity is violated and has a bad impact on creditors when bankruptcy occurs. Therefore, the limitation may refer to the draft Thai SMLLC Act, under which the founder of a SMLLC must be a person who has never been in bankruptcy, found guilty of fraud or other criminal offenses related to fraud.³³

Thus, referring to the discussion above, the prevention of violation of the establishment of SMLLC in Indonesia can be done in two ways: First, in terms of capital, it is carried out by partially adopting the provisions of establishment contained in the RRC Company Law, where an SMLLC can only be established as many as one by each. Second, from the side of abuse, the requirement for a person who can establish an SMLLC must be added, they are by stipulating that a person who has been declared bankrupt or has been a structural member of a bankrupt company and it is found guilty of fraud or other criminal acts related to fraud cannot establish an SMLLC. These two conditions are important, so an SMLLC entity with all its facilities is not abused in its establishment.

E. Conclusion

Based on the previous discussion, both Gierke's theory and Islamic law perspective on legal entity indicated that clear separation of will and the existence of controlling mechanism through organ or something else is important to ensure that the company as legal entity can be function properly as intended. Thus, it can be concluded that there are still problems contained in the regulations that cover SMLLC in Indonesia. That is, the lack of supervision and the possibility of misuse of SMLLC, which are still large. For this reason, the improvements must be made by adding provisions to PP 8/2021. The provisions are: firstly, reporting obligations must be preceded by an external audit, the obligation to record all company decisions in minutes, and in the case of bankruptcy, the owner of an SMLLC holds the burden of proof to prove the separation of company and individual assets so the limited liability can apply. Secondly, in the form of changes and additions to the provisions for the establishment of SMLLC, they are: first, by stipulating that SMLLC can only be established by one person by each person, Second is by adding requirements that the establishment of SMLLC, it is not allowed for people who have been declared bankrupt or become structurally bankrupt companies, and it has been found guilty of fraud or other crimes related to fraud.

³³ Natcha Rattaphan, "Legal Issues on Creditors Rights and Protections in Single Member Companies", *Faculty of Law, Thammasat University*, Volume 7 (2017), h. 5.

References

- Adam Dyrda, e. a., *Ratio Legis; Philosophical and Theoretical Perspectives*, (Springer International Publishing, 2018).
- Anggreany Arief and Rizki Ramadani, “Omnibus Law Cipta Kerja Dan Implikasinya Terhadap Konsep Dasar Perseroan Terbatas”, *Al-Adalah: Jurnal Hukum Dan Politik Islam*, Volume 6, No. 2 (2021).
- B.D., Anggono, “Omnibus Law sebagai Teknik Pembentukan Undang-Undang: Peluang Adopsi dan Tantangannya dalam Sistem Perundang-undangan Indonesia”, *Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional*, Volume 9, No. 1, (2020).
- Bite, V., & Jakuntaviciute, G., “Is The Limited Liability Doctrine Applicable To Company Directors?”, *European Scientific Journal*, Volume 10, No. 16 (2014).
- Bryan A. Gardner, *Black’s Law Dictionary*, 8th edition, (West, 2004).
- Burhanuddin Susanto, “How Should Shari’ah Principles be Applied in Modern Company?”, *Jurnal Hukum Syariah De Jure*, Volume 4, No. 1, (2012), DOI: <https://doi.org/10.18860/j-fsh.v4i1.2156>
- Fiqh recognized the term legal entity as *shakhsiyah i’tibariyah* (شخصيه إبتاريح) as opposed to humans in real terms (*shakhsiyah haqiqiyah/ شخصيه حقيقيه*). Muhammad Hasbi Ash-Shiddiqy, *Pengantar Fiqh Muamalah*, Pustaka Rizki Putra, Semarang, 2001).
- Hans Kribbe, *Corporate Personality: a Political Theory of Association* (London School of Economic and Political Science, 2014).
- Isa Abduh, *Al-Uqud al Syari’iyah al-Hakimah*, (Dal al-I’tisam, Kairo, 1977).
- J.M Landers, “A Unified Approach to Parent, Subsidiary, and Affiliates in Bankruptcy.” *Chicago Law Review*, (1976).
- Januarita, R., “The Newly Sole Proprietorship as Limited Liability Company in Recent Indonesian Company Law”, *Mimbar*, Volume 37, No. 1, (2021).
- Kemenkeu, *Kementerian Keuangan RI Ditjen Perbendaharaan BLU Pusat Investasi Pemerintah*. Retrieved from Website BLU Pusat Investasi Pemerintah, Kemenkeu, (2022).
- Laode Abdul Gani, “Tanggung Jawab Negara Membangun Ekonomi Kerakyatan dalam Menghadapi WTO (World Trade Organization)”, *Jurnal Penelitian Hukum*, Volume 1, No. 2 (2012).
- Lia Arliani, “Pengaruh Perilaku Usaha dan Modal Usaha Terhadap Keberhasilan UMK di Desa Tukad Sumaga Kecamatan Gerokgak Kabupaten Buleleng”, *Jurnal Pendidikan Ekonomi*, (2019).

- Maximilian Koessler, “Recht Person in Imagination or Persona Ficta of the Corporation”, *Louisiana Law Review*, Volume 9, No. 4 (1949).
- Muhammad Sadi Is, *Hukum Perusahaan di Indonesia* (Prenada Media, 2016).
- Mulhadi, *Hukum Perusahaan; Bentuk-Bentuk Badan Usaha di Indonesia*. (RajaGrafindo Persada, 2019).
- Natcha Rattaphan, “Legal Issues on Creditors Rights and Protections in Single Member Companies”, *Faculty of Law, Thammsat University*, Volume 7 (2017).
- Otto Von Gierke, *Political Theories of the Middle Age*, Translated by F.W. Maitlan (Cambridge University Press, 1927).
- Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media Group, 2010).
- Putu Devi Yustisia Utami dan Kadek Agus Sudiarawan, “Perorangan Pada Usaha Mikro dan Kecil: Kedudukan dan Tanggung Jawab Organ Perseroan,” *Jurnal Magister Hukum Udayana*, Volume 10, No. 4 (2021), DOI: 10.24843/JMHU.2021.v10.i04. p08
- Putu Devi Yustisia Utami, Kadek Agus Sudiarawan, “Perseroan Perorangan Pada Usaha Mikro dan Kecil: Kedudukan dan Tanggung Jawab Organ Perseroan”, *Jurnal Magister Hukum Udayana*, Volume 10, No. 4 (2021), DOI: 10.24843/JMHU.2021.v10.i04. p08
- Putusan Mahkamah Agung Republik Indonesia No. 070 PK/Pdt.Sus/2009.
- Raed El-Saadouni, *The Liabiliry of Groups of Companies in Islamic Law (a Comparative Study with Common Law)*, Doctoral Thesis, University of Stirling Law School, 2013.
- Shinta Pangesti, “Penguatan Regulasi Perseroan Terbatas Perorangan Usaha Mikro Dan Kecil Dalam Mendukung Pemulihan Ekonomi Masa Pandemi Covid-19”, *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, Volume 10, No. 1 (2021).
- Siti Hapsah Isfardiyana, “Tanggung Jawab Direksi Perseroan Terbatas dalam Pelanggaran Fiduciary Duty”, *Padjajaran Jurnal Ilmu Hukum*, Volume 2 No. 1 (2015).
- Wolff, “On the Nature of Legal Persona”, *Law Quarterly Review*, 54 (1938).
- Zainal Asikin dan Wira Pria Suhartana, *Pengantar Hukum Perusahaan* (Kencana, 2020).