b. EGMS dated October 19th, 2005 as set forth in the Deed. 128 dated October 19th, 2005 made before the Defendant V (Sutjipto, S.H.), a notary in Jakarta.

c. The result of EGMS dated December 23th 2005;

6. Punished the Defendants to submit to and obey this decision;
7. Punished the Defendant VI to receive the report and to record the result of the decision of EGMS of the Defendant I dated March 17th, 2005 as stated in the Deed. 114, dated March 17th, 2005 made before Buntario Tigris Darmawa Ng, S.H., S.E., M.H., a notary in Jakarta;
8. Declared an unacceptable compensation claim;
9. Rejected lawsuits other than and beyond.

In the intervention, the judges:

1. Rejected the revocation of Intervening Defendant's statement on the previous hearing.
2. II/Intervention Intervention VI/Comparator I, Comparable I/Comparator IV, Comparable IV to pay court fees at all levels of the court which in this cassation level is set at Rp500.000,00 (five hundred thousand rupiahs).

The verdict was read on Wednesday, October 2nd 2013 at the Supreme Court by I Made Tara, S.H., the Supreme Court prescribed by the Chief Justice of the Supreme Court as Chairman of the Assembly, Soltoni Mohdally, S.H., M.H., and Prof. Dr. Takdir Rahmadi, SH, LL.M., the Supreme Court Justices as

members, and pronounced in the hearing open to the public on that day by the Chairman of the Assembly in the presence of the Members and assisted by Dadi Rahmadi, SH, MH, Substitute Registrar and not attended by the parties.

E. Theoretical Framework

Since the dawn of human civilization, in the whole range of our legal, political and moral theory, the notion of justice has always occupied a central place. Although any attempt to define the term precisely, scientifically and exhaustively has presented a baffling problem to scholars of all hues. Consequently, on account of its multidimensionality, its nature and meaning have always been a dynamic affair. Besides, the problem of the definition of justice is beset with the problem of its normative as well as empirical connotations. While in the normative sense it implies the idea of joining or fitting the idea of a bond or tie[10], in an empirical context, it has its relation with the concept of positive law with the result that law and justice become sister concepts. It is owing to this affirmation that the fundamental purpose of the law is said to be the quest for justice which is to be administered without passion as when it (passion) comes at the door, justice flies out of the window.[11]

However, notwithstanding the problem of defining the term Justice, precisely, scientifically and exhaustively, it is submitted that "Jurisprudence can not escape considering justice since justice is ideally – the matter of law. But what if justice can not be known? Justice appears to be an overburdened idea.

[10] Earnest Barker. *"Principles of Social and Political Theory"*, London: Oxford University Press, 1967, p 102.

[11] C.K. Allen. Aspects of Justice, London, Stevens & Sons, 1955, p 34.

Sometimes it is reduced to a question of technique: it is thereby posed as the problem of what will guide the techniques of constructing social order. At other times it appears as a problem of legitimacy or put another way as an answer to the question of what will provide a rational framework. for judging the adequacy of the regulation of human relations."[12]

According to Kelsen[13],[14] there can not be a formal science of justice since even if a theory of justice were logically constructed, it would be based on emotive premises. It is not possible to identify in a scientific way the supreme values that a just order of social life should attempt to provide. It, therefore, appears that the concept of justice is not amenable to rational determination. Consequently, notwithstanding the value and importance of the concept of justice today, one of the central conflicts in legal moral and political philosophy is between those who espouse rights-based theories and those utilitarians in particular who put forward goal-based theories. A requirement is rights-based when generated by a concern for some individual interest and goal-based when propagated by the desire to further something taken to be of interest to the community as a whole.

Utilitarianism as an ethical-political and legal theory is essentially a product of the English mind. It is essentially associated with Jermy Bentham and John Stuart Mill. The theory believes that man is social by nature and is always

[12] Wayne Morrison. Jurisprudence – From the Greeks to post modernism, *Lawman* (India) Pvt. Ltd., New Delhi, Footnote 1 at p 383.

[13] Hans Kelsen is an Austrian lawyer and philosopher.

