

ICILS 2020

Proceedings of the 3rd International Conference on
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EDITORS

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PREFACE

It is a great honour to introduce to the Proceedings of the 3rd International Conference on Indonesian Legal studies 2020 (The 3rd ICILS 2020) held on July 1st 2020, as a virtual conference. ICILS 2020 was initially scheduled to be held at Semarang City, Indonesia, but the online presentation replaced the onsite presentation for the health and safety of our participants owing to the pandemic of COVID-19.

Interests arising from Law and Globalization have been dramatically increasing and becoming more and more critical in this modern and global era. ICILS 2020 carries the theme “*Law and Globalization: The Emergence of Global Regulatory Governance and Its Impacts on Indonesian Legal Development*”. Through this conference, it is expected to become a forum for Legal Experts, Legal Practitioners, Academics, Students, and the Community to provide advice, input, views, and debate on discourse and practice relating to law and globalization in the current era and its impact on Indonesia.

ICILS 2020 comprehensively presents the exciting results in Law and Globalization from four one keynote speakers and three invited speakers of leading scientists and a variety of authors in the world. Through this great event, we trust that we will be able to share the state-of-the-art developments and the cutting-edge thought in the broad areas of legal studies. The organizing committee truly believes that active participants will find erudite and enlightening discussions and will enjoy the opportunity for sharing ideas and research results. Although this conference was held as a virtual conference and after two years of the first conference (ICILS 2018), I hope this success can be evolved into ongoing success annually from this year, in which there are presenters from all corners of the globe and all major countries.

On behalf of the conference committee, we genuinely hope you will enjoy ICILS 2020 that will offer you a chance to network with academics and researchers in the field of Legal studies.

ICILS Conference Committee

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Towards a Globalisation of Law? Comments from the European Perspective in View of the Experiences with the Europeanisation of Law

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Abstract. This article aims to contribute to the debate on globalization of law and the challenges of globalization. Today the COVID-19 pandemic has also had an impact on international trade. An understanding of globalization can be started with comments from a European perspective in view of the experience with a similar phenomenon, namely Europeanization of law. Europeanization of law is an example of geo-regionalization of law. Geo-regionalization and legal globalization are different forms of the same phenomenon, the internationalization of law. First, there will be no globalization of law without commitment to the rule of law. Second, there will be no globalization of law without multilateralism. Third, there will be no globalization of law without demanding requirements for the effective domestic implementation and enforcement of the global rules and standards. Fourth, there will be no globalization of law without sophisticated conceptional precautions to ensure compliance with the global rules and standards. Fifth, there will be no globalization of law without global courts of justice

Keywords: Globalisation of law, Europeanisation of law, in particular administrative law and constitutional law, European Union - legal nature; supranational union, integration through law, direct effect and primacy of European Union law, implementation of European Union law by the member states, European Court of Justice, rule of law, further developing of law, general principles of law, effectiveness of the law (effet utile).

1. Introduction

For several decades, the world has been undergoing a process of transformation. The old political world order, emanating from the 19th century, where the independent individual nation-state was the basis of all power, law and politics, is dramatically changing. The world has seen the development from the solitary loner state to free trade, joint markets, economic interpenetration and interdependence, manifold and close international cooperation and booming international mobility. This development has been accompanied by a rise of global law and institutions. This raises the question: Are we on the way towards a globalisation of law? The following article will contribute to the debate with comments from the European perspective in view of the experiences with a similar phenomenon, the Europeanisation of law.

1.1. What is globalisation of law?

For two decades there has been a heterogeneous, sometimes blurred discussion about the globalisation of law, often rather from a political science or social science than a legal science perspective. [1] However, is this discussion backed by hard facts, in line with the fundamentals of law on this planet or is it for the time being still wishful thinking? The first step towards a realistic discussion is a realistic definition of "globalisation of law". The law of the modern state has never been totally free from external influences. Not every slightest influence of global norms on the domestic law in the wake of the growing international trade, mobility and cooperation "globalises" the domestic law. Globalisation of law is more: It is the *profound transformation or even replacement of national (domestic) law* by legal standards and other legal norms of global international law. It is a form of *internationalisation of law*. [2]

1.2. Background: The Unaffected Sovereignty of the State - Even in Times of Geo-Regionalisation and Globalisation

For a correct assessment of the dimension and limits of the phenomenon it is necessary to keep in mind an important background: the *unchallenged legal world order of sovereign territorial states*. [3] Even under the conditions of advanced globalisation in the 21st century, our planet does not constitute a legal unity but is divided into independent (sovereign) territorial states formed by distinct peoples, each state exercising an exclusive power to rule (state power) on its state territory. This Westphalian order is nowhere contested on this planet, neither by any state, nor by any people, nor by any political ideology. It focuses on the *sovereignty of the state*: the underived and independent legal capacity to act in internal and external affairs, which is only subject to a few basic restrictions under *ius cogens* in public international law but otherwise unlimited. Sovereignty is something absolute and therefore cannot be affected by the recent developments (which may, however, one day put the whole concept into question). The sovereignty of the state includes its control over all public power exercised in the state and, thus, over all law which is valid in the state. Consequently, there can be *no globalisation of law without the consent of the state*. The state may accept global norms only for economic and political reasons but is always legally free to reject them and bear the consequences. Thus, the responsibility for any globalisation of law ultimately lies with the individual state.

1.3. The First Few Signs for A Globalisation of Law

So far only a few signs for a globalisation of law can be identified. There is *still a very limited replacement of national law by global international law*. Global international treaties and binding decisions of international organisations usually need to be implemented into the domestic law or complement it but do not replace it. The *United Nations Convention on Contracts for the International Sale of Goods (CISG)* of 1980 is an exception: It offers international trading partners an autonomous global sales law for contracts of international sales of goods, which optionally replaces the sales law of the states of the contracting parties. While such examples are still rare, there is already a *growing influence of global standards and regulations on the national law*. This is about legally binding rules and standards that need to be implemented into or achieved by the national law. Examples can be found in the *WTO-Agreements*, the *UN environmental and climate protection agreements* and the *global human rights treaties*. The WTO Agreements provide for an effective enforcement mechanism but also the global human rights treaties ensure by the instruments of recommendations and general comments of their treaty bodies that the global standards do not remain a vague idea but are concretised and developed in practice. However, this development is still at an early stage. Often it rather concerns details than basic concepts of the law, and its impact on the national law is still moderate.

1.4. Prospects: from Economic Globalisation to Globalisation of Law or On The Way To Deglobalisation?

Will this development lead to a comprehensive globalisation of law? The fact that many developing and newly industrialised countries continue to emphasise the importance of the sovereignty of the individual state, raises doubts. Moreover, nationalist populism, in particular in the Western countries, poses a growing threat to globalisation: "Make my country great again"? This slogan of the American president Donald Trump does not only stand for economic protectionism and the attempt to renationalise the production of goods but also for a countermovement against any globalisation of law. Populist regimes want to get free from any legal commitments that may restrict their arbitrary rule. So, it is not a surprise that the present American government is sabotaging the UN, the WTO, the WHO and other global institutions and has withdrawn from the Paris Climate Agreement and other multilateral international treaties. Furthermore, the coronavirus crisis, which has seriously affected the global trade and revealed in many contexts the interdependence and vulnerability of the individual states, may have a lasting impact. Globalisation is viewed more sceptically and critically now, and since it had already slowed down before, the *discussion about deglobalisation*, which had already started, has intensified. [4] Deglobalisation would present a serious threat for the emerging economies in Southeast Asia. However, the reasons for the globalisation have not vanished and the more critical perspective on it will probably not lead to a regression but to more regulation with regard to the reliability of supply and to social, environmental and human rights standards. Thus, the coronavirus crisis may rather expedite than hinder the globalisation of law.

2. Result and Discussion

2.1 A Historical Precedent: The Europeanisation of Law

The globalisation of law is not unique. There has been a historical precedent: the Europeanisation of law. A look at this phenomenon, which was a concern to European lawyers in the 1990s, will be helpful to understand what to expect.

2.1.1 Geo-regionalisation and globalisation as different forms of internationalisation of law

In Europe, the national law is not only under the influence of global international law but, first of all, of European law. The Europeanisation of law is an example for a geo-regionalisation of law; more examples in other parts of the world may follow. Geo-regionalisation and globalisation of law are different forms of the same kind of phenomena, the internationalisation of law.

2.1.2. The integration of Europe in a supranational union

The Europeanisation of law must be seen against the background of the integration of Europe in a new form of organisation, the supranational union. The European Union is not an international institution like others. It is a *non-state but state-like supranational organisation of integration* which performs on a large scale public missions by the exercise of *supranational public power* in its member states, in particular through legislation and regulation. It is the first representative of a new form of organisation, which emerged in the process of European integration and is designed for a long transition from the (relatively small) nation-state to the (much larger) civilisation state. [5] This organisation even has its *own legal order* - not like an ordinary international organisation but like a state. The unconventional design of the European Union has sparked a long, intensive scholarly debate about its legal nature. The German Federal Constitutional Court developed a state-centred "Staatenverbund" doctrine (the Union as a "compound of states"). [6] Some scholars consider the Union's Founding Treaties a constitution and talk about a "Verfassungsverbund" ["constitutional compound"] [7] or a "Staaten- und Verfassungsverbund" ["compound of states and constitutions"]. [8] However, since the new form of organisation can only be understood in depth by focusing not on the member states but on the Union and its function in the process of supranational integration, it is instead appropriate to classify the European Union as a *supranational union*. [9]

2.1.3. The European basic concept of integration through law [10]

The integration of Europe in this new form of organisation is based on the innovative concept of integration through law. This concept is the answer to the problem that the Union is not a state and does not have the physical means of a state but is similar to a state, fulfils many functions of a state and must meet expectations that are similar to those towards a state.

a) The whole *integration is based on law and the respect for law*. With few exceptions, the Union does not execute its law itself. It is generally confined to pass legal acts that the member states must implement, execute and enforce. Since most provisions concern the economy or have an economic effect, compliance is essential: Even small irregularities may cause serious distortions of competition in the internal market that would disadvantage those who follow the law and, thus, quickly jeopardise the whole integration process.

b) This is underlined by the fact that the Union has *no coercive powers to enforce its law*. It relies on the correct implementation, execution, and enforcement by the member states. Unlike in a federal state, there is no way to ultimately force a renitent member state to comply.

c) Against this background, it is not a surprise that there is a *strong emphasis of the rule of law*. The rule of law is the most important foundation of the European Union and one of the common fundamental values of the Union and its member states, as they are anchored in art. 2 of the Treaty on the European Union (= EU Treaty). For accession candidates, the demanding requirements of the rule of law represent a serious obstacle for entering the Union.

d) Finally, a powerful *own court of justice* has the mission to "ensure that ... the law is observed" (original wording of art. 19 EU Treaty). The *European Court of Justice* (= ECJ) in Luxembourg [11] virtually functions as both, a constitutional court and a supreme court. It

cooperates with the courts of the member states, which may ask it under art. 267 of the Treaty on the Functioning of the European Union (= FEU Treaty) for *preliminary rulings* on the validity and interpretation of Union law. So, in the European Union, unlike in ASEAN, legal disputes are settled by a court and not by negotiations between governments. This is a logical consequence of the rule of law which refers to the law and not to politics. Legal problems must be solved by lawyers, not by politicians. This will also be an essential precondition for the globalisation of law.

