**CONSUMER PROTECTION CONSTRUCTION**

**THROUGH STRITCT LIABILITY TOWARDS LOSSES FROM HIDDEN DEFECTIVE PRODUCTS IN INDONESIA**

**Holijah\***

**Abstract:**

A weak control in quality control standardization, a negative effect of the use of technology and a fraudulent business behavior lead hidden defective products that cause a financial loss for consumer society in current globalization era. The aim of this paper is to analyze the phenomenon of hidden defective products and also to demand the importance of the government role to regulate, supervise and control in order to create a consumer protection system for achieving the prosper goal for community through legal protection for businessmen and consumers fairly. Normative analysis methods were applied in this study. The result of this study is the law needs product liability with strict liability as an alternative to claim the responsibility of business actors through the development of tort doctrine as a basic for demanding compensation of losses due to hidden defective products from businessmen in the market. Law is expected to provide the consumers’ rights without decreasing the business actor’s right to gain profits.

**Keywords**: Consumer Protection; Product Liability; Tort.

\* Faculty of Sharia and Law, University State Islamic of Raden Fatah. Palembang, E-mail: holijah\_uin@radenfatah.ac.id

**INTRODUCTION**

By observing the development of consumers of developing countries in the era free market and globalization[[1]](#footnote-1) nowadays, in one side consumers are benefited due to the liberalization as the effect of current free trade. The benefits are the simplicity of goods flow that enter to Indonesia and simplicity for consumers to choose and satisfy their needs from the various available products. However, the negative impact is that consumers become the object of produce in gaining maximum profit.[[2]](#footnote-2)

The relationship between produces and consumers is a continuous relationship, whereby the produces heavily depend on the consumers as the costumers. In other side, due to inefficient supervision in the field of product quality standardization, the impact of technology itself and the business behavior that influences the consumer society, [[3]](#footnote-3) especially the developing country hasn’t ready yet and still weak from all the negative effects of free trade itself. Among them are about the unpreparedness of product legislation that can guarantee consumer protection.

The significance of regulating of consumers’ rights in Indonesia is stated in the Consumer Protection Laws (acronymed UUPK in its native language) which is a part of the implemented *Konsep Negara Hukum Kesejahteraan Pancasila* containing the concepts of *rechtstaat[[4]](#footnote-4)* and *rule of law*[[5]](#footnote-5), with the difference in principle lies on its statehood philosophy which is based on the philosophy of Pancasila.[[6]](#footnote-6)

Along with the process of production and marketing that are sophisticated increasingly, those are sharpen and increase the distance between suppliers and consumers and also supported by the difference principal in doctrine that are adopted by Book of Civil Code/Book of Commercial Law is liberalism while the philosophical doctrine of philosophical Pancasila of Indonesia is Pancasila that its economic political thinking is the people's welfare with a balanced, harmonious and harmonious life, in fact, it has not been included in many laws and regulations which are currently urgently needed.

Furthermore, the government has also committed through various international agreements such as GATT (Generala Agreement on Trade and Tarif), WTO (World Trade Organisation), AFTA (Asean Free trade Area) and more to become one of the members who involved in the free trade era[[7]](#footnote-7). This free trade requires the teamwork between government, produce, and Indonesian consumer. Based on Article 3 UU No. 8 Year 1999 regarding Consumer Protection is, “Each individual or business body, either incorporated or not incorporated which is established under the jurisdiction of the Republic of Indonesia, either individual or contracted together through agreements which organize effort in various economic fields”.

The authoritative body plays are the important role in planning, supervising and controlling in order to create a legal protection system for maintaining the security of society through protective laws which are fair to both suppliers and consumers. The lacking consumer protection is one of the reasons why the country fails in the free trade.[[8]](#footnote-8) The consumers mentioned are the final consumers who are the users of the product, not the intermediary consumers.[[9]](#footnote-9)

Hence, more information should be provided to the consumers. Unfortunately, to hope all consumers have ability and a big chance to access the information is a difficult matter (consumer ignorance).[[10]](#footnote-10)It demanded awareness of suppliers to perform their duty and take responsibility as mentioned in Article 5[[11]](#footnote-11) of the UUPK especially related to losses from dangerous products including hidden defective products. [[12]](#footnote-12)

Based on the United Nations Resolution No. 39/248 Year 1984, the rights of consumers that must be protected include the following:

1. The protection of consumers from hazards to their health and safety;
2. The promotion and protection of consumers economic social interest;
3. Availability of adequate access for consumers to give them ability in decide their choices according to their own wishes and needs;
4. Consumer education;
5. Availability the effort of an effective compensation;
6. A freedom to establish a consumer organization.[[13]](#footnote-13)

However, regardless from all the causes of hidden defective products and no matter how large the dynamics of market economy to be developed, it still needs intervention state in form of regulation that will be very influential in the process of economic development and the control of free market itself,[[14]](#footnote-14) through the application of product liability that accordance with *rechtstidee* and *staatsidee* of Indonesian. Although law is not a goal but it is an effort to achieve goals.[[15]](#footnote-15) According to Salmond which explained by Fitzgerald, the existence of law itself is aimed to integrating, coordinating, limiting and protecting various interests in society.[[16]](#footnote-16) The intended law is consumer protection law system.