[14] Hans Kelsen, *Pure Theory of Law*, Barkeley and Los Angeles: University of California Press, 1957, p 385.

motivated in life chiefly by the desire to obtain happiness and avoid pain and that the happiness of each individual involves relations with other individuals which necessitates state regulation of mutual relations of men by legislation[15]. Utilitarian philosophy[16] is thus closely associated with practical ethics and practical politics. The object of legislation of the state is to promote and secure the greatest happiness of the greatest number[17]. The criterion of right and wrong of good and bad which the state should apply is found in happiness and not in divine revelation, dictates of conscience or in the abstract principles of reason. It insisted that all political institutions and public offices must be judged by their fruits and not by their ideality, by their actual effects on the happiness of the people and not by their conformity to the theories of natural rights or absolute justice. Thus this theory is based on the psychological doctrine of hedonism which proceeds on the assumption that man is a sentient being, a creature of feeling and sensibility. The principle of utility or the greatest happiness of the greatest number is the measuring rod by which utilitarian measure and evaluate the public policies and legislative enactments of governments. The state is a necessity for the promotion of the greatest happiness of the greatest number and it is a means, not an end in itself.

[15] Shiavault, *"Utilitarianism and notion of justice."* http://www.shiavault.com/books/concept-of-justice-utilitarianism-and-other-modern-approaches/chapters/2-b-utilitarianism-and-notion-of-justice. Accesed Desember 03 2019.

[16] A utilitarian philosophy, when directed to making social, economic, or political decisions, aims for the betterment of society.

[17] *Ibid.*

Thus, Bentham does not recognize an individual's human rights and therefore the idea of justice is merely a subordinate aspect of utility.[18] His principle of justice is an implicit part of utility as incorporated in legislation. It, therefore, seems that his theory of justice is justice according to the law as laid down in legislation. He was not prepared to recognize a general or specific human right to justice because he had no respect for natural rights. In his "Anarchical Fallacies"[19], Bentham critically examined the French Declaration of the Rights of Man[20] and dubbed them as simple nonsense theoritical nonsense, "nonsense upon stilts".[21] Every just government, Bentham accordingly would have said, had he been writing the American Declaration of Independence, deprives its authority not from the consent of the governed but from the utility of its acts in promoting the happiness of its subjects. The happiness of the body politic consists of promoting security, substance, abundance, and equality and these are the objects which legislators should keep in view while enacting a particular piece of legislation.

John Stuart Mill[22] agreed generally with Bentham's doctrine but he slightly modified it and included qualitative pleasure along with quantitative one. He also insisted that the utilitarian doctrine of happiness was altruistic rather than egoistic

[18] H.L.A. Hart. *Essays on Bentham, Jurisprudence and Political Theory*, Clarandon Press, Oxford, 1982, p. 51.

[19] The phrase "anarchical fallacies" to refer to a species of political fallacy but without any. reference to the French "Declaration". See J.H. Burns, Bentham and the French Revolution.

[20] Declaration of the Rights of Man and of the Citizen (French: *Déclaration des droits de l'homme et du citoyen de 1789*), set by France's National Constituent Assembly in 1789, is a human civil rights document from the French Revolution.

[21] Jeremy Betham, "Nonsense Upon Stilts, Anarchical Fallacies," *Cambridge University Press.* Vol. II, pt. VIII.

[22] John Stuart Mill (1806–73) was the most influential English language philosopher of the nineteenth century. He was a naturalist, a utilitarian, and a liberal, whose work explores the consequences of a thoroughgoing empiricist outlook.

since its ideal was the happiness of all concerned. Within the utilitarians, one of the chief issues of legal philosophy to which Mill suggested an approach different from that of Bentham was the significance that should be attributed to the concept of justice. Bentham had spoken of justice in a deprecatory fashion and had subordinated it completely to the dictates of utility. At one place he observed:

> *"Sometimes in order the better to conceal the cheat (from their own eyes doubtless as well as from others) they set up a phantom of their own, which they call 'Justice': whose dictates are to modify (which being explained means to oppose) the dictates of benevolence. But justice in the only sense in which it has a meaning is an imaginary personage feigned for the convenience of discourse, whose dictates are the dictates of utility applied to certain particular cases."*[23]

Whereas Mill, although taking the position that the standard of justice should be grounded on utility, believed that the origin of the sense of justice must be sought in two sentiments other than utility namely, the impulse of self-defense and feeling of sympathy.[24] Differently expressed the feeling of justice is the urge to retaliate for a wrong, placed on a generalized basis.[25] This feeling rebels against an injury, not solely for personal reasons, but also because it hurts other members of society with whom we sympathize and identify ourselves. The sense of justice, Mill pointed out, encompasses all those moral requirements, which are most essential for the well being of mankind and which human beings, therefore, regard as sacred and obligatory.[26]

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[23] Jermey Bentham. *Morals and Legislation*, Oxford At The Clarendon Press. 1823 p 125-126.