2.1.4. The Characteristic Features of European Union law

What are the characteristic features of European Union law that set it apart from the law of other organisations based on public international law and played a role in the Europeanisation of law?

- a) The *autonomy* of Union law: The Founding Treaties have created a distinct legal order of its own that is not an annex to national law and also apart from public international law. [12] In particular, the Union is not bound to any clauses in the constitutions of the member states. [13]
- b) The *direct effect* of Union law in the member states: All public authorities and also the citizens are directly bound to the law of the European Union without intermediate national legislation or other national acts (with the exception of directives, which must first be transposed to the national law). This also applies to the Founding Treaties, which are directly applicable. [14] Thus, in the European Union, except for directives, the classical problem of international organisations, that their binding rules are not, not correctly or belatedly implemented into the national law, does not exist.
- c) The *unity* of Union law is essential for the functioning of the Union. To avoid disparities endangering the integration process, the law is exactly the same in all member states, with uniform validity and application and without regard to the specific features of the national law. Thus, any national distortion by invoking specific "national values" is prevented. This will also be essential for a real globalisation of law.
- d) The *primacy* of Union law over national law: In case of conflict, the authorities and courts in the member states must not apply their national law but follow the European law. [15] Conflicts may be avoided by *interpreting national law in conformity with Union law*. [16] European law enjoys primacy *even over national constitutional law*. [17] as long as the constitutional identity of the member state (the fundamental values and ideas constituting the core of its constitution) is not affected. [18] It is a primacy in application, not in validity (the national law does not become void) but this does not make any practical difference.

2.1.5. Factors Stimulating the Europeanisation of Law

Which are the factors that have stimulated the Europeanisation of law?

- a) In the Founding Treaties and later in the reform treaties the member states undertook *far-reaching, abstractly formulated commitments, the full scope of which only became clear over time*. Since there had not been any process of supranational integration before, they could not know all the legal consequences this would involve. Notably the commitments in the internal market and the duty to respect, implement, execute and enforce the European law turned out to be more demanding and complex than anticipated.
- b) The *European Court of Justice* has taken a *prominent role as defender of Community respectively Union law* [19] and *motor of European integration*. Since many essential rules for the functioning of the organisation were not expressly regulated in the Treaties, they needed to be worked out by jurisprudence. So the European Court of Justice proceeded to *extensive judicial further development of law*, often by the "discovery" of unwritten general principles of law. [20] Numerous references of national courts for preliminary rulings enabled it to adjudicate in detail on many fundamental questions, in particular on the obligations of the member states under the Treaties and on the Union's requirements for national law. This jurisprudence was broadly accepted by the member states who rarely used the option to overrule it by amending the Treaties. New member states needed to accept it in the accession treaty as a part of the "acquis communautaire".

c) The *obligation to interpret national law in conformity with Union law* (see supra, II.4.d) has a Europeanising effect because often not the wording but a certain interpretation of a national provision causes the conflict with Union law. This problem occurs in particular with indefinite legal concepts. Often the Europeanisation of law has rather manifested in changes of jurisprudence or even administrative practice than in new national legislation.

d) The *jurisprudence* of the European Court of Justice *strongly focuses on the effectiveness ("effet utile")* of Union law. The practical effectiveness of the European legal norms has become the dominant criterion for their interpretation and application. Basically, this approach is just a consistent pursuit of the rule of law - the Court takes its mission to "ensure that ... the law is observed" (art. 19 EU Treaty) seriously. However, this has led to demanding requirements for and less discretion of the member states in the implementation, execution and enforcement of the European law. [21]

e) Finally, the *growing sectoral legislation of the Union in more and more fields of law* has led to a growing impact of the European on the national law. Nowadays there almost no fields of law anymore which have not been influenced by rules and standards of Union law. However, this is not a surprise but was intended and expected in the advancing integration process where every Treaty reform brought new legislative competences for the Union.

2.1.6. Fields and Examples of the Europeanisation of Law

a) Europeanisation of Administrative Law [22]

The Europeanisation of administrative law is not the most radical but the most striking example of Europeanisation of law:

aa) The story

The law of the European Union is generally executed by the member states based on their national administrative law. Administrative law is closely connected to the national political and legal system, its basic structures, concepts and traditions, and, thus, reflects more than other fields of law the legal-cultural heritage of the country. In the history of administrative law in Europe, three lines of traditions have emerged: the French, the German and the Common Law tradition; besides, some countries (e.g. the Netherlands, Sweden) developed unique regimes. In the wake of European integration, this traditional national administrative law has been *heavily transformed by demanding European standards* which often forced member states to *alter or give up traditional concepts* of their law. The European standards were developed by the European Court of Justice in the way of judicial further development of law (cf. supra, II.5.b), just concretising consistently and with a comparative approach the requirements of a strict commitment to the rule of law, with a special focus on the uniform and effective implementation of Union law in all member states.

In this process, the Court worked out many general principles of Community resp. Union law that reflect classical elements of the rule of law and were in general shared by all or most of the member states, such as the principle of legal certainty [23] and the protection of legitimate expectations [24], including the respect for acquired rights [25], the right to effective legal protection [26], the principle of proportionality [27] and principles of a fair administrative procedure [28] or "good [proper] administration" [29]. These principles must often be balanced with each other or with the need for uniform and effective implementation of the law. This balancing can be different in every legal order. Sometimes, a different balancing in the jurisprudence of the European Court of Justice forced individual member states to adapt their national solutions to those of the Union, at least in those areas where Union law was involved.

In the nineties, this development triggered the *resistance of some prominent scholars*. [30] In the discussion, some would consider the specific concepts and traditions of the national administrative law as elements of national identity. However, most experts of administrative law did not share this view and so the Europeanisation of administrative law was widely accepted.

bb) Examples for jurisprudence with a Europeanising effect

Only a small selection of the jurisprudence causing the Europeanisation of administrative law can be presented in this article. It may give non-European observers the impression that the European Court of Justice is acting like a governess of the member states, telling them all the time what to do and not to do. This impression is not entirely wrong: Most jurisprudence was *triggered by dirty tricks of individual member states to avoid compliance* with the European law in order to

achieve an unjust advantage for their citizens and businesses. Such tricks often prompted the European Commission to file an action against the member state for failure to fulfil obligations (art. 258 FEU Treaty) or made a national court ask the ECJ for a preliminary ruling on the states' obligations in the implementation, execution or enforcement of the European Union law (art. 267 FEU Treaty).

(1) The foundations were already created in 1963 and 1964 with the leading cases *van Gend & Loos* [31] and *Costa/ENEL* [32]. In the first case, the European Court of Justice worked out that Community law was an *independent legal order* and that the Treaties were *directly applicable* in the member states. In the second, it stated the *primacy* of Community law *over national law*. In the case *Internationale Handelsgesellschaft* [33] it specified that there is even primacy over national constitutional law. Together with the obligation of the courts and authorities in the member states to interpret national law in light of (in conformity with) Community law [34] this set already the course towards Europeanisation of law.

(2) In the decision *Deutsche Milchkontor* [35] the Court reminded to the responsibility - but also obligation - of the member states to implement the Community law. It confirmed that this process was governed by the national administrative law but stressed that this must not affect the scope and effectiveness of Community law. For example, when recovering unduly paid Community aids (subsidies), the member states may apply national provisions excluding the recovery with regard to such considerations as protection of legitimate expectation, loss of unjustified enrichment, passing of time-limits etc. but the conditions must be the same as for the recovery of purely national benefits and the interests of the Community must be "taken fully into account". [36] In the case *vin de table* [37] the Court reminded the member states of their obligation to take, where necessary, *coercive measures against their citizens* to enforce the Community law. In case of unforeseeable problems, they are obliged to cooperate loyally with the European Commission to solve the problem.

(3) Several decisions of the European Court of Justice ensured the *access of the citizen to legal protection* in matters concerning the execution of the European law. [38] They forced Germany to slightly extend the right of action before the administrative courts. In the case *Factortame* [39] the Court decided that the *national courts must grant interim relief* if it is necessary to enforce Community law, regardless of any adverse provisions of national law. This forced the United Kingdom to introduce interim relief against statutory law irrespectively of the British doctrine of parliamentary sovereignty. Furthermore, since there had been cases of abuse, the Court defined *restrictive conditions for interim relief against the implementation of Community law*: It is only admissible in case of serious doubts as to the validity of a Community act and if the question is referred to the ECJ for preliminary ruling, the applicant is threatened with serious and irreparable damage and there is taken due account of the interest of the Community that its legal acts have full effect. [40] Thus, Germany needed to correct its sometimes too "generous" practice of granting interim relief in favour of the citizen.

(4) In the European internal market, state aids (public subsidies to domestic businesses) which may distort competition and affect trade between member states are prohibited (art. 107 FEU Treaty). State aids are monitored by the European Commission and new state aids must be notified to it (art. 108 FEU Treaty). In the case *Alcan* [41] the European Court of Justice worked out *strict principles for the recovery of illegitimate state aids*, which limit the sometimes, abusive recourse to rule of law principles in order to enable the domestic businesses to keep their illegitimate benefits: There will be no protection of legitimate expectations of the beneficiary if the state aid has not been notified to the European Commission. Furthermore, the national authorities must recover the aid without own discretion if the Commission orders it.

The European Court of Justice has affirmed the direct applicability of decisions of the European institutions addressed to the member states in favour of the citizen, if the decision is unconditional and sufficiently precise. [42]

In the spectacular decision *Francovich* of 1991 [43] the European Court of Justice introduced by judicial further development of law the legal institution of *state liability for violation of Union law*. The state liability even applies in case of violations of Union law by the national legislator (contrarily to the tradition of some member states, such as Germany) or supreme court. [44]. It is based on Union law but details may be regulated in line with the European standards in the national law.