Furthermore, based on the principles of responsibility in law that are generally defined as follows:

1. Liability based on fault is a general principle of civil and criminal law, which states that a person can be liable in general if it is found the element of his error;
2. Presumption of liability is the principle that the defendant is always considered responsible until he can proves his innocent, it is means that the burden of proof is on the defendant;
3. Presumption of non liability only known within scope of very limited consumer transaction, no longer totally applied and lead to principle of responsible with a limitation of compensation in the form of money;
4. Strict liability is the principle of responsibility that defines an error not as a decisive factor;
5. Limitation of liability is responsibility principle that usually combined with other principle of responsibilities.[[17]](#footnote-17)

From the five legal liability principles mentioned above, in order to provide law protection for consumers who are disadvantaged by the existence of hidden defective products that provide a sense of fairness, then the need of idea to protect consumers from possible harmful products of hidden defective products, alternatively is to be able applying product liability principle with strict liability principle that accordance with the ideals of country and legal aspirations of Indonesia that is through resolution with development of tort doctrine in general in Article 1365 of present Civil Code which is very important in consumer protection law in Indonesia, especially for hidden defective products. Although explicitly the concept of strict liability of hidden defective product in Indonesian law has contained in Article 1504 of Civil Code.[[18]](#footnote-18)

The thought about the need for alternative effort of consumer protection through strict liability principle is caused the law hasn’t decided yet the error requirement/error as determining factor with a proof burden by the produce, which is unknown in Indonesian legal system, because Indonesia principle of *bewijsleer* or evidentiary teaching that stating those who postulate it are obligatory to prove the arguments and the events that is referred to, as found in Article 1865 of Civil Code. Article 1865 “ Any person who arguing that he has aright, or in order to affirms his or her own right or to deny rights of others, refers to an event, it is obligatory to prove such right or consent”, here is where there is a legal vacuum to provide optimal protection for consumers through regularization in legislation.[[19]](#footnote-19)

With the product liability principle[[20]](#footnote-20), with its strict liability, motivated by imbalance of responsibility between produce and consumers as a form of responsibility of these produce, produce are required to be careful of their products. Nowadays, produce is very demanding to know in advance how the interests and past experiences of consumers and the latest information about these products, so that Indonesian produce can produce qualified products in order to be able compete in global markets.

Although product liability with strict liability principle is the western legal culture from the state of *anglo saxon* system as originator state of liability principle application of produce with strict liability principle, [[21]](#footnote-21) which later undergoes changed in development in some adopted countries including Indonesia.[[22]](#footnote-22)

However, if public’s sense of justice and justice requires the other, then based on Article 5 paragraph (1) of Law No. 48 of 2009 about Judicial Power which reads “The Judges and the Judges of Constitution are obliged to explore, follow and understand legal values that live in society”, to achieve and fulfill sense of justice especially consumers as disadvantaged parties that fulfilling consumer rights without intent to reduce interest of produce to achieve commercial objectives in their business, because consumer rights are obligations of produces and vice versa, so that the achievement State of Pancasila Welfare Law provides sense of justice with achievement of consumers’ right without reducing the consumers interest to achieve the commercial aim in the form profits. Based on the background above, then in this paper will be continue discussed about the legal bases and significance that are the basis for the application of strict liability principle of produces due to the loss of hidden defective products as a consumer protection effort in Indonesia

**RESEARCH METHODS**

The type of research of this paper is a normative study, which is a form of legal research that was conducted by studying the literature materials and secondary data only. This research is analytically descriptive in which the result of this study is expected to describe development of liability of product in initiating strict liability of the development of tort doctrine as a form of consumer protection in future.

The analysis was done by analysing the content of analysis to the secondary data and decided conclusion with deductive techniques, namely decided conclusions from general facts to specific ones that are carried out after obtaining a clear, complete, and systematic description of the answer to the problem.

**ANALYSIS AND DISCUSSION**

**1. Legal Protection for Consumer in Indonesia and Law No. 8 Year 1999 concerning Consumer Protection**

**a. Consumer Protection Before The Law of the Republic of Indonesia No. 8 Year 1999 concerning Consumer Protection**

The idea to provide consumer protection is develop from the cases that happened in the society. The weak of consumer position needed legal protection. Indonesian is required to embrace a new paradigm as an alternative consumer protection effort in the system of consumer legal protection in Indonesia in the future.[[23]](#footnote-23) Based on the purpose from the legal action itself is giving protection to the society. Consumer legal protection[[24]](#footnote-24), it should be gotten serious attention, as it is corcerning not only the consumers who are getting protection but also the produces who have the same right, because whether the produces or the consumers are by itself have their own right and liability, what is the right of the consumers are the liability of the produces and vice versa.