[24] John S. Mill. *Utilitarianism* (edi.O. Piest), Indianapolis, Bobbs-Mreeill, New York, 1957, p 63.

[25] *Ibid*, p 65.

[26] *Ibid*, p 73, 78.

Apart from the above differences, Bentham's notion of subordination of justice to utility is further evident by the fact that he was opposed to wide judicial discretion to be given to judges to interpret the laws. He counsels that judicial interpretation should have no other role than strict interpretation, not an activist interpretation that gets "rid of the intention clearly and plainly expressed" and substitutes judicial intention for the legislative one.[27] Bentham has characterized an activist judge as a charlatan who nourishes the spectators by making a sweet and bitter run from the same cup.[28] While making a scathing attack of judicial activism, Bentham observed: "The serpent, it is said can pass his whole body whenever he can introduce his head. As respects legal tyranny, it is this subtle head of which we must take care, least presently we see it followed by all the tortious fields of abuse."[29]

Upendra Baxi[30] is of the opinion that Benthamite condemnation, of a Judge as a usurper, who substitutes his will for that of the legislator as a conscious overtaker who produces and reproduces arbitrariness is clearly addressed to a context where the legislator has, in fact, followed Bentham's Counsel of producing clear laws. It is only in such contexts that judicial activism, rightly thus stands condemned.[31] Bentham's condemnation of Judges is not confined to the mere usurpation of powers but he also condemned the delay and denial of justice

[27] *Op.Cit.* J. Bentham. Theory of Legislation, p 94.
[28] *Ibid*.
[29] *Ibid*.
[30] Upendra Baxi is a legal scholar, since 1996 professor of law in development at the University of Warwick, United Kingdom. He has been the vice-chancellor of University of Delhi (1990–1994), prior to which he held the position of professor of law at the same university for 23 years (1973–1996). He has also served as the vice-chancellor of the University of South Gujarat, Surat, India (1982–1985).
[31] Upendra Baxi. Bentham's *Theory of Legislation*, Tripathi, 1986, p 24.

on the part of Judges. He addressed them scornfully as "Judges and Co."[32] and even advocated the abolition of House of Lords and Monarchy.[33] It is, therefore, submitted that although Bentham does not formulate anywhere in the "Theory" a fully-fledged justification of judicial review, Prof. Baxi opines that it is embedded in the notion of reciprocal dependence of three powers. "The principle of utility asks us to guard against all forms of usurpation of political (legislative) power".[34]

Thus, while recapitulating our discussion on Bentham's notion of justice, it is submitted that there is no elaborate and systematic theory of justice given by Bentham. His theory of justice is grounded in the happiness of individuals and not that of society, which he never recognized. However, not with standing its incomplete and insufficient notion of justice, it is submitted that the utilitarian concept of justice is a landmark in the evolution of the theory of justice. Its value lies in starting a rational inquiry with a logical and analytical approach to the realization of truth and reality. It also gives an objective and scientific approach to the concept of justice, which throws and opens the avenues for reform development and progress even by the socialization of its shortcomings, errors, and failures. The great merit of the utilitarian approach to justice is that it dissociates justice from theology, mysticism, imagination, and speculation which leads to illusions unreal apprehensions and frustrations.

[32] Lawrance C. Wanless. Gettel *History of Thought*, London, 1950, p 313.
[33] Sukhbir Singh. *History of Political Thought*, Rastogi Publications, 1999, p 22.
[34] Nitarimbo, *it is therefore submitted that although bentham.* https://www.coursehero.com/file/p44uu6l9/16-It-is-therefore-submitted-that-although-Bentham-does-not-formulate-anywhere/. Accessed Desember 02 2019.