Finally, the European Court of Justice has taken precautions to ensure the *correct implementation of directives*. Directives are general rules of Union law that do not apply directly but must be transposed into the law of the member states (cf. art. 288 sub-sect. 3 FEU Treaty). Member states often tend to transpose them sloppily or late. The Court stressed that they must implement them by law, not just by administrative practice or administrative provisions. [45] During the implementation period, they must refrain from taking any measure liable to compromise the

directive's effect. [46] To avoid conflicts, any national law must be interpreted in conformity with the directive. [47] If a directive is not implemented in time, after the expiration of the implementation period it exceptionally applies directly in favour of the citizen if it is unconditional and sufficiently precise. [48] In this case, until the necessary national norms have been created, the domestic authorities or courts decide in their own competence about the appropriate implementation of the directive. Finally, in case of late or inadequate implementation, under the doctrine of state liability for violation of Union law the state must pay compensation to the citizen for damages. [49] Overall, this jurisprudence had a considerable impact on the administrative law of most member states.

b) Europeanisation of Constitutional Law

European integration also brought a Europeanisation of constitutional law. This Europeanisation was to some extent triggered by interpreting the national constitution in the light of European Union law; the German Federal Constitutional Court even postulated a "principle of the openness towards European law" ["Grundsatz der Europarechtsfreundlichkeit"]. [50] However, primarily it was caused by *constitutional amendments*. At the beginning, the constitutional implications of supranational integration were mostly ignored but in the nineties the Treaty of Maastricht raised the awareness of the need for a solid constitutional basis for the participation of the state in such a process. Many old and later many new member states inserted *European integration clauses* into their constitutions. [51] Actually, these clauses would need to cover at least the delegation of sovereign rights to the Union and the acceptance of the direct applicability and primacy of Union law. Other constitutional amendments were necessary to participate in new integration steps (e.g. to allow to join the monetary union, to recognize the role and independence of the European Central Bank or to extradite own citizens to other member states under the European arrest warrant) or to comply with newly agreed self-restraints (e.g. to establish constitutional limits for budgetary deficits). Finally, in some cases constitutional amendments were necessary to adapt the constitution to requirements under Union law whose consequences only became apparent in time. For example, Germany needed to abolish the constitutional prohibition to employ women in the armed military service (art. 12a (4) Basic Law), since this prohibition, which intended to protect women but prevented them from pursuing a career in the armed forces, turned out to violate the principle of equal treatment of men and women under Union law. [52]

Moreover, there is another side of Europeanisation of constitutional law, which is not directly linked to the European Union: the strong *influence of the jurisprudence of the European Court of Human Rights* in Strasbourg *on the interpretation of fundamental rights and rule of law principles in the national constitutions*. Theoretically, the rights and principles anchored in the European Convention of Human Rights are different from those in the national constitutions, but often in both cases the wording is vague and the substance highly depends on the interpretation by the relevant court. In these cases, the convincing reasoning of the European Court of Human Rights has often prompted the national constitutional courts to adopt a similar position in the interpretation of their national constitutional law (or even to give up their previous position). [53] In Spain, art. 10(2) of the Spanish Constitution of 1978 even provides for this. In particular, the East European constitutional courts have orientated themselves by the jurisprudence of the Strasbourg court when developing their own free and democratic fundamental rights doctrine. Furthermore, the constitutional courts often orientate themselves by the jurisprudence of their European colleagues, in particular the German Federal Constitutional Court. This has led to a pan-European discussion of many upcoming questions, in particular in the fields of rule of law and fundamental rights.

c) Europeanisation of Other Fields of Law

In almost seven decades of European integration, European law has profoundly transformed or even replaced the domestic law in numerous fields of law. This was intended and expected in the integration process. Since the European Communities started with a customs union (see now art. 28 et seq. FEU Treaty), *customs law* was the first field of law, where European law would almost entirely replace the domestic law. Moreover, for more than twenty years, in the European monetary union (art. 119, 127 et seq. FEU Treaty), European law has totally replaced the national *monetary law*. Besides, the realisation and later the safeguard of a functioning European internal market required a comprehensive harmonisation of *economic law*, often by the approximation of national laws by European legal acts (under art. 114 et seq., 46, 50, 53 FEU Treaty). Furthermore, there has been a strong transformation or even predetermination of the domestic law in the fields of *agricultural law*, *environmental law*, [54] *asylum and refugee law*, [55] *consumer protection*

law, [55] *public procurement law and data protection law*. The European Union's General Data Protection Regulation [57] is the most progressive and most-noticed legislation in its field worldwide. Finally, elements of Europeanisation can be found in several fields of civil law (e.g. contract law, international private law) [58] and even in criminal law, where a European arrest warrant has been introduced. [59]

3. Conclusions

3.1. Lessons on the Globalisation of Law Drawn from the Experiences with the Europeanisation of Law

What lessons on the globalisation of law can we draw from the experiences with the Europeanisation of law?

1) First, there will be **no globalisation of law without commitment to the rule of law**. The Europeanisation of law could only happen because European integration is based on law. If in the global trade and cooperation the law is not taken seriously in some countries and this is tolerated by their international partners, there will be not enough political pressure to allow global norms and standards to influence the domestic law. In particular, globalisation of law *cannot happen in a world of populist and totalitarian regimes*.

2) Second, there will be **no globalisation of law without multilateralism**. The European integration process, which led to the Europeanisation of law, was always based on the firm desire to overcome national egoism and to find general solutions that were fair to all parties, to big and small, wealthy and poor, highly and less developed member states. A globalisation of law will require *universal standards in universal treaties, not a cacophony of heterogeneous bilateral agreements*, which would often be imposed on the weaker partners by hegemonial powers. Consequently, for the coming years, a globalisation of law is hardly conceivable if the American president Donald Trump is re-elected.

3) Third, there will be **no globalisation of law without demanding requirements for the effective domestic implementation and enforcement of the global rules and standards**. These requirements must ensure that these rules and standards have a *practical impact*. Otherwise, the "globalisation of law" would only be symbolic.

4) Fourth, there will be **no globalisation of law without sophisticated conceptional precautions to ensure compliance with the global rules and standards**. They must prevent all dirty tricks and ensure compliance in every single case and under all circumstances, even if it is unpopular or detrimental to the interests of the national governments, authorities and businesses. Without such precautions, the effectiveness and, thus, the practical impact of the global law is not guaranteed. This may pose a challenge for Southeast Asian countries where it is not a matter of course that the law is enforced in the individual case. The precautions may include *binding global requirements for an effective fight against corruption*.

5) Fifth, there will be **no globalisation of law without global courts of justice**. The European example proves that systems based on international law that function well in the individual case are possible. However, they require *independent, impartial, unpoliticised and highly respected international judicial bodies for the authoritative interpretation, intrinsic further development and effective enforcement of the international law* in transparent, formalised legal proceedings. Private arbitration panels (as in international investment protection agreements), expert treaty bodies (as in global human rights treaties) or other soft solutions are not sufficient. The European example also shows that it is important that national courts have the option to ask global courts for *preliminary rulings* on difficult questions of the global law. The direct cooperation between national and global courts will be helpful to ensure the rule of law locally and globally, to create a mutual understanding between local and global lawyers and to achieve a smooth globalisation of law without severe ruptures. Finally, as a last resort, the global law needs to provide for special instruments (court orders, penalty payments, international sanctions etc.) for the enforcement of the judgements of the global courts.

So, we can draw the lesson from the experiences with the Europeanisation of law, as another form of internationalisation of law, that a real globalisation of law is possible if there is a global commitment to the rule of law and certain requirements, including the establishment of global courts of justice, are met. Will it happen in the near future?

4. References

- [1] See, as examples for the early and current discussion, *Rüdiger Voigt (editor)*, *Globalisierung des Rechts* [Globalisation of Law], 2000; *Wolf Heydebrand*, *From Globalisation of Law to Law under Globalisation*, in: David Nelken; Johannes Feest (editors), *Adapting Legal Cultures*, 2001, p. 117 ff.; *Tania Lieckweg*, *Das Recht der Weltgesellschaft* [The Law of the Global Society], 2003, p. 1 ff.; *Halliday, Terence C; Osinsky, Pavel*: *Globalization of Law*, *Annual Review of Sociology* 2006, p. 447 ff., www.researchgate.net/publication/228352345_Globalization_of_Law; *Jürgen Schwarze (editor)*, *Globalisierung und Entstaatlichung des Rechts* [Globalisation and Denationalisation of Law], 2008; *Alison Brysk (editor)*, *The Politics of the Globalization of Law*, 2013; *Auby, Jean-Bernard*: *Globalisation, Law and the State*, 2017.
- [2] See for another definition *Terence Halliday; Pavel Osinsky* (note 1), p. 447: "worldwide progression of transnational legal structures and discourses along the dimensions of extensity, intensity, velocity, and impact". This definition, however, is too wide and too vague for a clear delimitation of the phenomenon and therefore inappropriate for legal science.
- [3] See, as examples for the early and current discussion, *Rüdiger Voigt (editor)*, *Globalisierung des Rechts* [Globalisation of Law], 2000; *Wolf Heydebrand*, *From Globalisation of Law to Law under Globalisation*, in: David Nelken; Johannes Feest (editors), *Adapting Legal Cultures*, 2001, p. 117 ff.; *Tania Lieckweg*, *Das Recht der Weltgesellschaft* [The Law of the Global Society], 2003, p. 1 ff.; *Halliday, Terence C; Osinsky, Pavel*: *Globalization of Law*, *Annual Review of Sociology* 2006, p. 447 ff., www.researchgate.net/publication/228352345_Globalization_of_Law; *Jürgen Schwarze (editor)*, *Globalisierung und Entstaatlichung des Rechts* [Globalisation and Denationalisation of Law], 2008; *Alison Brysk (editor)*, *The Politics of the Globalization of Law*, 2013; *Auby, Jean-Bernard*: *Globalisation, Law and the State*, 2017.
- [4] See, for example, the discussion of *Peter Watkins, Linda Yueh and Michael Cox*, in: *London School of Economics and Political Science (editor)*, *COVID-29 and Deglobalisation*, LSE public event 30.04.2020, video accessible at www.youtube.com/watch?v=N93HHJ7xQSg; *Andrés Ortega*, *The deglobalisation virus*, *Blog of the Elcano Royal Institute* 17.03.2020, <https://blog.realinstitutoelcano.org/en/the-deglobalisation-virus/>; *Frederik van Til*, *Three Scenarios for Globalisation in a Post-COVID-19 World*, *Clingendael Spectator* 01.04.2020, <https://spectator.clingendael.org/en/publication/three-scenarios-globalisation-post-covid-19-world/>; *Douglas Irwin*, *The pandemic adds momentum to the deglobalisation trend*, column at *VOX, CEPR Policy Portal* 05.05.2020, <https://voxeu.org/article/pandemic-adds-momentum-deglobalisation-trend>; *Finbarr Livesey*, *Unpacking the possibilities of deglobalisation*, *Cambridge Journal of Regions, Economy and Society* 11 (2018), p. 177 ff., <https://doi.org/10.1093/cjres/rsx030>.
- [5] Cf. *Thomas Schmitz* (note 3), p. 168, 215 ff.
- [6] *Federal Constitutional Court* [Bundesverfassungsgericht], *Maastricht judgement* of 1993, BVerfGE 89, 155 (decisions of the Bundesverfassungsgericht, vol. 89, p. 155 ff.); *Lisbon judgement* of 2009, BVerfGE 123, 267.
- [7] See in particular *Ingolf Pernice*, *Theorie und Praxis des Europäischen Verfassungsverbundes* [Theory and Practice of the European Constitutional Compound], WHI Paper 8/2008, www.rewi.hu-berlin.de/de/lfoe/whi/publikationen/whi-papers/2008/whi-paper0808.pdf; *Ingolf Pernice*, *The EU - a Citizens' Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe*, WHI Paper 09/2013, p. 3 f., www.rewi.hu-berlin.de/de/lfoe/whi/publikationen/whi-papers/2013/whi-paper-09-2013.pdf.
- [8] See in particular *Christian Calliess (editor.)*, *Verfassungswandel im europäischen Staaten- und Verfassungsverbund. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht* [Constitutional Change in the European Compound of States and Constitutions. The Göttingen Talks on German and European Constitutional Law], 2007.
- [9] Cf. *Arnim von Bogdandy*, *Supranationale Union als neuer Herrschaftsträger: Entstaatlichung und Vergemeinschaftung in staatsrechtlicher Perspektive* [The Supranational Union as a New Ruler. Denationalisation and Communitarisation from the Perspective of General Theory of State], in: *Integration* 1993, p. 210 ff.; *Thomas Schmitz* (note 3), p. 74 with further references.
- [10] See on this concept *Thomas Schmitz*, *Integration through Law - the European Approach of Supranational Geo-regional Integration*, in: *ASEAN Studies Center, Faculty of Social & Political Sciences, Universitas Gadjah Mada (editor)*: *Conference Proceeding: International Conference on ASEAN Studies (ICONAS 2019): Rethinking Law, Institution and Politics in Advancing Partnership for Sustainable ASEAN Community*, Yogyakarta, 13.-14.03.2019,