Consumer protection is giving a description of legal protection that given to the consumer in his effort to fulfill it need from the right which is detrimental the consumer itself.[[25]](#footnote-25) Article 1 number 1 law No.8 of 1999 concerning Consumer Protection is mentioned “consumer protection is all the effort to unsure legal certainty to provide consumer protection”. In the history of human, including inodonesia, showing that losses that are experienced by consumers of products are often from businessmen, so that they need to be regulated in order not to harm consumers. The form of legal protection that is provided by a country has two characteristics, namely prevention (prohibited) and punitive (sanction).[[26]](#footnote-26)

Therefore, consumers protection is purposed to regulate the right and obligations of produces and consumers, and how to maintain the rights and to carry out these obligations. Regulation of rights and obligations and prohibitions for businessmen intended to create a condusive climate of business for the expansion and economic in generally, hence the healthy relation between businessmen and consumers. Article 4 of Law No.8 of 1999 concerning Consumers Protection (UUPK) which contain the basic rights of consumers and consumers liability in accordance with the Article 5 of law No.8 of 1999 concerning Consumers Protection.

To achieve reciprocal relationship between the businessmen and the consumers, before the birth of Law No.8 Year 1999 concerning Consumer Protection, normatively no certainty in legal standing, because it has not summarized in form of law yet. Meanwhile, the main problem of consumers’ protection is to protect the interest of every single human in general that must be protected by the state.

The balance of protection between produces the consumers is a legal function according to Roscoe Pound as facility of community life control by balancing the interests those are found in the society in other word means as social control facility.[[27]](#footnote-27)

Before the birth of consumers protection law, protection effort to the consumers were less felt by the community because they were spread in various laws and regulations and their implementation were not felt as a protection for consumers.[[28]](#footnote-28) The jurdis venture in giving consumers protection in Indonesia, before the birth of law No.8 Year 1999 about consumers protection, (UUPK), there were already provide various legistations, in outline it could be divided in the private legistation and public legistation, but the distinctions were not rigid because in many legalisms there were found private aspect and also public such as the Law on brands.[[29]](#footnote-29)

The absence of one specific legalism in the consumers protection filed, in fact they being spreaded in some regulation about the consumers protection rules, these problems would be discuss further, wether after the Law No.8 year 1999 concerning Consumers Protection, the condition of consumers protection in Indonesia has truly achieved or on the contrary or no movement.

**b. Consumers Protection after The Law No.8 1999 concerning Consumers Protection**

The establishment of legislation rules is formed by the state institution has various aims and various reasons named legal policy. The legal policy can be differentiated into two dimension, they are basic policy and law policy. In the process of establishing legislation law policies are needed to find out the purpose or reasons that arise behind the law of a statutory regulation that is translated into the law itself and the formulation of the article formulation.[[30]](#footnote-30)

The birth of consumers protection law is also cannot be separated from the policy paradigm priorities and action in political, economical dan establishment of law.[[31]](#footnote-31) The law policies have a political content that can be used for positive or negative things, they are depended on what the legislator want.

The formulation of enactment policy are contained in consideration of weighing or public explanation also on formulation of the enact or the combined of those three. In Indonesian consumers protection law, the formulation of policy is to provide a legal protection to the consumers from the actions of produce that harming the consumers, and also intended to give a legal certainty from the arbitrary actions that harming the produce just for the interest of consumers protection. This mean even so it was named consumers protection law, it doesn’t means the produce interest is not being a concerned, especially because the national presence is largely determined by the actor of business.[[32]](#footnote-32)

Although the born UUPK that is be expected to maximing legal protection for consumers in Indonesia, evidently it hasn’t achieved yet a development like other developing countries. The slow development of consumers protection in Indonesia is because of the government action generally is still tends to protect industrial interests which are considered as essential factors in development and also the stage of industrial development is only the beginning stage unlike the developed countries which have already established their industrial development, so that the implementation of rules are purposed to provide protection to the consumers is less functional, because it isn’t regulated strictly.

Even so, in the Article No.8 Year 1999 concerning Consumers Protection has been developed an effort to give balance between the consumers and the produces, eventhough there are still many lack of it, regarding provision that are difficult to implement properly.

**2. The Claims for Compensation of Hidden Defective Product through the Principles** **Product Liability of Produces in Indonesia**

**a. The Basis of Compensation Claims In Indonesian Consumers Protection**

The birth of Law No. 8 Year 1999 concerning Consumers Protection is not the beginning and the ending of Indonesian consumers protection problem, as said in consumers protection law for the establishment of implementing regulations from several articles of this law, and the possibility of other laws that provide consumer protection in the future.

The Consumer Protection Law formation is expected to encourage a balance of position between businessmen and consumers. The fact is the consumers is always the one that harmed, with compensation provisions in the Consumer Protection Law Article 19 Verse (2) in form of refunds or replacement of goods and/or services of a similar or equivalent value or health care and/or compensation in accordance with the provisions of the applicable legislation.