F. Problem Formulations

Does the action of defendant in the decision Number 862 K/ Pdt/ 2013 consider the element of unlawful acts?

G. Legal Consideration

Before granting a decision the Judges of Supreme Court of Indonesia hold some considerations specifically for this case, as follows:

1. That the reasons for the appeal might be justified, *Judex Facti* (Court of Appeal) had incorrectly applied the law on the following grounds: That *Judex Facti* (High Court) had mistakenly interpreted the agreement dated 23 August 2002. Due to the actions of the Defendant II and GMS held by Defendant, I with matters considered by *Judex Facti*[35] (Court of Appeal) were right outside the agreement containing the arbitration clause;
2. That the *Investment Agreement* dated 23 August 2002 occurred between the Plaintiff and the Defendant I only, while the Defendant II of PT Sarana Rekatama Dinamika did not participate in the agreement;
3. That the main issue in this matter is about "the results of EGMS dated 17 March 2005 in Deed No. 17 made by the Plaintiffs of PT Cipta Televisi Pendidikan Indonesia in participation of the Defendant I, "Sisminbakum Access has been blocked" by the Defendant II on the willingness of the Defendant I, so that the registration of the results of EGMS cannot be accepted by the Defendant VI, and consequently cannot be registered at

[35] Judex Facti means the authority of the District Court and the High Court to examine facts and evidence relating to the case being tried.

Ministry of Law and Human Rights;

a. Such acts were considered *unlawful acts*, which were not part of the contents of the Investment Agreement dated 23 August 2002, so that this dispute was the authority of the General Courts;
b. That for all the above matters, the response of the Cassation Defendant in the Court of Cassation Memorandum shall be rejected;
c. That the consideration of the District Court was appropriate and taken over into consideration of the Supreme Court, except on the claim for damages petitioned by the Plaintiff. *Judex Juris* was of the opinion that since the claimant's claim of compensation was not supported with clear details and sufficient evidence, the merger and separated claim is unacceptable;

H. Legal Analysis

Hoffman explained that the existence of an act against the law must fulfill four elements such as:

1. *Er moet een daad zijn verricht* (Someone must do something)
2. *Die daad moet onrechmatig zijn* (The act must be unlawful act)
3. *De daad moet aan een ander schade heb bentoege bracht* (The act must be arising loss for someone)
4. *De daad moet aan schuld zijn te wijten* (It is because of guilty mistake).[36]

[36] *Ibid*, pg 49.

In line with Hoffman, Mariam Darus Badrulzaman said that the conditions that must exist to determine an act as an act against the law are as follows:[37]

1. There must be an act, which is meant by this act, both positive and negative, meaning that each behavior does or does not act.
2. The act must be against the law.
3. There is a loss.
4. There is a causal relationship between the act of the law and the loss.
5. There is an error (Schuld).[38]

The unlawful act is translated from the Dutch term *"Onrechmatige daad"*. According to M.A. Moegni Djojotirto, in the term "against" inherent in active and passive terms, active characteristic can be seen by conducting something that harms others, so deliberately moves so clearly its active nature of the term "against". On the contrary, if it passively passes so that it causes another person to lose, then he has "fought" without having to move his body.[39]

Before 1919, *Hoge Raad* argued and interpreted the law against the law narrowly, where the offense was declared to do or did not violate the rights of others or contrary to the lawfulness of the perpetrators set by law. The establishment was seen in Hoge Raad's opinion on his arrest on February 18, 1853, considering among others as follows:[40]

> *"Considering whereas from one another to the other and the provisions of articles 1365 and 1366 of the Civil Code each may be concluded that an*

[37] Mariam Darus Badrulzaman, Mencari Sistem Benda Hukum Nasional ,(Bandung:Alumni,1997),p 146-147.

[38] *Ibid*, p 50.

[39] M.A Moegni Djojodirjo, Perbuatan Melawan Hukum (Jakara:Pradnya Pramita,1982) p 13.

[40] M.A Moegni Djojodirjo, *Opcit,* p 28.

act may be a rechtmatig and allowed act, and the creator shall, therefore, be responsible, when it is in that respect have done no caution."