2019, <http://asc.fisipol.ugm.ac.id/wp-content/uploads/sites/741/2020/03/CONFERENCE-PROCEEDINGS-ICONAS-2019.pdf>, p. 1 ff.

[11] <https://curia.europa.eu>. Note that this court must be distinguished from the *European Court of Human Rights* in *Strasbourg* (the treaty body under the European Convention of Human Rights, www.echr.coe.int). The latter is not an institution of the European Union.

[12] ECJ, case 26/62, *van Gend & Loos*, [1963] ECR 1, p. 23 ff. Strictly speaking, in the legal world order of sovereign states there can only be domestic and international law and European Union law is a part of international law. However, this part is so different from (other) public international law and so developed that most rules of international law do not apply and that it is generally recognised as a distinct and autonomous legal order.

[13] Cf. ECJ, case 11/70, *Internationale Handelsgesellschaft*, no. 3 f.

[14] ECJ, case 26/62, *van Gend & Loos*, headnote 5.

[15] ECJ, case 6/64, *Costa/ENEL*.

[16] ECJ, case 79/83, *Ratti*, no. 19 ff.

[17] Cf. ECJ, case 11/70, *Internationale Handelsgesellschaft*, no. 3 f.

[18] This limit was first worked out by the *Italian Constitutional Court* [Corte costituzionale], judgement 183/73, *Frontini Franco*, www.giurcost.org/decisioni/1973/0183s-73.html, and the *German Federal Constitutional Court*, BVerfGE 37, 271 (see p. 277 ff.), "Solange I", English translation at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>, and BVerfGE 73, 339 (see p. 366 ff.), "Solange II", English translation at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572>. Nowadays there is common sense about it, see for example *French Constitutional Council*, decision of 27.07.2006, 2006-540 DC, no. 19, www.conseil-constitutionnel.fr/decision/2006/2006540DC.htm.

[19] Note on terminology: When European integration started with three European Communities, the European law was called *Community law*. In 1993 the Communities became part of the European Union and Community law the most important part of Union law. The Treaty of Lisbon, which entered into force in 2009, abandoned the European Community as distinctive part within the Union, and, thus, the distinction between Community law and Union law.

[20] See on these principles *Thomas Schmitz*, The general principles of European Union law - a source of inspiration for the development of a modern administrative law in the Republic of Moldova, *Administrarea Publică* 2017, no. 1 (93), p. 26 ff., http://aap.gov.md/files/publicatii/revista/17/AP_1_17.pdf.

[21] See on the significance of the "effet utile" in European Union law *Lukasz Stępkowski*, The notion of effectiveness in the law of the European Union, *Studia nad Autorytaryzmem i Totalitaryzmem* 38 (2016) no. 2, p. 81 ff., <http://sfzh.wuwr.pl/download.php?id=479e62064724e01e54cc9db8f1d89788292cef8b>; *Alenka Berger Škrk*, Effet utile and national practice: Is there a room for improvement?, *InterEULawEast* 1 (2014), no. 1, p. 113 ff., <https://hrcak.srce.hr/123278>; *Sibylle Seyr*, Der effet utile in der Rechtsprechung des Europäischen Gerichtshofs [The Effet Utile in the Jurisprudence of the European Court of Justice], 2008; *Francis Snyder*, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, *The Modern Law Review* 56 (1993), p. 19 ff., www.francis-snyder.com/tl_files/contents/articles/%20The_Effectiveness_of_European_Community_Law.pdf.

[22] See now for a recent analysis *Attila Vincze*, Europäisierung des nationalen Verwaltungsrechts - eine rechtsvergleichende Annäherung [Europeanisation of National administrative law - a Comparative Approach], in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 77 (2017), p. 235 ff., www.zaoerv.de/77_2017/77_2017_1_a_235_268.pdf; *J.H. Jans; S. Prechal; R.J.G.M. Widdershoven (editors)*, *Europeanisation of Public Law*, 2nd edition 2015.

[23] ECJ, See on legal certainty as a general principle of Union law *Juha Raitio*, in: Ulf Bernitz; Joakim Nergelius; Cecilia Cardner; Xavier Groussot (editors), *General Principles of EC Law in a Process of Development*, 2008, p. 47 ff.; see for the limitation of retroactive effects ECJ, case C-293/04, *Beemsterboer*, no. 24 f.

[24] ECJ, case 21/81, *Bout*, no. 13; case C-293/04, *Beemsterboer*, no. 24.

[25] Cf. ECJ, case C-496/08 P, *Serrano*, no. 84 with further references.

[26] ECJ, case 222/84, *Johnston*, no. 18 f.; case 222/86, *Heylens*, no. 14.

[27] This principle represents a core element of the rule of law and thus applies as a general principle of law in the whole legal order of the European Union, cf. *Cordula Stumpf*, in: Jürgen Schwarze (editor), *EU-Kommentar [EU Commentary]*, 2nd edition 2009, art. 6 EUV [= EU Treaty], no. 11 with further references.

[28] See *Thomas Schmitz* (note 20), p. 26 (31 f.).

[29] Cf. ECJ, case C-255/90, *Burban*, no. 7, 12; joint cases 33 and 75/79, *Kuhner*, no. 23 ff.

- [30] See in particular *Friedrich Schoch*, Die Europäisierung des Allgemeinen Verwaltungsrechts [The Europeanisation of General Administrative Law], in: Juristenzeitung 1995, p. 109 ff.; *Friedrich Schoch*, Die Europäisierung des verwaltungsgerichtlichen vorläufigen Rechtsschutzes [The Europeanisation of Interim Relief by the Administrative Courts], in: Deutsches Verwaltungsblatt 1997, p. 289 ff.; see also *Rupert Scholz*, Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahren [On the Relationship between European Community Law and National Administrative Procedural Law], Die Öffentliche Verwaltung 1998, p. 261 (265); further references to the discussion at *Thomas Schmitz* (note 3), p. 110.
- [31] ECJ, case 26/62, *van Gend & Loos*, [1963] ECR 1, 23 ff.
- [32] ECJ, case 6/64, *Costa/ENEL*, [1964] ECR 585 ff.
- [33] ECJ, case 11/70, *Internationale Handelsgesellschaft*, no. 3 f.
- [34] See, with regard to directives, ECJ, case 79/83, *Harz*, summary 1.
- [35] ECJ, joint cases 205-215/82, *Deutscher Milchkontor*, no. 17 ff.
- [36] ECJ, joint cases 205-215/82, *Deutscher Milchkontor*, no. 33.
- [37] ECJ, case C-217/88, *vin de table (Commission v. Germany)*, no. 14 ff., 33.
- [38] See on this topic now *Attila Vincze*, Die Europäisierung der verwaltungsgerichtlichen Klagebefugnis – eine rechtsvergleichende Analyse [The Europeanisation of the Right of Action - a Comparative Analysis], in: Faculty of Comparative Political and Legal Studies of the Andrassy University Budapest (editor), *Jahrbuch für Vergleichende Staats- und Rechtswissenschaften* 2014/2015, 2016, p. 55 ff. with further references.
- [39] ECJ, case C-213/89, *Factortame*, no. 20 ff.
- [40] ECJ, joint cases C-143/88 and others, *Zuckerfabrik Süderdithmarschen*, no. 16 ff., 22 ff.
- [41] ECJ, case C-24/95, *Alcan*, no. 25, 34.
- [42] Cf. ECJ, case 9/0, *Leberpfennig (Franz Grad)*, no. 5 ff.
- [43] ECJ, joint cases C-6/90 and C-9/90, *Francovich*, no. 31 ff. This jurisprudence has been further developed in ECJ, joint cases C-46/93 and C-48/93, *Brasserie du Pêcheur/Factortame*, no. 16 ff.
- [44] Cf. ECJ, joint cases C-46/93 and C-48/93, *Brasserie du Pêcheur/Factortame*, no. 32; case C-224/01, *Köbler*, no. 32 ff., 51 ff. \
- [45] Cf. ECJ, case C-361/88, *TA-Luft (Commission v. Germany)*, no. 20 f., 24.
- [46] ECJ, case C-129/96, *Inter-Environnement Wallonie*, no. 44 ff.
- [47] Cf. ECJ, case 79/83, *Harz*, summary 1.
- [48] Cf. ECJ, case 148/78, *Ratti*, no. 19 ff.
- [49] Cf. ECJ, joint cases C-6/90 and C-9/90, *Francovich*, no. 31 ff.; case C-392/93, *British Telecommunications*, no. 40 ff.
- [50] *Federal Constitutional Court*, Lisbon judgement, BVerfGE 123, 267 (347, 354).
- [51] See in particular the new art. 23 of the Basic Law for the Federal Republic of Germany of 1949 and Title XI (art. 88-1 et seq.) of the Constitution of the French Republic of 1958.
- [52] Cf. ECJ, case C-285/98, *Tanja Kreil*.
- [53] See, for example, *Federal Constitutional Court*, fire service levy for men, BVerfGE 92, 91, de facto following *European Court of Human Rights*, judgement of 18.07.1994, *Karlheinz Schmidt v. Germany*, [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57880"\]}](https://hudoc.echr.coe.int/eng#{).
- [54] See already *Franz-Joseph Peine; Anna Samsel*, Die Europäisierung des Umweltrechts und seine deutsche Umsetzung [The Europeanisation of environmental law and its German implementation], in: *Europäisches Wirtschafts- und Steuerrecht* 2003, p. 297 ff.
- [55] See *Thomas Schmitz*, The implementation of the rights of refugees and asylum seekers in Europe and Germany, lecture at the National Seminar "Refugees and Asylum Seekers in Indonesia: Upstream and Downstream of Issue Handling, the Protection of Human Rights and its Implications for the Security of the State Border" at Universitas Muhammadiyah Buton, 08.02.2020, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Asylum-Refugee-Rights-EU-Germany.pdf, p. 1 f.
- [56] See *Hanane Ouirini*, Essai sur l'eupéanisation du droit de la consommation [Essay on the Europeanisation of Consumer Law], doctoral thesis in law, University of Avignon, 2016.
- [57] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
- [58] See, for example, *Hannes Rösler*, Europeanisation of Private Law through Directives - Determining Factors and Modalities of Implementation, *European Journal of Law Reform* 11 (2009), p. 305 ff.; *Jan von Hein; Eva-Maria Kieninger; Giesela Rühl*, How European is European Private International Law?, 2019.