This provision illustrates the development of a balanced position of produces and consumers, even though the provisions have not been sufficiently capable of providing legal certainty that can be done by consumers who suffer losses due to hidden defective products, namely by not including articles that determine the basis of demands for compensation from consumers against produces.

The hidden defective product in this research that are:

every item that has been added value and usefulness by a businessmen through a production process before being traded which contains disability results in not fulfilling the purpose of manufacture or cannot be used properly or has reduced function or does not meet consumer safety requirements that are unknown to consumers or from Initially, it was not promised that the produce would not be responsible for defective products that had been sold for the defect of the product of the produces, whether the defect was known and/or unknown to the businessmen which caused the consumer to assume strict liability for the loss suffered.[[33]](#footnote-33)

In line with the corrective justice from Aristoteles[[34]](#footnote-34), that is justice that focus on the correction of something wrong throught the similarities position between businessmen and consumers to get legal certainty and protection from the government in regulation of strict liability of produces towards the losses due to hidden defective products.

Hidden defects indicate that the defect occurred because the consumers was not careful about the result of product that they choose. Hidden defects are the part of the defective product that can be in the form of:

* 1. Production defect

This production error can be distinguished into two part, the first is errors that include failure of the production process, product installation, failure in inspection facilities, whether due to human negligence or machine irregularity and the similar things. And second, the products intended by the maker, but they are proved to be unsafe in normal use;

* 1. Design defects

The design defect is the defect that happened in preparation product stage. This is consist of design, composition or construction;

* 1. Inadequate information defects

This inadequate information is related to the marketing of a product, where the safety of a product is determined by the information that is provided to the users in form of product labeling, how to used, warning of certain risk or others, so the manufacturers and suppliers can provide guarantee that their products can be used as intended. Thus, the producers are obliged to pay attention to the safety of their products. This does not end only in the circulation of products.[[35]](#footnote-35)

From the types of defective products mentioned above, it cannot be used as a standard to classify the products condition as a defective product.

Here are several conceptual standards for defining product as a defective product:

* 1. Consumer expectations

The standards of consumer expectation are usually with merchantability standard (eligibility for sale), it means that the product sold must at least be in accordance with the usual goals where the product are used;

* 1. Alleged of seller’s knowledge

That is: Will the seller be negligent in placing their product on the market if the seller knows the dangerous condition on the product?;

* 1. Balance of risks and benefits

The majority of courts use risk-benefit analysis to determine defects, especially in cases of design. Risk-benefits can be understood as something that similar with the risk of usability. If the cost to change is bigger than the risk but it is not been change, then the product is not classified as defective. While if the cost is smaller than the risk, but no changes are made, then the product is classified as defective;

* 1. *State of the Art*

It is similar with *unavoidably unsafe defence*, whereas the lack of knowledge or the ability to eliminate suspected dangers is used to determine whether a product is truly safe.[[36]](#footnote-36)

By taking into the standard conceptual from the defective products above and by considering the danger from hidden defective products whose regulation has not been written yet normatively in Article of UUPK. This condition cause an injustice especially consumers who directly bear the impact of losses. To deal with this phenomenon, what must be done is to clarify the forms of the relationship between produces and consumers as a basis for demanding compensation. Here are the forms:

1. What is the relationship between the seller and the consumer base on contractual relationship, it means that both them are preceded by an agreement, so the basis for compensation claims is based on a default, or;

2. If there is no contractual relationship between the seller and the consumer, then the basis for the compensation claim submitted by the consumer is based on tort.

Based on the two basis claims to prosecute businessmen for their products that are circulated in the market, then the foundation as the basis for claiming compensation due to the existence of defective products are through the tort claim which is generally regulated in Article 1365 of the Civil Code and based on demands of default that can be done as an effort to protect consumers to demand a compensation.

1. **Philosophical Basis of the Importance of Compensation Claims of Hidden Defective product in the Protection of Consumers with the Strict Liability of Produces**

From the both of basics for claiming compensation above, if the basis of the claim is the default; it means that the relationship between businessmen and consumers was preceded by an agreement at the beginning. In fact with the current development of economic and technological trade, not all consumers can engage directly with produce in engagement through written agreements or verbal.

Direct relationship is the absence of an agreement between the consumers and the produces, this condition does not means that consumers cannot claim compensation towards produce who distribute products that cause losses to the soul, physical, property or to the product of item itself.

In the engagement law, the sources are not only an agreement but also from the law. Based on the sources of agreement in the form of laws, they are divided again into laws itself, the laws due to human actions in accordance with the laws and into those who break the laws. in this case if it is then associated to the basis of claims of compensation that are not based on the contractual relations with the division of the engagement sources above, then it is deemed to be related to the source of the engagement originating from the tort law.