The narrow teachings are in fact contrary to the doctrine put forward by the scholars at that time, among others, Molegraaff who argue that the act of opposing the law is not merely a violation of the law, but also violates the rule of law and virtue. In 1919, the Hoge Raad began to interpret broadly illegal acts.[41] The broad teachings were marked with arrest on 31 January 1999 in Lindenhaum's case against Cohen where *Hoge Raad* argued that acts against the law must be interpreted as acting or not acting against or violating:

1. Subjective rights of others.
2. A legal obligation of the perpetrator.
3. The method of decency.
4. Decency in society.[42]

Since Arrest 1919 the judiciary has always applied the notion of "against the law" in the broadest sense. By following narrow interpretations means that broad interpretation can lead to legal uncertainty. Modern opinions do put a heavy burden on old teachings. This does not only apply to unlawful acts but to all legal fields. Modern lawmakers are aware that the law cannot regulate all things and therefore submit to judges' judgments to make decisions. Making regulations in detail, something that is not possible because it cannot accommodate all the things that might arise in the future. Regulations that are too detailed will allow

[41] Rosa Agustina, *Opcit*, p 51.
[42] *Ibid*, p 52.

researchers who are diligent to find their weaknesses as material for argumentation.

Therefore the field where the judge gives the final decision becomes increasingly widespread. Unlawful acts in the broad sense, namely:[43]

a. Breaking the subjective rights of others means violating special authority granted by law to someone. Jurisprudence gives the meaning of subjective rights as follows:
    1. Individual rights such as freedom, honor, and good name
    2. Property rights, material rights, and other absolute rights.
b. A violation of the subjective rights of others is against the law if the act directly violates the subjective rights of others, In today's view, it is implied that there is a violation of behavior, based on written or unwritten which should not be violated by the perpetrator and there is no justification according to law. Contrary to the legal obligations of the offender. Legal obligations are defined as obligations based on law, both written and unwritten (including in this sense, criminal acts of theft, embezzlement, fraud, and destruction).
c. Contrary to the rule of morality, which is contrary to moral norms, throughout the life of society is recognized as a legal norm. Utrecht wrote that he meant morality was all the norms in society, which were not legal, custom or religion.

[43] Djuhaendah Hasan, *Istilah dan Pengertian Perbuatan Melawan Hukum dalam Laporan Akhir Kompendium Bidang Perbuatan Melawan Hukum*, (Jakarta: Bdan Pembinaan Hukum Nasional Departemen Kehakiman RI, 1996/1997), p 24.

d. Contrary to the propriety that applies in community traffic to self and others. In this regard should be considered the interests of others and the interests of others and follow what the society deserves and deserves. Included in the category of objectionable adjudication consist of:

    1. Deeds that are harmful to others without proper interest
    2. Useless action that poses a danger to others, based on normal thinking needs to be taken into account.[44]

A contract party's interest in performance can be divided into two sub interests. The first, and more obvious, is the interest in present performance. That interest is harmed when the party in breach fails to perform as and when agreed. For example, when a landowner contracts to have a commercial building constructed, direct financial interest is impaired if the building is completed late or imperfectly. The owner may lose rent from tenants, be liable to tenants for delays, or be required to repair defects. The court's remedy and unjustified impairment of the interest in present performance by awarding compensatory damages[45]. The nonbreaching party is entitled to a judgment sufficient to pay for the net loss of value caused by the breach, such as the amount needed to repair defects or to cover lost rents.

The cancellation remedy protects another interest, the interest in future performance. It concerns a party's security or confidence that the other party will perform duties not yet due, as and when agreed. Largely on the basis of senses of security, contracting parties lay plans and make commitments. For example, long

[44] *Ibid*, p 56.

[45] Celia R. Taylor, Self-Help In Contract Law: An Exploration And Proposal, Reproduced With Permission of 33 *Wake Forest Law Review*, (1988) p 854.

before the building is completed (perhaps before it is even started), the owner may make the commitment to the building's future tenants, which committee would be ill-advised absent a reliable expectation that the builder will bring the world of the contract into being as promised. The security at the heart of the interest in the future performance is one of the most important benefits enjoyed by those participating in a contractual relationship.