[59] Cf. *Edita Gruodyte; Ingrida Kairiene*, The Europeanisation of Criminal Law in the Member States, in: *Administrativa un Kriminola Justicija* 2009, Nr.2, p.32 ff.; *Libor Klimek*, The European Arrest Warrant, 2014.

Table of Jurisprudence

Note: All judgements of the European Court of Justice (= ECJ) are easily accessible in English at the Court's website (https://curia.europa.eu/jcms/jcms/j_6/en). Please just insert the case number into the search mask of the database!

ECJ, case 26/62, *Van Gend & Loos* [1963] (Community law as an independent legal order; direct applicability of primary Community law)

ECJ, case 6/64, *Costa/ENEL* [1964] (primacy of Community law)

ECJ, case 11/70, *Internationale Handelsgesellschaft* [1970] (primacy of Community law over national constitutional law)

ECJ, case 148/78, *Ratti* [1979] (direct applicability of directives in favour of the citizen after expiration of the implementation period)

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Law and the International Community: Looking Into the (Post-COVID-19) Future

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Abstract. This article aims to discuss the global legal challenges in the post-COVID 19. One of the most visible challenges is the human rights challenge created by the COVID-19 restrictions has been the focus of serious debate in Australia. In the state of Queensland, legislation enacted on 18 March 2020 empowers the Chief Health Officer ('CHO') and other emergency officers to implement social distancing measures, including arranging mass gatherings, isolating or quarantining people suspected or known to have been exposed to COVID -19. These restrictions affect movement and gatherings across communities in contexts such as schools, higher education, hospital, court proceedings, family gatherings, sporting and community events, public entertainment, tourism, travel and vacations. There are many reasons why governments limit the human rights of its citizens. The challenge for society and government is to ensure that any restrictions on human rights are reasonable and justifiable.

Keywords: Human Rights, Chief Health Officer, Queensland. Pandemic Covid-19

1 Introduction

I had originally intended to talk about globalisation and the international community with reference to this auspicious year of 2020. This year seemed to be an appropriate time to look around with '2020 vision'.^[1] and to consider some questions about the role of public international law in a globalised world. An important threshold question might be: what is globalisation? What does it represent when we are talking about the development of the law that is expected to address its various problems? Although the term globalisation is commonly used, it has different meanings for different people and entities in the international community. I am reassured by legal scholar Professor Wolfgang Friedmann's observation that 'over thousands of years the most powerful minds of all nations have been unable to agree on a universal definition of law'.^[2] Although I don't believe that Professor Friedmann turned his attention to the term 'globalisation', I am confident that he would have reached a similar conclusion if he had.

The current coronavirus crisis has now raised particular questions in relation to globalisation. Academic and media commentary currently fluctuates between warning that COVID-19 means the end of globalisation and predicting that the virus highlights the importance of globalisation.^[3] As we know, the coronavirus pandemic has shut down many of the everyday activities of a globalised world: international travel has slowed or stopped, countries have closed their borders, domestic and international tourism have ground to a halt, foreign workers and students have returned home and local populations are in lockdown to an extent that would have been unimaginable a year ago. The nation State has never seemed more important or omnipotent, with countries enacting wide-ranging restrictions in response to the

pandemic. Domestic commercial activity and economies have declined, jobs are cut and unemployment is rising in many countries, national laws and regulations are prioritising nationals over foreigners and ‘globalisation has imploded.’[4]

My paper will start by discussing the novel coronavirus disease, now commonly called COVID-19, and will consider the public health restrictions that have been imposed to respond to the COVID-19 pandemic, with reference to human rights law, in my jurisdiction of Queensland. In this discussion I will mention briefly the challenges to global governance that the COVID-19 crisis has brought to prominence.

2 Result and Discussions

2.1. Coronavirus and COVID-19 Restrictions

In late December 2019, international media reported the rapid spread of a novel coronavirus disease, starting in Wuhan City in the People’s Republic of China.[5] There was increasing international awareness of its transmission in China and into other countries, including Australia, throughout January 2020.

On 29 January 2020, my home state of Queensland become the first state in Australia to declare a public health emergency due to the outbreak of COVID-19 in China, its pandemic potential due to cases spreading to other countries and the public health implications within Queensland.[6] The public health emergency order was declared for all of Queensland for seven days but has been extended several times.[7]

On 30 January 2020, the Director-General of the World Health Organisation (‘WHO’) declared that COVID-19 was a public health emergency of international concern. On 11 March 2020, the Director-General declared that COVID-19 could be characterised as a global pandemic. Since then, data collected by the WHO underpin the declaration: as at 26 June 2020, the number of confirmed cases worldwide sat at 9.8 million across 216 countries, with almost 500,000 confirmed deaths.[8] In the current pandemic, there is an important role to play for a central agency such as the WHO, which can impartially share public health information, coordinate equipment and expertise and advise States on the best responses to the coronavirus crisis.

States must work with international organisations such as the WHO to guide and make decisions that will affect the health of their populations. In its founding *Constitution*, the WHO urged all States to commit to ‘the health of all peoples’, which is ‘fundamental to the attainment of peace and security’ and depends on ‘the fullest co-operation of individuals and States.’ The *Constitution* also offers a salient warning to States who adopt isolationism and exclusionary policies: ‘Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.’[9]

There is also an important part to play for individual nations in the international community. States must be seen to take responsible and intelligent action to restrict COVID-19 transmission, and to share information and resources with neighbouring States to assist with their responses to the coronavirus. Over the past few months, we have seen that some States responded rapidly to early warnings about COVID-19 by, for example, closing their borders, declaring a national public health emergency, imposing social distancing, testing early and often and preparing personal protective equipment. Jurisdictions that acted early, like Queensland and countries such as South Korea, Thailand and Vietnam,[10] Georgia and Costa Rica,[11] appear to have had better public health outcomes. The Indian state of Kerala commenced intensive public health interventions in January which have set it up well for the challenges that followed.[12] As is apparent from COVID-19 infection and transmission rates in the USA, States that dismissed global warnings about COVID-19 by the WHO and other expert bodies because such messages were unpopular or inconvenient, or called for a cooperative response,[13] have not fared well.[14]

Along with reports of nationalist sentiment and protectionism,[15] the pandemic has also generated international cooperation. For example, scientists and medical professionals have collaborated to identify the virus' genome sequence and share information on how the virus affects (and infects) the human body.[16] Former senior Australian bureaucrat Jane Halton heads up the Coalition for Epidemic Preparedness Innovations, an international public health coalition that is now spearheading the global race to develop – and fairly distribute – a vaccine for COVID-19.[17]

2.3. Restrictions and Human Rights

The human rights challenges created by the COVID-19 restrictions have been the focus of much debate in Australia. In recent months, restrictions on movements and gatherings have been imposed by the different states and territories, resulting in a patchwork of laws restricting individual and commercial activities in response to perceived levels of risk in the different jurisdictions. In my state of Queensland, legislation enacted on 18 March 2020 empowered the Chief Health Officer ('CHO') and other emergency officers to implement social distancing measures, including regulating mass gatherings, isolating or quarantining people suspected or known to have been exposed to COVID-19 and protecting vulnerable populations such as the elderly.[18] From 19 March 2020, the CHO issued public health directions every day or couple of days in relation to different topics including trading hours, gatherings, aged care, the upcoming local government elections, border restrictions, non-essential business closure, corrective services facilities, and school and early childhood service exclusion. On 2 April 2020, the CHO issued the comprehensive Home Confinement, Movement and Gathering Direction 'to assist in containing, or to respond to, the spread of COVID-19 within the community.' The Home Confinement, Movement and Gathering Direction imposed home confinement except for 14 'permitted purposes' and limited gatherings in private residences and commercial premises. These restrictions affected movement and gatherings across the community in contexts such as school, tertiary education, work, hospitality, court proceedings, family get-togethers, sporting and community events, public entertainment, tourism, travel and holidays. The direction applied from 2 April 2020 until 'the end of the declared public health emergency'.[19]

The CHO's reasons for making the public health directions that imposed the COVID-19 restrictions in Queensland were obvious to most people who followed the news. In addition, the Queensland government announced the restrictions in numerous public and media statements and the Health Minister explained their context, purpose, scope and limited duration in the extrinsic materials that supported the amending legislation. In Queensland, these restrictions raised important questions about human rights. The questions were particularly apt because last year the Queensland Parliament enacted new human rights legislation. The *Human Rights Act 2019* (Qld) was proclaimed into force in its entirety from 1 January 2020 – just in time to apply to the COVID-19 restrictions.