At this time, the effort that can be made to provide consumers protection that are harmed due to hidden defective products is by developing tort doctrines and including liability product with the principle of strict liability. Article 1365 of the Civil Code, mention that “Every tort that causes harm to others, obligating people who because of their mistake cause a loss for others, to compensate the loss ".”. At the beginning, this tort law only interpreted as acts that are against to the law but since *Drucker Arrest* in the Cohen and Lindabeaum cases that were decided on the 31st January 1919, there were an expansion of the tort law, such as:

1. Violate the rights of others;
2. Contrary to the legal obligation of the perpetrator;
3. Contrary to the decency;
4. Not in accordance with appropriateness in community in terms of paying attention to the interests of others.[[37]](#footnote-37)

Although there is a broad understanding of the tort law which contain the meaning of doing (active) or not doing (passive) as long as it is contrary to the meaning of tort in a broad sense. But according to the theory of error, that liability will arise after an error occurs[[38]](#footnote-38), so that even if there is an error in the provisions of the element does not exist, in fact there is only a presumption that there is none, so actually the element of the error is still exist.

Basis of compensation claims based on a default or through a tort, beside the problem of the element of error and the absence of an element of error, and the obligation of the consumer in the form of proof of the burden returned to the postulated, as in Article 1865 of the Civil Code.

The position of consumers who are weak even in economic, knowledge and experience of a process and distribution of a product especially hidden defective products to prove errors and even shows a causality relationship from a mistake that cause losses that is suffered by the consumers is to complicate and even it is an impossible thing that consumers can do in general.

This burden proof problem makes consumers reluctant to claim compensation for their losses which endanger in physically and / or mentally, and / or property, and/or environment, and/or the product itself through litigation after the procedure that through non-formal path that can be done directly between produces and consumers by advancing the elements of kinship found a deadlock.

Therefore, it is need legal renewal and the courage of law enforcers by modifying the tort doctrine in product liability with principle of strict liability, by not determining the error factor as a determining factor with the burden of proof on the businessmen in demanding compensation that were done by consumers, whether the hidden defects are known by the businessmen or not known, but are not known by consumers or it is not agreed from the beginning that the produces does not take any liability if there is a loss in the future to the consumers.

However, there are exceptions, if the defect has already known by consumers or it has been agreed that the risk of defects is borne by the consumers, or for the reasons of *force* *majeur* and / or the businessmen can prove the loss suffered by the consumer is not because of the actions of the produces.

It is seen that there is a need of consumers who are also the part of all society to demand a change in the system of liability from “error” concept to “risk” concept in demanding compensation. In this condition, it is needed a law that are not only as a tool but also as a means of society renewal, which is a central theme of social engineering through law, but how do we move the social’s behaviour or to reach the desired conditions through the law, as the opinion of Mochtar Kusumaatmadja.[[39]](#footnote-39)

From the description above, it shows how important the legal functions are, in generally are:

1. Facilitating function, in this case includes facilitating so that it is achieved orderliness.
2. Repressive function, in this case includes the use of law as a tool for the power elite to gain their goals.
3. Ideological function, in this case includes ensuring the achievement of legitimacy, hegemony, domination, freedom, independence, justice and others.
4. Reflective function, in this case the law reflects a mutual desire in society, so that the law must be neutral.[[40]](#footnote-40) (Fuady 2013).

Paying attention to these four legal functions in general, it still must be returned to the main purpose of the law existence is to fulfil the sense of justice. Sense of justice that wants to be achieved in consumer protection in the principle of strict liability of businessmen towards losses due to hidden defective products is the fulfilled of consumers’ rights which are the obligations of businessmen by not reducing the interest of businessmen in pursuing commercial goals from their efforts to gain profits.

For the Indonesian people, the intended justice is based on Pancasila. Conception and perception of justice must be in accordance with the feeling of a nation. Likewise in the case of products liability of the businessmen from the existence of hidden defective products in market. Law is something that is binding and if the bond is related to humans, in other words, the bond must reflect a sense of justice. The justice as a conception is a justice of *sollen’s* world, however the *sollen’s* world of justice is also seen in the formulation of the efforts to translate the world of ideas into the *sein* world (reality).

The role of the state to realize legal protection for all its citizens, both businessmen and consumers is aligned with the objectives which contained in paragraph IV of the Preamble of 1945 Constitution of Republic of Indonesia. The 4th paragraph of the Preamble of the 1945 Constitution confirms,

…, then the national independence is arranged in an arrangement Republic of Indonesia which is people sovereignty based on;   
The Belief in the One and only God, on just and civilized humanity, on Indonesian unity and on democratic rules that is guided by the strength of wisdom resulting from deliberation/ representation, so as to realize social justice for all the people of Indonesia.

The basic motivation for the enactment of the UUPK is also that every community both individually and communally is a consumer who always benefit the product. This is the background motivation for understanding that the philosophy of national development includes the development of law that provides protection for consumers to form Indonesian people as a whole.

Therefore, the discourse of principle of strict liability of the businessmen to losses due to hidden defective products as an alternative settlement of compensation of consumers, then normatively for legal certainty must be contained in Law No. 8 of 1999 concerning Consumer Protection as a short-term step, while the long term is by published of a special law which regulates the strict liability of produces due to the loss of hidden defective products.