A breach of contract may harm the nonbreaching party's interest in present performance, in the future performance, or in both. If early in the construction, the foundation of building deviates substantially from the agreed plans in its position and strength, the owner has received a lesser performance than was promised a harm o the interest in present performance. Award damage can compensate by enabling the owner to put the defective work right. But the flawed work at the started of the project may give the owner reason to believe that there will be further shortcomings in workmanship. This insecurity impairs its interest in future performance. Damages to repair foundation are not an effective remedy for that injury. [46]

With the inclusion of error requirements in article 1365 of the Indonesian Civil Code, the lawmaker wants to emphasize that the offender is only responsible for the damage caused if the action is blamed on him. The term error *(Schuld)* is also used in the sense of omission *(Onachtzaamheid)* as opposed to intentionality. Errors include two senses namely errors in the broad and narrow sense. The definition of error in the broadest sense appeal when there are

[46] Steven J Burton and Eric G Andersen , *Contractual Good Faith Formation , Performance , Breach , Enforcement ,Little Brown and Company* , Boston New York Toronto London , 1995, p 6.

negligence and deliberation occurred, while errors in the narrow sense are only intentional. The problem of this error lies in a spiritual relationship *(Psychic Verband)* between the nature of the mind and feelings of the subject and a particular rape of interest. If someone at the time of committing an act against the law knows very well that his actions will result in a certain legal condition that is detrimental to the other party, it can be said that in general they can be held accountable.

That a person knows the existence of certain circumstances around his actions, that is the conditions that cause the possibility of that effect to occur. Vollmar questioned whether the condition of error (*Schuld Vereiste)* should be interpreted in its subjective meaning (abstract) or in the sense of its objective (concrete). In the case of the condition, the error should be interpreted in its subjective (concrete).

Vollmar has argument, the condition of error shall be interpreted in its subjective sense so that a perpetrator can generally be examined whether his actions can be blamed on him, whether his state of being is so that he may be aware of the meaning and meaning of his deeds and whether my general duties are generally accountable. As for the condition of error in the objective sense then the question is whether the perpetrator is generally accountable, can be blamed for a particular act in the sense that it should prevent the occurrence of the consequences of his concrete actions. Then there will be (Schuld) in its objective sense if the perpetrator should do something different than he ought to have done

and in such case, the lawlessness and the nature of the law become one.[47] The lawmakers apply the term Schuld (mistake) in several meanings:

a. The liability of the perpetrator of the act and of loss, arising out of the act.
b. Negligence as contrary to intentional.
c. Nature against law.[48]

Article 1366 of the Indonesian Civil Code affirms that:

> *"each person is responsible, not just for damages caused by acts, but also for losses caused by his negligence".*[49]

Compensation for illegal acts is not regulated by law. Therefore, the rules used for this compensation are, analogically, using compensation rules due to defaults set out in article 1243-1252 of the Indonesian Civil Code. Besides that, recovery returns to its original state. Claims for compensation due to illegal acts can be:

1. Money and get it with forced money
2. Recovery in its original state (with forced money)
3. Prohibition of repeating the act again (with forced money)
4. Can ask the judge's decision that his actions are illegal.

Those who can be sued based on Article 1365 of the Indonesian Civil Code include:

1. Destruction of goods (causing material losses);

[47] Vollmar., *Verbintenissen en bewijsrecht*, p 327, dalam Moegni Djojodirdjo "Perbuatan Melawan Hukum",(Jakarta: Pradnya Paramita,1982) p 66.
[48] Ibid , pg 66.
[49] Article 1366 Indonesian Civil Code.

2. Interference (hinder), causes material losses, namely reducing the enjoyment of something;
3. Misusing the right of people to use their own property without proper interests, the purpose of which is to harm others.[50]

C.J.H Brunner and G.T. de Jong, describes the engagement as a legal relationship *(Rechtsverhouding)* between two parties based on one party, the debtor *(Schuldenaar)* or (Debiteur), has an achievement located in the field of wealth (*Vermogen*), and creditors *(Schuldeiser or Crediteur)* have the right to fulfill that performance.[51] In the case of bankruptcy that occurred to a company, usually the party who suffered a loan and attempted to settle it by conducting debt restructuring with proposing a loan in the form of debt to equity swap. The process of payment conducted by acquiring an amount of loan into shares that owned by Shareholder in a company.[52] According to Farwell: "A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with".[53]

Based on article 52 of Indonesian company law no 40 of 2007, shares owned by shareholders give the owner the right to;

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[50] *Ibid*, p 68.

