

# Juridical Analysis on Stock Ownership Transfer Mechanism in Scripless Stock Trading System in Stock Exchange

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## Abstract

The advanced scripless stock trading system in stock exchange relates to the principle of law property as it is stated in book II and principles of obligation law in book III of Civil Code. In the Civil Code, it is stated that the ownership can only be transferred if it is in accordance to the existing regulations. Levering principles, as it is regulated in Article 613 of Civil Code, is contradictive to the rules of levering from stocks regulated in Constitution Number 8 of 1995 concerning Capital Market. In fact, normative conflict occurs because after the regulation in Article 55 subsection (1) of Constitution Number 8 of 1995 concerning Capital Market is tested with the regulation in Article 613 of Civil Code, both are contradictive showing that transfer ownership for intangible movable property, including scripless stock in Civil Code, is done physically, cession or endorsement, whereas the constitution of capital market is done by book entry settlement. The mechanism of transfer ownership on the scripless stock trading system in capital market is by transferring the beneficial ownership of stock which is noted by debiting and crediting in the stock account on custodian. The ownership transferred are beneficial ownership on stock, while registered ownership is just transferred after it is converted to scripless stock and trading on-line in stock exchange.

**Keywords:** Transfer ownership on stock, scripless stock trading

## 1. Introduction

Capital market is considered as the effective way to accelerate the development of a country. It is likely to happen because it is a media to collect long term financial from society to be delivered to any productive sectors. When the act of public fund through financial institutions and stock has been well-established, the financial for developing country which comes from foreign countries will slowly decrease.

In relation to rapid development of science and technology, relating to e-commerce for exact, capital market authority then introduces as well as regulates electronic trading system which possibly saves all stocks and other securities in a form of electronic notes, and also the transfer ownership can be done electronically. Through this trading system (known as scripless trading), stocks which are originally paper-based will be converted to electronic note. Moreover, for the finishing transaction, clearing using book entry settlement system from one account to another is done. In other words, scripless trading is a stock trading without physical form or stock certificate, but book entry settlement among stock accounts.

The reason of capital market authorities regulates electronic trading system is that it is assumed that conventional trading system by physical form submission causes big problems because of its inefficient and late transaction process. Moreover, it is difficult to achieve great number and transaction value which finally causes low liquidity. Furthermore, fake stocks that can injure capital market players can occur in physical stock trading (Fuady, 1999:29).

According to Indra Safitri, scripless trading is a trading system having settlement mechanism and stock saving electronically. One of the essential purposes to implement the scripless stock trading system in the capital market is related to the mechanism that can create efficient and save transaction. In other words, scripless trading is an electronic trading system converting stock certificate to electronic form. Thereby, the implementation of the trading system can eliminate any challenges causing obstacles and any disputes in capital market (Safitri, 2010).

The existence of scripless stock trading system in capital market is a product of business technology or, at least, a product of a new and modern system. Thus, phenomena of the relation between law and technology should be involved in the existence of scripless stock trading system in the capital market. In other words, reality should show how advanced scripless stock trading system can be used by law, mainly by law in capital market, so that it can gain maximal benefit for law, law product or law institution, including its impact on law institution development which is in a form of stock trading in capital market.

To realize the implementation of scripless stock trading system, the stocks that will be traded should be saved in the center of depository called Custodian central or Depository and Settlement Institution, an institution established based on Capital Market Constitution Number 8 of 1995 to do central Custodian service. For instance, a company offering activities as depository and settlement institution is Indonesian Central Securities Depository Ltd. established on December 23, 1998 which began its Custodian central service on July 2000. It was at the same time with the implementation of scripless stock trading system in Indonesia. However, compared to scrip stock trading system, submission and transfer of stock ownership is done electronically. On the other hand, commonly, scrip stock trading system is done manually, and it uses stock scrip. Besides, the submission and transfer of the stock ownership is hand to hand. As a result, normative conflict occurs.

The existence of Constitution Number 8 of 1995 concerning Capital Market is then expected to give greater contribution to the development of country so that the target of development in economy can be achieved. In other words, capital market is considered as one of effective media to accelerate the development of a country. In relation to the rapid development of science and technology, capital market authorities introduce and implement trading system electronically which possibly save all stocks and other securities in a form of electronic note, and the ownership settlement can also be done electronically. Through this trading system (known as scripless trading), paper-formed stocks are converted into electronic note, and for the finishing transaction, clearing by book of entry settlement system is done.