The changes that are preceded by the changes in law/ legislation, are generally preceded by the desire in the community to change the law/ legislation, which if the legal changes are successful, it will result an automatically change of mindset and attitude of the community. Therefore, to achieve it in the future, the mindset of consumers must be formed with awareness of their rights and to obtain their rights.

**CONCLUSION**

That the development and the progress of trade economics in the current era of globalization and free market have positives and negatives impacts. The need for cooperation of all parties who are involved in this process including the government, businessmen and the consumers as a society in broad, to achieve a balance of position between each party.

The foundation as a basis for claiming compensation for the existence hidden defective products is through the demand of the Tort which is generally regulated in Article 1365 of the Civil Code and on the basis of demands for default.To further overcome the negative impact of the existence of hidden defective products which are part of defective products in the future as well as the weak position of consumers and a proof system that burdens consumers who have to prove what is postulated is by changing the thinking paradigm of the parties involved such as the state, businessmen, consumers and law enforcers to change the liability system from the concept of error to the concept of risk, by developing the doctrine of tort in product liability with the principle of strict liability, because of the weak position of consumers.

The background motivation of consumer protection that becomes its importance sense is the philosophy of national development including the development of laws that provide protection to consumers to form Indonesian people as a whole. Consumer protection is intended not to reduce the interests of businessmen to pursue the commercial purpose of their business in the form of obtaining profits, so that the fulfilled of consumer’s rights which are the obligation of the businessmen and also to the fulfilled of the businessmen’s rights which are the obligations of consumers, so that social justice can be achieved from the development process as stated in the fourth paragraph of the 1945 Constitution of the Republic of Indonesia.