The *Human Rights Act 2019* (Qld) protects 23 human rights, mostly civil and political rights but also two economic, social and cultural rights, which makes it quite ground-breaking for a Western liberal and common law jurisdiction. The Act also imposes specific duties and obligations on all branches of government: the executive plays its part through administrative decision-making and policy development, the legislature scrutinises and passes legislation, and the judiciary interprets laws and adjudicates rights. Not surprisingly, the COVID-19 restrictions breached a number of human rights. The most obvious of these was the right to freedom of movement, protected under s 19 of the *Human Rights Act 2019* (Qld), although other rights were also restricted, notably rights to privacy, peaceful assembly, freedom of expression, take part in public life, liberty, and others.[20] Section 19 provides that every person who is lawfully in Queensland has the right to move freely within the state, and to enter and leave Queensland, and

has the freedom to choose where to live. The right to freedom of movement applies to all people lawfully in Queensland and means that public entities cannot act in a way that would unduly restrict people's freedom of movement. In addition to protecting human rights, international human rights law provides that many human rights may be subject to limitations in prescribed circumstances.[21] Section 13 of the *Human Rights Act 2019* (Qld) provides that the 23 human rights may be subject under law to reasonable limits that can be demonstrably justified in a free and democratic society in order to protect the rights of others or important public policy issues. The provision sets out factors that must be considered when deciding whether a limit on a right is reasonable and justifiable.

This paper does not have the scope to assess the threshold questions and the permissible limitations test that must be satisfied before a conclusion may be reached about whether a human rights limitation is reasonable and demonstrably justified under the *Human Rights Act 2019* (Qld). However, a broad assessment of the relevant provisions suggests that the COVID-19 restrictions are not in breach of Queensland law. The restrictions may be regarded as emergency measures that are unavoidable, specific to the COVID-19 public health emergency and of finite duration. On balance, they may be reasonable and justifiable limitations on human rights in the current global coronavirus pandemic. The detailed explanations of the purpose, scope and duration of the COVID-19 restrictions, together with the national and international circumstances of the COVID-19 pandemic, brought what would otherwise be government breaches of human rights within the permitted limitations provided under s 13 of the *Human Rights Act 2019* (Qld).

The non-governmental organisation Human Rights Watch advises that 'the scale and severity of the COVID-19 pandemic' indicate that it is a sufficiently significant public health threat to justify restrictions on certain human rights 'such as those that result from the imposition of quarantine or isolation limiting freedom of movement.' Human Rights Watch also warns that governments should not impose overly broad restrictions that do not meet these criteria and recommends 'careful attention to human rights such as non-discrimination and human rights principles such as transparency and respect for human dignity'.[22] There are many reasons why governments restrict the human rights of their populations. The challenge for communities and governments alike is to ensure that any restrictions on human rights are indeed reasonable and justifiable, as required under the balancing exercise set out in s 13 of Queensland's *Human Rights Act 2019*.

The *Human Rights Act 2019* (Qld) does not unreasonably bind the government or public entities in their acts and decisions. Its legislative objects are to encourage dialogue about human rights and to develop a culture in the Queensland public sector that respects and promotes human rights. Importantly, the *Human Rights Act 2019* does not overturn parliamentary supremacy. This means that the Queensland Parliament may override it or even amend it into insignificance, although undoubtedly at a political cost. International human rights law offers a salutary reminder to communities as well as governments of its overarching purpose: to protect people against government mistreatment and to restrain governments from acting in ways that harm people's human rights.

3 Conclusions

The COVID-19 pandemic is a truly global problem that has confronted all countries around the world at the same time – an urgent problem that calls for global solutions.[23] Yet the United Nations' global health agency has not been without critics for its role during this and previous pandemics, with the US President being one of its most vocal critics. Australia's Prime Minister Scott Morrison has promised a three-point plan to 'reform' the governance of the WHO, create an independent review organisation to examine its performance in global health calamities such as the current COVID-19 pandemic. Most controversially, the PM wants to empower the WHO

to send teams of investigators into countries to determine the factors behind disease outbreaks. These investigators, he argues, could be similar to weapons inspectors deployed to verify disarmament programs.[24]

The idea of pandemic police raises some interesting issues in the context of international law. Few international organisations have the power to unilaterally enter a State to undertake an investigation. In the field of human rights, many States have issued standing invitations to the United Nations Human Rights Council to allow independent human rights experts to enter to assess compliance, but many have not. Even in the highly developed European human rights system, only one treaty – the *European Torture Convention*[25] – mandates States to permit visits by independent experts.[26] Professor Alison Duxbury of the University of Melbourne has flagged objections to the idea, noting that weapons inspectors gain their powers from treaties that address threats to international peace and security. Although the WHO *Constitution* recognises that the health of all peoples is fundamental to the attainment of peace and security, the Security Council has only once identified a pandemic as such a threat: the Ebola outbreak in conflict-ridden West Africa in 2014.[27]

In the current circumstances, the idea that the WHO could turn into ‘the policeman [of] global health’ is likely to remain the ‘dream [that] will never happen’, as former WHO Legal Counsel Gian Luca Burci has observed.[28] The COVID-19 pandemic has indeed been global in its impact, yet the legal responses, while based on the advice of an international body, have remained intensely local. The pandemic reminds us not just of how interconnected the modern world has become but of how important the role of each and every nation State is in securing a world that is safe for all of its citizens. Whether or not the global legal frameworks on public health are still fit for purpose for an effective global public health response is likely to be the subject of an intense and ongoing debate.

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Legal Advocacy as a Strategy for Agrarian Activism in Indonesia

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Abstract. This article aims to analyze the trajectory of legal struggle for agrarian justice in contemporary Indonesia. Author identifies several currents of legal advocacy in agrarian activism in Indonesia. First position is the liberal view of the rule of law. The second position is the structural approach to legal advocacy, promoted by the next generations of activist lawyers and advocates who integrate class analysis and community organizing in their work. The third strand is what author would call as the populist view of legal advocacy that sees legal struggle as a part of the broader class-based or populist politics.

Keywords: Legal Advocacy, Legal Struggle, Agrarian Activism

1 Introduction

Appealing to the rule of law has always been part of agrarian and social movement advocacy in Indonesia and other parts of the world. In doing so, ordinary citizens and activists legitimize their claims of grievances. In China, for example, peasants and rural citizens use the Chinese state's own rhetoric and legal provisions to fight corrupt local officials, expand the scope of popular participation, and gradually advance their rights [1]. In the United States (US), the civil rights movement pressured the American state and society by urging them to live up to the spirit of the US constitution. In Indonesia, peasant communities and agrarian activists have been using legal advocacy as a major arsenal in the struggle for agrarian justice, at least since the 1960s. Though actors involved in environmental and agrarian movements in Indonesia have expanded and diversified their advocacy strategies, they still utilize legal advocacy as a tool for community organizing and promoting a wide range of rural interests – from land rights to identity recognition. Legal advocacy can take various forms, such as calling for the consistent implementation of the existing laws and regulations, pushing for the fulfillment of legally-guaranteed rights, and proposing new laws, among others. But in contemporary Indonesian context, these multiple forms of legal advocacy share two main characteristics, namely 1) support for the rule of law and 2) emphasis on societal or popular mobilization as a backbone for legal advocacy.

Here, I aim to analyze the trajectory of legal struggle for agrarian justice in contemporary Indonesia. Mapping its evolution since the height of agrarian populism of the 1960s until today, I identify several currents of legal advocacy in agrarian activism in Indonesia. First is the liberal view of the rule of law, espoused by the pioneers of Indonesia's Legal Aid Foundations (*Lembaga Bantuan Hukum*, LBH), centered around the notion of the protection of individual citizen rights against arbitrary state power. [2] The second position is the structural approach to legal advocacy, promoted by the next generations of activist lawyers and advocates who integrate class analysis and community organizing in their work. The third strand is what I would call as the populist view of legal advocacy that sees legal struggle as a part of the broader class-based or populist politics.

2 Discussion

Historically, the initial major breakthrough in legal struggle for agrarian justice originated from the populist strand, represented by left-leaning peasant and rural labor unions. During the

Guided Democracy period (1959-1965) it was the left-leaning Indonesian Peasants' Front (*Barisan Tani Indonesia*, BTI) and Plantation Workers Union (*Sarekat Buruh Perkebunan Republik Indonesia*, SARBUPRI) who were at the forefront of political struggle for the rights of the peasantry and plantation workers [3]. Through mass mobilization, they championed the consistent implementation of the 1959 Basic Share-Tenancy Law (*Undang-undang Pokok Bagi Hasil*, UUPBH) and the 1960 Basic Agrarian Law (*Undang-undang Pokok Agraria*, UUPA) that mandated land redistribution, capping of landholding size, and redefinition of tenancy into ownership rights. Tragically, the 1965 anti-communist purge systematically excised the leftist-populist tradition from Indonesia's body politic and reversed the achievements of land reform campaign. In the near-absence of this tradition in post-1965 political landscape, the liberal view of legal advocacy burst into Indonesia's civil society scene. Albeit moderate, this strand of legal activism helped in setting the motion for the slowly burgeoning opposition under the New Order authoritarian regime.

The broader change of rural political economy during the 1970s and 1980s played a significant part in the progressive shift of legal advocacy in agrarian activism. This was the period when the New Order regime intensified its exploitation of land and forest resources, a process legitimized via the issuance of commercial lease rights (*Hak Guna Usaha*, HGU) and other regulations justifying corporate expansion to the countryside [4]. This led to the intensification of land grabbing by state and corporate authorities at the expense of rural communities. Soon LBHs, lawyers, activists, and students participated in the new wave of legal advocacy for various local agrarian struggles [5]. Informed by the structural approach of legal advocacy, legal practitioners, activists, and rural community leaders of this period aimed to solve land dispute cases and, equally important, rejuvenate mass politics in rural areas. Later, democratization in 1998 paved the way for a more assertive, contestational mode of agrarian activism. In early 2000s, local peasant unions sprang up in districts affected by enduring agrarian conflicts. This post-authoritarian wave of agrarian activism also facilitated the resurgence of populist tendency in legal advocacy for agrarian justice. This means legal advocacy for agrarian justice is no longer the exclusive domain of lawyers and middle-class activists. Ordinary community members and peasant leaders now have become more involved in the day-to-day process of legal advocacy. In my field experience in various districts (North Bengkulu, Ciamis, and Bulukumba, among others), I found that they take up a variety of roles in this process: as a chronicler of events and legal documents, an educator for their fellow neighbors, and a local paralegal, to name a few. Various rural communities and organizations along with their activist allies have also combined legal advocacy with more disruptive tactics, such as mass demonstrations. It has become a common strategy, for example, to protest local authorities to issue a copy of HGU agreements for communities affected by the expansion of HGU plantations.