The legal foundations of scripless stock trading system implementation are collective custody as they are regulated in Article 55 (1) of Capital Market Constitution Number 8 of 1995 with its explanation as well as the regulations of Capital Market and Financial Institution (now is Financial Service Authority). In this Article 55 subsection (1) of Constitution Number 8 of 1995 concerning Capital Market, it is stated that “the exchange transaction settlement can be implemented through book entry settlement, physical settlement, or other ways regulated with government regulations.”

The advanced scripless stock trading system in capital market has a strong relation to the principle of the law of property as it is regulated in Civil Code. In Civil Code, it is stated that ownership can be diverted if it is implemented based on the existing constitution regulations. For instance, levering of immovable property like stock (Article 511 of Civil Code) is done through cessie or endossemen (Article 613 of Civil Code).

However, levering of stocks existing in capital market is contradictive levering principles regulated in Civil Code which causes normative conflicts. Its contradictory is not that Article 55 subsection (1) of Constitution Number 8 of 1995 concerning Capital Market is contradictive to the regulation stated in Article 613 of Civil Code Book. Instead, the concept of levering for movable property regulated in Civil Code has been outdated. Therefore, Article 613 of Civil Code needs to be refined and re-studied in order to adapt and give benefits for social life. Another crucial issue relating to levering of stock within scripless stock trading system in stock exchange relates to ownership evidence for scripless stock holders because it is crucial to obtain legal certainty.

The basic study of this college is aimed to dig out and discover the ownership transfer of stock within the scripless stock trading system in capital market and ownership evidence for stock holders in accordance to the development and advancement of technology recently.

## 2. Research Problems

Based on the here forth explanation, it can be identified and discussed that:

- a. How is the concept of transfer ownership in the civil law system (Burgelijk Wetboek)?

- b. How is the mechanism of transfer ownership of stock in scripless stock trading system in stock exchange?

### 3. Research Method

Research method takes an important role in a research. In this study, the research method used is:

#### 3.1 Research Design

A research relates to analysis done methodologically, systematically and consistently (Ibrahim, 2011: 294). This research is a normative law study which research is based on logical scientific of normative law established based on scientific discipline and ways of scientific normative law works which object of the science is itself (Ibrahim, 2011: 57). This study, in particular parts, is completed with empirical study about transfer ownership of stock in scripless stock trading system in stock exchange relating to the development of Information Technology (IT). However, it is only as a supporting thing to obtain complete and whole description of research problems discussed in this study.

#### 3.2 Problem Approach

There are some approaches provided in studying law. Through the approaches, information from many aspects related to issues studied can be obtained. The approaches used in this study are:

##### 3.2.1 Conceptual Approach

This conceptual approach utilizes thoughts and doctrines developed in law which is expected to produce relevant definitions, concepts of law, and principle law to encountering issues (Marzuki, 2008: 95). This approach is a qualitative approach used to understand any substantive problems relating to existing values, principles, and legal norm.

##### 3.2.2 Statute Approach

Normative law study with statute approach is implemented through the analysis of all constitutions and regulations relating to issues of law being discussed (Marzuki, 2008: 93). This approach is used because this study focuses on any norms studies in a law regulation which mainly relates to scripless stock trading system. Thereby, ratio legis and basic ontologis of scripless stock trading in capital market can be found (Marzuki, 2008: 94).

##### 3.2.3 Legal Material Sources

Because this study is a normative law study, the main source studied and used is in a form of legal materials consisting of primary and secondary legal materials.

The primary law material is legal entity having binding power and authoritative meaning it has authority. The primary legal materials consist of valid constitution regulations, such as:

- a. Constitution of Indonesian Republic 1995;
- b. Civil Code;
- c. Constitution Number 8 of 1995 concerning Capital Market;
- d. Constitution Number 11 of 2008 concerning Information and Electronic Transaction;
- e. Government Regulation Number 45 of 1995 concerning Procedures of Investigation in the Capital Market Sector;
- f. Government Regulation Number 12 of 2004 concerning the Amendment to Government Regulation Number 45 of 1995 concerning the conduct of Activities in Capital Market Sector. Decisions of Finance Minister of Republic Indonesia relating to stock ownership, stock purchase, stock register, stock trading;
- g. Decisions of Stock Director of Stock Exchange
- h. The Rules of Capital Market and Financial Institution Supervisory Board

The secondary law material (Suratman & Dillah, 2013) is legal materials relating to primary legal, and can

analyze and understand primary legal materials, such as:

- a. A Bill,
- b. Scholars' Scientific Works, and
- c. Research Findings.