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1. The definition of globalisation is the change of every aspect of life including religion, socio-culture, economy, politic, security, education and more. According to Abid al Jabiri, globalisation is the elimination of the limiters or boundaries of the country and nation in the economic field, allowing all issues related to economy to be resolved without obstacles from all corners of the world., Abdul Manan, *Aspek-Aspek Pengubah Hukum*, Jakarta: Kencana Prenada Media, 2006, p57-58. From the economical perspective, the most fundamental definition of globalisation is the expansion, development and integration of goods and finance of the world., Ginandjar Kartasasmita, *Peran Pelaku Ekonomi dalam Sistem Ekonomi Pancasila***,** received at Rapat Kerja BP7 Pusat Jakarta, 3 December 1997, p1. [↑](#footnote-ref-1)
2. There are multiple factors which show that consumers are disadvantaged compared to the suppliers because of their weak positions. Another factor is the lack of knowledge regarding the production process and raw materials. Besides that, incompetence in bargaining is also a factor, Janus Sidabalok, 2006, *Hukum Perlindungan Konsumen,* Bandung: PT. Citra Aditya Bakti, 2006, p4. [↑](#footnote-ref-2)
3. Yusuf Shofie, *Perlindungan Konsumen dan Instrumen-Instrumen Hukumnya,* Ed. Cet. Ke-3, Bandung: Citra Aditya Bakti, 2009, p312., Janus Sidabalok, 2006, *Hukum Perlindungan Konsumen,* Bandung: Citra Aditya Bakti, p2. [↑](#footnote-ref-3)
4. Rechtstaat is a concept where the national laws are established and expanded revolutionarily and focused on Civil law*.* According to F.J. Stahl, a national law must have four elements which are (1) recognition and protection of basic human rights; (2) power is divided; (3) governing must be based on laws, and (4) administration must be just., Azhary, 1995, Negara Hukum Indonesia: *Analisis**Yuridis Normatif tentang Unsur-Unsurnya,* Jakarta: Universitas Indonesia Press, 1996, p49. [↑](#footnote-ref-4)
5. Rule of law is a concept of state law that is established and expanded revolutionarily and focused on Common law. According to A.V. Dicey, a national law must consist three elements which are (1) *supremacy of law*; (2) *equality before the law*; (3) *human rights*., Azhary, *Note* 2, p49. [↑](#footnote-ref-5)
6. The soul and contents of the Pancasila Law State are (1) the country desires congeniality between the ruler and the citizens based on concordance; (2) establishment of functional relationships which are proportional between the country’s authority; (3) resolution of problems through discussion while fairness is the final means; (4) stressing on the balance of basic human rights and responsibility., Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, Surabaya: Bina Ilmu, 1987, p84. [↑](#footnote-ref-6)
7. Celina Tri Siwi Kristiyanti, *Hukum Perlindungan Konsumen*, Jakarta: Sinar Grafika, 2008 , p7. [↑](#footnote-ref-7)
8. Jagnes Delors, 1995, “*T*he Future of Free Trade in Europe and The World*”*, *Fordham International Law Journal* Vol. 18. p723., in the paper of Erman Rajagukguk, 2000,*Pentingnya Hukum Perlindungan Konsumen dalam Era Perdagangan Bebas,* p4. [↑](#footnote-ref-8)
9. Ahmadi Miru and Sutarman Yodo, *Hukum Perlindungan Konsumen,* Jakarta: PT. RajaGrafindo Persada, 2007, p4. [↑](#footnote-ref-9)
10. Consumer ignorance refers to the inability of the consumers to receive information due to the advancement of technology and the variability of the products marketed”. Celina Siwi Kristiyanti, *Note 2,* p35. [↑](#footnote-ref-10)
11. The contents of Article 5 UUPK are (a) act well during the transaction or service; (b) provide information which are true, clear and honest regarding the condition and guarantee of the product or service as well as provide explanation, uses, repair and maintenance; (c) treat consumers truthfully and honestly without being discriminatory (d) guarantee the quality of the product or service based on the standard of the product or service; (e) provide consumers with the opportunity to test out product or service as well as provide guarantees for the product or service; (f) provide compensation, redress or replacement when the product or service fails to satisfy the consumers and the agreements [↑](#footnote-ref-11)
12. Emma Suratman, (Team leader) manuscript Law Academy related to Responsibility of Production in Pharmaceutical Field towards Consumers Year 1990, 1991, BPHN Justice Department RI, p9., inside Az. Nasution 2001, *Hukum Perlindungan Konsumen*, Diadit Jakarta: Media, 2001, p248., Defective products are products which fail to fulfill their purposes either intentionally or unintentionally through mistakes during the production process or delivery, or failure to prepare conditions for the consumer or belongings during usage. Hidden defect means “defect which is hard to discern by normal buyer, not overly thorough buyer because the overly cautious buyer may be ableto detect the defect., Subekti, *Aneka Perjanjian,* Cetakan Keenam, Bandung: Alumni, 1984, p20. [↑](#footnote-ref-12)
13. Erman Rajagukguk, The Importance of Consumer Protection in the Globalisation Era, in the book *Hukum Perlindungan Konsumen,* edited by Husni Syawali dan Neni Sri Imaniyati, Bandung: Mandar Maju, 2000, p3. [↑](#footnote-ref-13)
14. According to Stiglitz, one of the roles of government economic development is to provide tool or legal framework that deals with all economic transactions. This is very important as it will provide certainty of economic law, security and justice. The government acts as regulator. The rules required in business such protecting labor, consumers and the environment. The rules relating to exchange rate ssystem, international trade traffic, or with respect to honest competition are also a part of government, Stiglitz by Edy Suandi Hamid and MB. Hendrie Anto, *Ekonomi Indonesia Memasuki Milenium II,* Yogjakarta: UII Press, Yogjakarta, 2000, p82-83. [↑](#footnote-ref-14)
15. Related to this legal function, Prof. Sudino states that “the law is not a goal, but a means or tool for achieving a goal that is nourishist and develops due to external stimuli.” He further mentions the ultimate goal of law namely to create a orderly society order, creating order and balance as to protect human interest, Sudikno Merokusumo, *Mengenal Hukum,* Fifth Edition, Yogjakarta: Liberty, 2003, p40 and 77. [↑](#footnote-ref-15)
16. P. Fitzgerald, 1966, *Salmond and Jurisprudence, Sweet & Mazwel*, London, cited in Satjipto Rahardjo, 2000, *Ilmu Hukum*, Bandung: PT. Citra Aditya Bakti, 2000, p53.