[51] C.J.H. Brunner and G.T. de Jong , *Verbintenissen Algemmen* (Deventer : Kluwer , 2001), p 8.

[52] Winandya Almira Nurinasari and Teddy Anggoro, *Tinjauan Yuridis Pelaksanaan Konversi Utang Menjadi Saham (Debt to Equity Swap) Sebagai Upaya Menyelamatkan Perusahaan Dari Kepailitan Studi Kasus "PT. Istaka Karya (Persero)"* Jakarta, FH UI PRESS, 2014, p 2.

[53] Alfonso Martinez Echevarra, *Nature Share and Shareholdership*, Spain, CEU Universidad San Pablo,2016 p 7.

1. Attending and issue votes at the GMS;
2. Receive payment of dividends and remaining assets resulting from liquidation;
3. Exercise other under the Company Law.[54]

Acquisition based on article 1 number 11 of Indonesian Company Law No 40 of 2007 mentioned that "Acquisition is a legal act carried out by a legal entity or person individuals to acquiring the Company's shares which resulted in the transfer control of the Company". [55] Moreover, the regulation also stipulated on article 3 of Government Regulation No 57 of 2010 about acquisition mentioned: "Acquisition is a legal act carried out by a business actor to take over the shares of a business entity which results in the transfer of control over the business entity".[56]

The resulting consequences are reviewed in terms of corporate law as well as from the business aspect "the transfer of control" is the transfer of power from the company taken over to the company that took over. The legal act of expropriation does not result in the company being taken over by the shares, disbanding or ending. The company still exists and is valid as before, only its shareholders that switch from the original shareholders to those who take over. The legal consequences are only limited to the transfer of control of the company to the party who acquiring.[57] Where a company acquires control over another by

[54] Indonesian Company law no 40 of 2007.
[55] *Ibid.*
[56] Government regulation no 57 of 2010 about merger and acquisition of shares of company that causing invention of monopoly and unfair competition.
[57] M.Yahya Harahap,Hukum Perseroa Terbatas, Jakarta,Sinar Grafika,2015,p 509.

buying all or a majority holding of its shares, it is called 'take-over'.[58] The expression of 'take-over' is used to identify a transaction in which control of the business or assets of a company passes by means of some voluntary transaction.[59] The offeror objective in taking–over is to obtain control of the business and assets of the target, normally by acquiring shares of the target. However, certain distinctions should be borne in mind;

a. *Total ownership of all classes of shares of the target* is the most absolute form of control. At this stage, the offeror may deal with the business and assets of the target without being subject to the constraints arising out of the law of oppression and fraud on the minority.
b. *Total ownership of all voting shares of the target* puts the offeror in almost as strong a position, except that if there are independent holders of preference shares, convertibles or other non-voting shares, their rights must be respected.
c. *Entitlement to sufficient shares to implement compulsory acquisition* is also a significant category of control. After take over scheme or take-over announcement, the offeror is entitled to not less than 90 percent of the shares in respect of which take-over offers have been made, and (where the offeror was entitled to more than 10 percent at the commencement of the bid) three-quarters of the offerees have disposed of their shares to the offeror.

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[58] LS Sealy, Cases and Materials in Company Law, New Zealand, Butterworths, 2001, p 552.

[59] Haj Ford Principle of Company Law 5th edition, Melbourne, Butterworths, 1990, p 630.

d. *Ownership or control of sufficient voting shares to secure the passing of special resolutions* puts the offeror in position both to control the boards of target director's composition of the boards of director of the target and to make such changes to the constitution of the target, may be necessary for the purposes of reconstruction or change of activity, subject however to the rights of the minority shareholder expressed in the law of oppression and fraud on the minority.

e. *Ownership or control of sufficient voting shares to give the offeror a simple majority of votes at general meetings* enables the offeror to control the composition of the board of the director of the target, but not to ensure the passing of amendments to the memorandum and articles of association of the target. Such control will be sufficient to enable the offeror to continue the business of the target in a way that will benefit the offeror as majority shareholder, subject to the rights of minority shareholders. However, the offeror may not be able to reconstruct the target or alter its activities, if its plans are opposed by a minority shareholders.