### 3.2.4 Collecting and Processing Legal Materials

The collection of legal materials, both primary and secondary legal materials are done through studying and noting legal materials needed. The legal materials are collected using documentation study which is done through existing documents and law regulations study both directly and indirectly relating to transfer ownership in scripless stock trading system which also becomes the research object, such as Civil Code; Constitution Number 8 of 1995 concerning Capital Market; Government Regulation Number 45 of 1995 concerning Procedures of Investigation in the Capital Market Sector; Government Regulation Number 12 of 2004 concerning the Amendment to Government Regulation Number 45 of 1995 concerning the conduct of Activities in Capital Market Sector. Decisions of Finance Minister of Republic Indonesia relating to stock ownership, stock purchase, stock register, stock trading; Decisions of Directors of Stock Exchange and Rules of Capital Market and Financial Institution Supervisory Board. Next, the legal materials are chosen and classified based on the characteristic of legal materials. Therefore, it can be used to analyze proposed problems of the study. The collection of those legal materials is aimed to discuss the proposed research problems easily based on its arrangement.

### 3.2.5 Legal Material Analysis

After all legal materials are successfully collected and identified, analysis on the law institutions is conducted. In analyzing the data in this study, prescriptive analysis is conducted meaning that the analysis is by describing or explaining existing regulations relating to discussed problems in scripless stock trading system to gain conclusion.

## 4. Discussion

### 4.1 *The Concept of Ownership Transfer in Civil Law System (Burgelijk Wetboek)*

As it is stated in Article 570 of Civil Code, the definition of ownership is as the following:

Ownership is a right to enjoy the use of property freely and to behave freely on the property with full sovereignty as long as it does not violate the existing constitution or general regulations defined by an authority having the right to define it, and does not interfere others' rights; all of which by not reducing the possibility of the right revocation for public needs based on constitution and with indemnification.

If the authority of a property based on the ownership, based on the theory of the purpose of law, ownership holder has an authority to control it peacefully and to defend it from anyone who intends to disturb his tranquility in authorizing, utilizing, and using the property. Therefore, it can be concluded that ownership provides two basic rights for its owner:

- a. The right to enjoy the use of a property; and
- b. The right to behave freely on the property with full sovereignty. In this case, owners are free to sell, grant, and hand their property to anyone as long as it does not violate the regulations which force and/or violate public needs or other's right (see the acts against law). Pledging the property as debt guarantees is also included (Wijaya, 2006: 40-41).

Regarding to the explanation, it is stated that owners have a right to transfer their property, for instance, trading the property. The obligation to transfer the ownership involves any behavior which, according to law, is needed to transfer the ownership of the trading property from seller to purchaser.

Because Civil Code has three kinds of properties, i.e. movable property, fixed property, and intangible movable property, Civil Code also provides three ways of transferring ownership which are available for each type of the property.

- a. Authority transfer on property for movable property

Article 612 of Civil Code states:

The submission of movable property as well as intangible property is by real submission on its property by or on behalf of the owner, or by handing keys of building in the name of the property situated. The submission may not be done if the submitted property with another right has been overruled by someone who intends to receive it.

From the regulation, it can be seen that it is likely to submit the key if the traded property is a property in a storage room meaning that its authority submission is done symbolically. On the other hand, if the property has been under the purchaser's authority, the submission is by giving a statement. This way is well-known as "*tradio brevi manu*" (Latin) meaning "short hand transfer" (Subekti, 1982: 21).

b. Title Transfer (Dutch: *overschrijving*) in front of a cadastral employee or title transfer employee or mortgage employee (i.e. according to Article 616 of Civil Code related to Article 620 of Civil Code) for fixed property (immovable).

According to R. Subekti, anything that relates to land, as it is stated in Civil Code Book II, is invalid because of the enactment of Agrarian Principle Constitution (Constitution Number 5 of 1960). Through the Government Regulation Number 10 of 1961 which has been replaced by Government Regulation Number 24 of 1997 concerning Land Registration which is the regulation of the implementation of Agrarian Principles Constitution stating that the transfer of land ownership, such as land trading, have to be proved by a deed made by and shown to Land Acquisition Authorities. The regulation means that the ownership of the land is also transferred at the time the deed is made in front of the conveyancer (Subekti, 1982: 22).

c. *Cessie* for intangible movable property

Article 613 subsection (1) of Civil Code states that "the submission of on behalf of credits and other intangible properties is by making authentic or privately made deed in which the rights of the property are delegated to other people". Article 613 subsection (2) of Civil Code states that "the submission for the borrower has no consequences unless the written submission has been shown, approved, and acknowledged". Article 613 subsection (3) of Civil Code states "the submission of each credit because of handed letter is conducted through letter submission; the submission of each credit because of point letter is conducted through letter submission including the *endossemen*".