Some rural social movements take one step further by institutionalizing their legal advocacy works. The Sundanese Peasant Union (*Serikat Petani Pasundan*, SPP) have established its own LBH to advance its legal struggle and provide legal service for other marginalized rural communities in Ciamis and Tasikmalaya [6][7]. In Bulukumba, the indigenous Kajang people, local peasant communities, and some other civil society organizations have successfully pushed the drafting and issuance of regional bylaw (*peraturan daerah*, perda) recognizing the rights of the Kajangs as indigenous people, especially concerning ancestral land and community forest [8]. In Demak, women in fishing communities have been actively participating in various paralegal works for fishers' rights and gender equality [9]. While the recent resurgence of legal populism might be different from that of BTI and Sarbupri, it nonetheless brings back the element of mass participation and progressive popular politics into legal advocacy for agrarian activism. Seen from that perspective, one can say that post-1965 agrarian movements in Indonesia have come a long way.

3 Conclusion

The many expressions of legal advocacy strategies for agrarian justice in Indonesia deserve a closer scrutiny. One way to do so is to assess achievements and limitations of these strategies. One should also put these advances in movement strategies in the broader historical and comparative contexts. Looking at qualitative evidence from various recent and historical case studies in Indonesia and beyond, it is safe to say that for legal advocacy to succeed, it must integrate community participation and mass mobilization. In this context, the liberal form of legal activism might be insufficient to get pro-democratic and agrarian justice agenda codified into laws and implemented as policies. While its emphasis on legal impartiality and individual rights is appreciated, it is not sufficient to expand democratic spaces and citizens' rights especially in socio-economic realms.

This is why the shift to structuralist and populist approaches in legal advocacy for agrarian justice should be welcomed. An important lesson from the experience of BTI, SARBUPRI, and many other rural community organizations is that the rule of law and policy change do not fall from the sky. There is a higher chance for legal advocacy to bear fruits if it is accompanied with mass pressure from below. There is an empirical basis for this claim: quantitative and cross-national evidence show that major political reforms, such as democratization, occur because of the disruptive capacity of non-elite actors [9].

We should also look at the achievements of legal advocacy for agrarian justice with caution. Here, it is important to remember that the *adoption* of laws advocated or proposed by agrarian activists and rural communities is the same as their implementation. One should not conflate policy formulation with its implementation. I therefore remain skeptical with the claim regarding the increasing influence of activist groups and community leaders in Indonesia's elite-dominated politics. [11] To date, the mandates of UUPA and UUPBH have not been implemented consistently. Furthermore, there has been no major policies addressing land grabbing cases across Indonesia. Nevertheless, as *cliché* as it may be, the idealized notion of the rule of law still has the potential to serve as a battle cry for marginalized rural communities and agrarian activists in their struggle for agrarian justice in an unequal market society. The downtrodden can strategically make use of the idea of legal impartiality, however feeble and Janus-faced it is. This is the point of the British social historian, E. P. Thompson (1975). [12] When armed with mass mobilization and democratic community organization, perhaps clinging to such an old notion might not be a bad idea after all.

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The Urgency of the Omnibus Law in Accelerating the Harmonization of Legislation in Indonesia

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Abstract. Empirical facts show that there are 42 thousand laws and regulations in Indonesia. As a result, there are many overlapping regulations, both in the same hierarchical level and / or with the regulations below. This condition makes the Omnibus Law urgency in statutory regulations. Omnibus Law is one of the important alternative choices by harmonizing legislation. The Omnibus Law is an umbrella law because it regulates thoroughly and then has power over other rules. *Stufenbau* theory, the legal system and the operation of law are the basis for analysis that the harmonization of the Omnibus law becomes a protector for executives (implementing legislation) who will innovate and create divine justice in economic progress and investment. The implementation of the concept of omnibus law in Indonesia is a hierarchical order of linear legislation with Law Number 15 of 2019 concerning the Formation of Legislations. The form of a law is not a basic law, but a law which is equivalent to other laws, which all or part of the provisions are amended or abolished by making new norms.

Keywords: omnibus law; harmonization of legislations; accelerating; legal drafting

1 Introduction

Since Indonesia's independence, Indonesia has gone through various government regimes. From the Old Order government, the New Order to the Reform Order. Changes from time to time, accompanied by changes in the president and cabinet of government clearly resulted in the birth of many laws and regulations in accordance with the context of the problems and challenges at that time. Over the past 74 years of independence, the increasing number of regulations produced has caused its own problems, such as disharmony and overlapping regulations. As a further result, there are also many conflicts over policies or authorities between one ministry/agency and other ministries/agencies, and also between the Central Government and the Regional Government.

Unfortunately, disharmony and overlapping of these regulations not only makes the government unable to move swiftly and responsively to face problems and challenges that arise, but also has an impact on hampering the implementation of development programs and worsening the investment climate in Indonesia.

Considering that the production of regulations, starting from the level of laws throughout Indonesia's independence, has accumulated and has led to the phenomenon of "hyper-regulation", so every government organizer intends to make innovations or breakthroughs, it is certain that there will be a clash with statutory regulations. Meanwhile, if the revision of legislation is to be carried

out conventionally, it is easy to predict that it will take a very long time to harmonize and synchronize the many existing regulations.

At the same time, the challenges of the digital society ecosystem era are in front of us. Indonesia should not be entangled in formal procedures for long. A policy breakthrough in the law drafting process must be born immediately. Based on this urgency, the only way to quickly simplify and uniform regulations is through the Omnibus Law scheme.

The definition of Omnibus Law comes from the words omnibus and law. The word omnibus comes from the Latin word *omnis*, which means “for all” or “many”. When coupled with the word law, which means law, the Omnibus Law can be defined as the law for all.

The debate regarding the Omnibus Law as the main means of structuring regulations surfaced when the Omnibus Law method, which was previously not widely known in Indonesia—a country with a Continental European legal system, was used in the preparation of the Draft Law (RUU) which became the 2020 Priority National Legislation Program. There are two bills in the 2020 Priority National Legislation Program that use the Omnibus Law method, namely: the Omnibus Law proposed by the Government and the Bill on Taxation Provisions and Facilities for Economic Strengthening (Omnibus Law) proposed by the Government [1][2].

Regulatory reform policy through the implementation of the Omnibus Law in Indonesia, is certainly not something the government does carelessly. Many considerations made by the government why choose the Omnibus Law method in carrying out urgent regulatory reforms. Various efforts to encourage increased investment were made by the government, but in the midst of the era of the Fourth Industrial Revolution, various policies that have been taken by the government to improve the investment climate have not attracted investors to invest in Indonesia.[2][4][5]

2 Method

This study uses a hermeneutic approach and in hermeneutically, that is, analyzing the content and context of policy material. The research will interpret the meaning of the articles in the policy so that it will get the correct meaning sociologically, philosophically and juridically [3].

3 Results and Discussion

3.1 Stufenbau Theory in the Formation of the Omnibus Law

Omnibus Law is something new in Indonesia even though other countries have implemented such as the United States (The Omnibus Act of June 1868, The Omnibus Act of February 22, 1889), Canada (Criminal Law Amendment Act, 1968-69), the Philippines (Tobacco Regulation Act of 2003) and 39 countries that adopted the Omnibus Law in terms of personal data protection released by Privacy Exchange.org (A global information resource on consumers, commerce, and data protection worldwide National Omnibus Laws), such as Argentina, Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, The Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Thailand, and United Kingdom. [30][31]

The definition of Omnibus Law starts from the word Omnibus. The word Omnibus comes from Latin and means for everything. In Bryan A. Garner's Black Law Dictionary Ninth Edition it mentions omnibus: relating to or dealing with numerous object or item at once; including many things or having various purposes, which means relating to or dealing with various objects or items at once; include many things or have multiple purposes. When coupled with the word Law, it can be defined as law for all. [15][18]

In the hierarchy/order of laws and regulations in Indonesia as regulated in Law Number 12 Year 2011 concerning the Formation of Legislation, the concept of Omnibus Law has not been included as one of the principles in the source of law. However, the harmonization of laws and regulations in Indonesia is continuously carried out to minimize conflicts of legislation. The Indonesian legal

system that adheres to the Civil Law system is one of the reasons why the concept of Omnibus Law is unknown. [15]

From the problem of harmonization of laws and regulations in Indonesia, the government needs to take a legal breakthrough to fix regulatory conflicts. The demand for improvement and rearrangement of overlapping laws and regulations in Indonesia is very urgent. One of the Omnibus Law ideas is likely to be applied in Indonesia along it is given space and a legal foundation. [15][16]

Omnibus Law is not new in the world of legal science globally, it is just that in Indonesia it is very necessary to fix overlapping laws and regulations. The process of harmonizing statutory regulations in addition to the above obstacles also takes a long time. With the concept of Omnibus Law, regulations that are considered irrelevant or problematic can be resolved quickly.

However, some academics also think that if the Omnibus Law concept is enforced, it is against the principles of democracy, because the concept of Omnibus Law is considered anti-democratic. However, the biggest question, do we have to continue to allow conflicts of laws and regulations? The government needs to make a legal breakthrough to be able to solve the overlapping problem of several laws and regulations. [20][21][22]

The order of laws and regulations in Indonesia must be revised and provide room to apply the Omnibus Law concept. Moreover, the current condition of policy makers can easily be criminalized by law enforcement officials. The understanding of the legal knowledge of the majority of law enforcement officers wears the perspective of legal positivism, so it is difficult to provide room for policy makers in this case officials to exercise discretion. Often discretion made by policy makers leads to crimes because they are accused of committing corruption. [20][21][22]

The aims of abstract law in the midst of a complex society can only be realized through complex organization. This means that the community will accept the law's objectives. The objectives of law include creating peace and upholding justice. Thus, the public will not do street justice or vigilante justice. The legal community will fully submit to the legal process because it is able to provide a sense of legal certainty (*rechtszekerheid*). [23][25]

This is an irony where Indonesia as a rule of law with all its instruments aims to protect human rights and provide justice for most of its citizens which is very urgent now to "bring justice to the people" (to bring justice to the people) by resolving justice to the people properly. problems which the people deem to be resolved legally. Another problem is when the act is disliked or hated by the community because it causes harm or causes a victim. In other words, the extent to which the problem or action contradicts the prevailing values in society and society considers it appropriate or inappropriate to be punished in the context of carrying out the welfare and security of the community. [4][5][8][10]

Order and security become real things through the actions of the Police. It can be argued that law enforcement will always involve humans in it and with human behavior itself. The law cannot run alone but must be implemented by the community. These legal regulations become a social contract and provide legal certainty in society. Thus, legal awareness arises automatically along with increasing trust in law enforcement officials. The law referred to can be in the form of criminal law, civil law, family law and other fields of law. [9][10][11]