f. *Effective control at a general meeting* may arise where the offeror has acquired a parcel of voting shares which is less than the number needed to guarantee the passing of a resolution by a simple majority at a general meeting. In particular, where the target is a listed public company, the offeror has obtained a substantial minority parcel of voting shares, and the remaining shares are widely dispersed among many unassociated shareholders, the offeror may have practical certainty that a motion which

it proposes at meeting of the shareholder of target will be passed simple majority. For this purpose, effective control may arise shortly of ownership of a substantial minority parcel of shares, where the offeror has collected instruments of proxy in respect of shares which it does not own.

g. *Board room control* may arise where, for whatever reason, a majority of the board's director of the target company are prepared (subject to their fiduciary responsibilities) to act in accordance with the wishes of the offeror. This category is worth recording because occasionally the battle for control is fought as a contested election for vacancies on the board directors, rather than by way bidding for shares. This may occur, for example, where legislation limits shareholding to quantities that would not normally carry voting control at a general meeting.[60]

Shares that can be taken over according to article 125 (1) Law number 40 of 2007 of Indonesian Company Law, the takeover of shares, can be carried out on:

1. Shares to be issued, and/or
2. Shares that will be issued by the company.[61]

The acquisition of the company must be based on the resolution of the GMS. As stated above, article 125 paragraph (2) Law number 40 of 2007 of Indonesian Company Law, affirms that acquisition can be carried out by legal entities or individuals. If it turns out that the legal entity that acquisition the shares

[60] *Ibid,* p 634.
[61] *Ibid,* p 511.

is in the form of a company, not in the form of a cooperative or foundation, it must meet the following conditions:

1. The acquisition must be based on the GMS[62]

   Based on article 125 paragraph (4) Law number 40 of 2007 of Indonesian Company Law, before the directors of the company carry out legal acts of acquisition. It must be based on the resolution of the GMS. Without a GMS decision, takeovers by directors are legally flawed and categorized as *ultra vires;*

2. The quorum of attendance and requirements for making GMS decisions based on Article 89 Law number 40 of 2007 of Indonesian Company Law.

The second condition, the GMS decision regarding the takeover to be carried out must be in accordance with the provisions of article 89 Law number 40 of 2007 of Indonesian Company Law:

a. The quorum has at least 3/4 of the total shares with voting rights, present or represented in the GMS;
b. A new decision is valid if it is approved at least 3/4 of the total votes issued.

Based on company law no 40 of 2007 GMS included as company organ which has stipulated on article 1 point (2), the company has three (3) organ consist of :

1. GMS

[62] General Meeting Of Shareholders ("GMS") is a Company Organ in a Limited Liability Company. The provisions regarding the procedures, quorum and other requirement to hold a GMS in a Limited Liability Company are regulated under the Law No 40 of 2007 regarding the Limited Liability Company ("UUPT").

2. Directors
3. Commissioner. [63]

Furthermore, the existence of a GMS as a corporate organ is reiterated in article 1 number (4) which says, a GMS is a corporate organ. Thus, according to the law, a GMS is a corporate organ that cannot be separated from the company. Through the GMS, the shareholders as owners (eigenaar owner) of the company control the management of the board of directors as well as the wealth and management policies carried out by the company management.[64]

In general, according to article 1 number (4), the GMS as an organ of the company has authority not given to the directors or the board of commissioners, but within the limits specified in this law and / or the Company's AD. Then the authority of the GMS was restarted again in article 75 paragraph (1) which reads:

> *"The GMS has the authority not given to directors or the board of commissioners within the limits specified in this law and / or articles of association".*

Generally, any authority that is not given to the Directors and / or Board of commissioners becomes the authority of the GMS. Therefore, it can be said that the GMS is the highest organ of the company. However, this is not exactly the case, because basically the three organs of the company are aligned and side by side in accordance with the separation of power stipulated in the law and the articles of association. Therefore, it cannot be said that the GMS is higher than the

[63] Company law no 40 of 2007.
[64] M Yahya Harahap, Op.cit, p 306.