Stated by R. Subekti, in relation to trading agreement, the Civil Code follows "*obligatoir*" system, meaning that the agreement of new trading put reciprocal rights and obligations between seller and purchaser: obligating the seller to give the ownership of the sold property and giving the right to demand the payment based on the agreed price, and obligating the purchaser to pay the price of the property and getting the ownership transfer of the purchased property (Subekti, 1982: 23).

In other words, trading agreement, according to Civil Code, means that it has not diverted the ownership. The ownership diverts when "*levering*" or submission is done. Thereby, in Civil Code system, "*levering*" is a juridical behavior aiming to transfer the ownership in three ways which depend on kinds of property as it is previously explained. Then, the explanation about the characteristics of trading according to Civil Code as something which is "*obligatoir*" as it is obviously stated in Article 1459 of Civil Code stating that "the ownership of sold property does not divert to the purchaser unless the transfer is done according to related regulations".

If the regulation of articles in the Civil Code relates to ownership transfer on movable property, fixed property, and intangible movable property are analyzed using the theory of the purpose of law, it means analyzing the position of justice and beneficial side of those articles. The formulation of justice refers to justice principles; one of which is giving anyone's proportion. In this case, it is suitable with Aristotle's statement about the same proportion producing a principle: "giving each person what has been his right" (Tanya, 2013: 42).

In the trading context, according to the theory of the purpose of law, both seller and purchaser have reciprocal rights and obligations, i.e. obligating the seller to give the ownership of the sold property and having the right to demand the payment based on the agreed price. On the other hand, the purchaser obligates to pay the price of the property and demands the ownership submission of the purchased property as the right. However, the concept of trading agreement according to Civil Code has not diverted the ownership because the ownership is diverted after "*levering*" or transfer which is one of juridical acts to divert the ownership. However, the concept of transfer ownership of a property can only be implemented on the conventional trading agreement which is

implemented manually. In the contrary, leveraging cannot be implemented in trading agreement using electronic facilities because conflict of norm will occur.

Recently, the development of technology, especially in Information Technology (IT), has offered benefits for human beings because trading, including right settlement, can be more effectively and efficiently done using technology. In this case, it is suitable with the theory of utilitarian stating that law should be beneficial for human life. The fine law, according to this school, is a law that can bring great happiness for societies (the greatest happiness for the greatest number) (Bentham, 1980: 92).

#### 4.2 The Mechanism of Transfer Ownership of Stock in Scripless Stock Trading System in Stock Exchange

Principally, regulations stated in Civil Code are valid for this scripless trading system. The regulations mentioned relate to leveraging concept and right proof concept based on civil law procedure.

Levering or transferring is a way to obtain important and frequently happened ownership in the society. In this case, it is the law institution which specifically known in civil law system. In civil law concept, leveraging or transferring means transferring property by the owner or in the name of his name to another person; thus, another person has the ownership of that property. Moreover, civil law consists of ways of property submission whether it is moving or fixed property as the following:

- a. Levering of tangible movable property is regulated based on Article 612 subsection (1) of Civil Code in which it is done through the real levering (*feitelijklevering*) or hand to hand levering.
- b. Levering of intangible movable property, such as the submission of credit letter *aan tonder*, regulated in Article 613 subsection (3) of Civil Code, is by the real levering. Besides, the submission from *opnam* credit (on behalf of someone) stated in Article 613 subsection (3) of Civil Code is by *cessie* in which authentic certificate or *onderhands* (under hand) stating the credit has been diverted to another person is made. The submission of *aan order* credit regulated in Article 613 subsection (3) of Civil Code is by letter submission, including *endossemen* stating to whom the credit is diverted which is written behind the credit letter.
- c. Levering of immovable property, especially relating to land, after the Agrarian Principle Constitution Number 5 of 1960 enactment, is made at the time of transfer ownership deed is made in front of the Land Acquisition Authorities (Rokhmatussa'dyah & Suratman, 2011: 220-221).

In recent decades, the development of science and technology has made great development and growth rapidly. The development of science and technology has accelerated information to all over the world. One of which is electronic technology in which electronic commerce in the world trading traffic having positive and negative impact on society's life.

According to Hasan Fawzi, any great changes occur in capital market causing significant changes in stock trading by the development of technology. Moreover, the settlement of stock exchange transaction also develops from the settlement per each transaction to netting, and even scripless settlement was implemented in 2000 (KPEI, 2013).

Rapid development of Information Technology (IT) has achieved positive response by exchange authority which is proven by the implementation of scripless stock trading system. In scripless trading mechanism, it is unlikely for stock exchange as the front office to implement it without support from other institutions, such as Indonesian Central Securities Depository Ltd. and Indonesian Clearing and Guarantee Corporation which back up the stock trading.