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17. Shidharta, *Hukum Perlindungan Konsumen*, Jakarta: Grasindo, 2000, p59. [↑](#footnote-ref-17)
18. As for Article 1504 Civil Code: “The seller is obliged to bear hidden flaw in selling item, which makes item insufficient for intended use, or reduces wearer so that if the buyer knows defect, he will not buy goods at all, or will not buy them besides less price., R. Subekti and R. Tjitrosudibo, *Kitab Undang-Undang Hukum Perdata*, 10th Edition, Jakarta: Dian Rakayat, 2009, p374. [↑](#footnote-ref-18)
19. According to Indonesian dictionary, the meaning of regulatization is :;the making of ordinary, regular, orderly and symmetrical, *Educational and Cultural Departments*, Kamus Besar Bahasa Indonesia, Jakarta: Balai Pustaka, 1997, p827. [↑](#footnote-ref-19)
20. According Agnes M. Toar product reponsibility are as follows “The responsibilities of producers for products that have been brought into circulation that cause or cause loss due to defects attached to product.” Celina Siwi Krstiyanti, *None 2*, p101. [↑](#footnote-ref-20)
21. The United States is a nation of originators from applying principle of product responsibility businessmen with absolute responsibility principle. The strict liability of company in United States is the restatement of second as codification of United States firm’s strict product liability. The two refernces are Section 402. A Restatement oif Tort containing regulationon seller’s objectively accountable for losses incurred by defective product and Restatement of Tort on business responsibility of product of losses incurred by product without attributes as published by seller <http://www.blogster.com/komparta/strict-product-liability/> Retrieved 2011, May 19. [↑](#footnote-ref-21)
22. In Indonesia this can be seen in Law No. 32 Year 1999about Protection and Management of Living Environment, Law No. 41 Year 1999 on Forestry and Law No. 8 Year 1999 on Consumer Protection. [↑](#footnote-ref-22)
23. Holijah, 2018, “Examining the Reverse Verivication of Compensation Demand for Consumers of Products in the Free Trade Era”. *The Journal Of Social Scienses Research.* (4/12), p395. [↑](#footnote-ref-23)
24. One other opion, consumen legal protection is one part of the bigger legal consumen. According to Az. Nasution, as such saying that legal consumen does have a principles or rules that are unified, and also contain properties that protect the interest of consumers. As for the legal consumer protection can be describe as the whole principles and rules which govern the relation and various party problems with each other that connected with good and/or consumers services in life., Shidharta, *None2,* p9-10. [↑](#footnote-ref-24)
25. Janus Sidabalok, *Hukum Perlindungan Konsumen di Indonesia,* Bandung: PT. Citra Aditya Bakti, 2006, p9. [↑](#footnote-ref-25)
26. Rafael La Porta, 1999, “Investor Protection and Corporate Governance”, *Journal of Financial Economics*, (8/10), p9. [↑](#footnote-ref-26)
27. Peter Mahmud Marzuki, Without years, *Pembentukan Hukum Ekonomi Indonesia,*Universitas Airlangga, Surabaya, p3., Pick by dari Edgar Bodenheimer, *Jurisprudence, The Method and Philosopy of Law,* Cambridge: Harvard University, 1962, p111. [↑](#footnote-ref-27)
28. For example the law that giving consumers protection since year 1961, that is Law No.10 year 1960 concerning goods, then followed with various form of laws.The result of the investation of legistation that been done with the framework of the academic preparation of the consumers protection law. There is eight field, that is in health and medicine, food and drinks, electronic devices, motor vehicle, metrology and earth, industrial, quality control of goods and living environment., Ahmadi Miru, *Prinsip-prinsip Perlindungan Hukum bagi Konsumen di Indonesia,* Jakarta: Rajawali Pers, 2011, p68-69. [↑](#footnote-ref-28)
29. Ahmadi Miru, *None2*, p55-46. [↑](#footnote-ref-29)
30. Hikmahanto Juwana, 2005, “Politik Hukum Undang-Undang Bidang Ekonomi di Indonesia”, *Jurnal Hukum,*  (01/1), p24-25. [↑](#footnote-ref-30)
31. Solly Lubis, *Development of Nasional Law,* Paper delivered in development of nasional law seminar V111, Denpasar, 14-18 July 2003, p3-5. [↑](#footnote-ref-31)
32. Ahmadi Miru dan Sutarman Yodo, *Hukum Perlindungan Konsumen,* Jakarta: PT. RajaGrafindo Persada, 2004, hlm. 1. [↑](#footnote-ref-32)
33. Holijah, Holijah, “Tanggung Jawab Mutlak Pelaku Usaha terhadap Kerugian Akibat Produk Barang Cacat Tersembunyi sebagai Upaya Perlindungan Konsumen diIndonesia”*,*   
    *Dissertation Pproposal*, FH-UNSRI, Palembang: FH-UNSRI, 2013, p97. [↑](#footnote-ref-33)
34. Carls Joachim Friedrich, 2004, *Filsafat Hukum Perspektif Historis*, Bandung: Nuansa dan Nusamedia, 2004, p11. [↑](#footnote-ref-34)
35. H. Duintjer Tebbens, *International Product Lability, A Study of Comparativeband International Legal Aspect of Product Liability,* Sijthoff & Noordhoff International Publisher, Netherlands, 1980, p7-9. [↑](#footnote-ref-35)
36. Jerry J. Philips, 1993, *Product Liability*, St. Paul Minnesota: West Publishing Company p10-21., in Ahmadi Miru, 2011, *None 2,*p27-32. [↑](#footnote-ref-36)
37. Van Dunne J.M. dan Gregor v.d. Burght, 1987, *Perbuatan Melawan Hukum. Terjemahan L.S. Pusponegoro*, Dewan Kerja Sama Ilmu Hukum Indonesia-Belanda, 1987, p9., Wirjono Prodjodikoro, 1990, *Perbuatan Melawan Hukum,* Bandung: Sumur, Bandung, 1990, p14. [↑](#footnote-ref-37)
38. Van Dunne J.M. dan Gregor v.d. Burght, *None 2*, p66. [↑](#footnote-ref-38)
39. Sadjipto Rahardjo, *Ilmu Hukum***,** Bandung: PT. Citra Aditya Bakti, 1996, p65. [↑](#footnote-ref-39)
40. Munir Fuady, *Teori-Teori Besar (Grand Theory) dalam Hukum,* Jakarta: Prenada Media Group, Jakarta, 2013, p246. [↑](#footnote-ref-40)