The scripless trading system is based on Article 55 subsection (1) of Constitution Number 8 of 1995 concerning Capital Market stating that the settlement of exchange transaction can occur by the settlement of book entry settlement, physical settlement, or other ways regulated by government regulation.

Book entry settlement refers to the fulfillment of rights and obligations existing as the impact of stock exchange transaction which occurs electronically by reducing the stock from one stock account and adding the stock to another custodian. The transfer of stock ownership occurs at the time the stock is reduced from one stock account and then added to another stock account.

In relation to book entry settlement, according to Regulation of Capital Market and Financial Institution Supervisory Board Number VI.A.3, Attachment of Decision of the Head of Capital Market and Financial Institution Supervisory Board Nomor: Kep-/PM/1997 on December 1997 concerning Stock Account on

Custodian, it is further described that in scripless stock trading system in stock exchange, the evidence of ownership for the stock holders occurs by seeing the stock account which are for the beneficial ownership of stock and the transfer of beneficial ownership of stock which occurs by debiting and crediting in stock account on custodian. Then, it is confirmed to stock account holders about the stock trading. In this case, the proof of beneficial ownership of stock is given by custodian to stock account holders in a written form confirmation. In fact, the Regulation of Capital Market and Financial Institution Supervisory Board Number VI.A.3 regulate mechanism of stock ownership transfer of stock in the scripless stock trading system at the time of book entry settlement.

For the registered ownership of stock is proven by the announcement of issuer about sharing rights to registered stock owners if the stock has registered in a stock account in particular time, after the registered stock is in the issuer book on behalf of the owner has been converted to scripless and on line trading.

In contrary to civil law concept (see Article 613 of Civil Code) in which the transfer of right is done using *cessie* or *endossemen*, the regulation in Article 55 subsection (1) of Constitution Number 8 of 1995 concerning Capital Market states that the ownership transfer occurs by having book entry settlement by reducing the stock from stock account from one and adding it to another stock account electronically. Juridical ownership transfer occurs at the time of stock levering or the stock is reduced from one stock account, and then added it to another stock account. Therefore, the concept of ownership transfer for intangible movable property, as regulated in Article 613 of Civil Code, which is considered as outdated and not practical in the scripless stock trading system in stock exchange, has been neglected by capital market players.

Conflict of norm occurs between regulations in Civil Code and Constitution Number 8 of 1995 concerning Capital Market need to be considered. Therefore, constitution makers should review and refine some articles in Civil Code aiming to adapt and give benefits for society's life in this technology era which is advanced and modern.

The adaptation of law to the modern technology can be seen through the use of technology in some constitution regulations, such as Constitution of Indonesian Republic Number 11 of 2008 concerning Information and Transaction Electronic (Constitution of ITE). It occurs to make the law keeps following the development of era and fulfill human needs.

In relation to human need issues, Rahardjo (in Tanya, 2013: 190) states that law (progressive) does not receive law as the absolute and final institution. Instead, it is very determined by its ability to serve human. In other words, the law is not for itself, but for human.

Moreover, Jeremy Bentham, Utilitarianism school scholars, as well as John Stuart Mil and Rudolph von Jhering state that the point of the law is that it has to be beneficial for human happiness (Bentham et al., 1996: 112-113). In conclusion, according to this school, a good law is the law that can produce great happiness for society.

## 5. Conclusion

Based on the explanation relating to problems proposed, it can be concluded that:

Having three kinds of properties: movable property, fixed property, and intangible movable property, Civil Code regulates three ways of transferring ownership in which each of them is available for each kind of property: authority submission on the property for movable property, title transfer for fixed property, and *cessie* for intangible movable property.

The concept of stock ownership transfer in scripless trading system in stock exchange relates to the development of Information Technology (IT), meaning that it does not use physical form, *cessie* or *endossemen*. Instead, book entry settlement is conducted by reducing stock of stock account and adding stock to another stock account electronically. The stock transfer of beneficial ownership is noted by debiting and crediting in stock account on custodian. Besides, the diverted ownership is the stock beneficial ownership. On the other hand, the registered ownership will be diverted after being converted to scripless stock and trading on-line in stock exchange. This system exists because of the existence of science and technology development which has provided easiness and benefits on human life in fulfilling needs. However, conflict of norm in scripless stock trading system in stock exchange as the impact of technology development has to be concerned. Thereby, Legislative Institution (House of Representative) which has a role to create constitution should review and refine the regulations in Article 613 of Civil Code, especially for scripless stock, in order to adapt and give contribution to social life and knowledge development.

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