The Omnibus Law which can later be realized in the form of an integrated regulation (Omnibus Regulation) will minimize the clash of laws and regulations related to certain fields. Observing the statutory system in Indonesia, the Law resulting from the concept of the Omnibus Law can lead to the Omnibus Law because it regulates thoroughly and then has power over other rules. However, in Indonesia it does not adhere to the Umbrella Law because the position of all laws is the same. Problems that arise when examined from the perspective of the theory of legislation regarding their position, so that their position must be given legitimacy in Law Number 12 of 2011 concerning the Formation of Laws and Regulations must be amended. [10][11]

The process of forming laws and regulations from theoretical studies related to the existence and enforcement of laws in society is known as Legal Development (*rechtsbeoefening*). This activity includes activities in shaping, implementing, implementing, discovering, interpreting, studying, and teaching law. The development of law is distinguished in the Development of Practical Law and the Development of Theoretical Law. [10][11]

The adoption of Practical Law is a human activity with regard to realizing the law in the realities of everyday life in a concrete manner. These activities include Legal Formation, Legal Discovery and Legal Aid [10][11]

Meanwhile, The Development of Theoretical Law is also known as Theoretical Reflection on law, which is an activity of reason to gain intellectual mastery of law or scientific understanding of law, namely methodically systematic - logically rational. Development of Theoretical Law is divided into 3 (three) types based on the level of abstraction or based on the level of analysis (level of analysis), namely Law Studies, Legal Theory and Philosophy of Law

There are several advantages of applying the Omnibus Law concept in resolving regulatory disputes in Indonesia, including: (1) Resolving legislative conflicts quickly, effectively and efficiently; (2) Uniform government policies both at the central and regional levels to support the investment climate; (3) Licensing management is more integrated, efficient and effective; (4) Able to break the long bureaucratic chain; (5) The increased coordination relations between related agencies because it has been regulated in an integrated omnibus regulation policy; (6) There is a guarantee of legal certainty and legal protection for policy makers.[15][16]

Meanwhile, the weaknesses in the application of this concept when applied include: (1) Opening up opportunities to be rejected at the time of plenary or in judicial review of the issued omnibus regulation policy; (2) The legislature feels “castrated” because the process of forming legislation does not involve the legislature; (3) Will affect the stability of the national legal system due to the orientation of government policies that change according to the will of the governing regime. [22][25][26][32][33]

3.2 How the Omnibus Law in Indonesia Should Become an Alternative for Overlapping?

In several countries, such as the United States, Belgium, United Kingdom, they offer solutions to problems with the emergence of conflicts and overlapping norms / regulations. If you want to fix them one by one, it will take quite a long time and a lot of money. Not to mention that the process of drafting and forming legislation on the part of the legislature often creates deadlocks or is not in accordance with interests.

This ultimately consumes energy, time, cost, and the goals to be achieved are not on target. In fact, this is added with the decrease in the level of public trust in legislative performance. For this reason, a legal breakthrough from the government is needed to solve regulatory problems

To achieve this, it is necessary to be based on strong regulations. One of the countries that adopted the Omnibus Law is Serbia. The Omnibus Law is a law adopted in 2002 that regulates the autonomous status of the Vojvodina Province which belongs to Serbia. The law covers the jurisdiction of the Vojvodina Provincial government regarding culture, education, language, media, health, sanitation, health insurance, pensions, social protection, tourism, mining, agriculture, and sports.

The Process of Law Formation Omnibus law is done in the same way as the formation of laws in general. In Article 1 number 1 of Law 12 of 2011 referred to as the Establishment of Legislative Regulations is the making of Legislative Regulations that includes the stages of planning, preparation, discussion, ratification or stipulation, and legislation. The stages of the formation of legislation are generally done as: (1) Planning Stages of drafting laws; (2) Preparation for the Formation of Law; dan (3) Submission of Draft Law.

According to Heri, the concept of the omnibus law in its manufacturing mechanism must follow the procedures stipulated in Law Number 15 of 2019 concerning the Formation of Legislation, starting from planning, drafting, discussion, to ratification. He considered, the omnibus law scheme was too sectoral and narrow. However, on the other hand, it is good for stimulating investment and exports. In fact, if the omnibus law is applied, of course, it will have a significant impact on better economic growth.

There are five steps that must be fulfilled by lawmakers in drafting the Omnibus Law. Here are five steps that the government must take to ensure that the Omnibus Law is effective and not misused, namely: *First*, the People's Representative Council (DPR) together with the government must involve the public in every stage of its formulation. The broad scope of the Omnibus Law

demands that lawmakers reach out and involve more stakeholders involved. *Second*, the DPR and the government must be transparent in providing any information on the progress of the Omnibus Law formulation process. This absolute participation and transparency is reflected in the legislation process that has sparked recent controversy, such as the formulation of the revision of the Corruption Eradication Commission Law and the Revision of the Criminal Code. *Third*, compilers must map the relevant regulations in detail. *Fourth*, the compilers must strictly harmonize both vertically with higher regulations and horizontally with equivalent regulations. *Fifth*, compilers must preview before it is passed. This preview is prioritized to assess the impact that will arise from the law that will be passed. [15][16]

Furthermore, it is also emphasized that Omnibus Law is a method for making a regulation or Law which consists of many subjects or subject matter for certain purposes to deviate from a regulatory norm. The Omnibus Law differs from most draft regulations in terms of the number of content materials covered, the number of articles that are regulated (size), and finally in terms of complexity. An Omnibus Law covers almost all related material substances—reflecting integration, codification of rules whose main goal is to streamline the application of these regulations. The theoretical and practical method of Omnibus Law legislation is still not well known in Indonesia. [7][10][11][15]

In drafting a rule using the Omnibus method, it will cover almost all related material substances so that the regulation can stand alone and not depend on other regulations. Rules with the omnibus method reflect an integrated, codified rule where the ultimate goal is to streamline the application of these rules in the practices. [17][18][19]

4 Conclusions

Simplification of laws and regulations in the midst of overlapping legal conditions in Indonesia is one of the government's top priorities. Through the Omnibus Law, the government seeks to simplify various regulations, especially those related to the economy, environment, and investment. In the context of the Theory of Laws and Regulations, the formation of the Omnibus Law is an opportunity for harmonization of statutory rules in Indonesia. With reference to the Self-Regulating System, giving high authority to the President to regulate regulations for himself. The power of the President in making regulations is exercised to regulate both economic regulation, social regulation, and administrative regulation. The Work Creation Bill (Omnibus Law) was prepared with the consideration of supporting work copyright where it is necessary to adjust various regulatory aspects where changes to sectoral laws are partially felt to be ineffective and efficient, so that a legal breakthrough is needed through the formation of laws using the Omnibus Law method that can solve various problems in several Laws into one Law in a comprehensive manner.

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The Principles and Meaning of Indonesian Citizenship Conception According to The 1945 Constitution

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Abstract. Emphasizing on legal aspects of the conception of Indonesian citizenship, which is in the Constitution 1945 framework is putted as legal science study of matters pertaining to form of government. There were some kind of words, like as “bangsa, rakyat, and warga negara” that contented at the Constitution 1945, that show one meaning which in the conception of Indonesian citizenship. Major problems that are identified are (1) What fundamental principles of Indonesian citizenship that could brow up from the Constituion 1945 and (2) How the meaning of Indonesian citizenship according to the Constitution 1945. There are several fundamental principles of Indonesia citizenshipin the Constitution 1945 that could be base of Indonesian Laws of Citizenship toward, e.i. the unity citizenship principle, the integrated principle, non-immigration state principle, a close and factual connection, ius soli, and ius sanguinis. The Indonesian citizenship conception not only contain the meaning in legal or formal sense, but has wide sense that invollep contain historical, sociological, and yuridis sense. In Indonesian state”the tie pepertual or permanent allegiance” is inherent in each citizen of Indonesia.

Keywords: Citizenship, Meaning of citizenship, Principles of Citizenship.

1. Introduction

Discussing the principles of citizenship and the meaning of a conception of citizenship is closely attached to state organizations, such as the Indonesian state. In the study of Constitutional Law (*staatsrecht*), the state is the object of general state studies (*staatswissenschaft*) which in Logemann's view is conceived of as an organization of power[1] or political organization[2]. Generally, the state as an organization of power (*gezagsorganisatie*)[3] which is a political integration of power[4], formed of certain elements.

According to the 1933 Montevideo Convention, the states as a person of international law should have qualifications): (1) a permanent population; (2) a defined territory; (3) a government; and (4) a capacity to enter into relations with other states[5]. A permanent population which in the legal sense is a citizen, is a core element of the country's building, therefore the issue of citizenship in the state concerns the most central element. The

formulation of the understanding of the state in various schools of thought from experts ranging from ancient to modern thinking always places the existence of citizens as the main element[6].

In the context of the Republic of Indonesia, citizens are the main pillars of the existence of state buildings. The term “*sokoguru*” was put forward by the drafters of the constitution before the session of the Indonesian Independence Preparatory Agency for Investigation (BPUPKI)[7]. The thought of the conception of Indonesian citizenship was born in line with the formulation of the concepts of an independent Indonesian state which officially began to emerge since the discussions at the BPUPKI session[8]. Then obtain a constitutional form spread in the construction of the 1945 Constitution of the Republic of Indonesia (1945 Constitution), both listed in the Preamble and in the Body.

So far there have been quite a lot of studies on territorial issues, governance issues and sovereignty issues[9], while studies on citizenship issues are still lacking[10]. Research on the issue of Indonesian citizenship has so far not been carried out adequately compared to other fields of constitutionality[11]. General symptoms, writing and developing citizenship are more likely to be in the domain of State Administrative Law[12]. Therefore, a study of the conception of Indonesian citizenship occupies a strategic position in the discourse and treasury of Indonesian constitutional law, especially concerning more basic aspects.

In terminology, citizenship is as old as the Republic of Indonesia, but conceptually, there is no understanding that can be followed together. The conception of Indonesian citizenship, both stated in the Preamble and in the body of the 1945 Constitution, has not been well identified at least about the perspective of the principles and the meaning of the concept.

The element of citizens is closely related to the purpose of the formation of a country, because basically the state was established to protect the interests of its citizens. The Preamble to the 1945 Constitution states that Indonesia's independence on August 17, 1945 is the right of the Indonesian nation and is a gateway that delivers the Indonesian people to become an independent, united, sovereign, just and prosperous nation. Preamble of the 1945 Constitution contained the same *rechtdede* as the Jakarta Charter, Preamble of the RIS Constitution, and the Preamble of the 1950 Provisional Constitution. Likewise, within the framework of amending the 1945 Constitution, the MPR RI had agreed that Preamble of the 1945 Constitution was not changed. This means that the main ideas in the Preamble are very fundamental and remain relevant to development, because they continue to function as philosophical references to this day. Thus, the purpose of the formation of the Republic of Indonesia was to protect the entire Indonesian nation.

There are several words or terms for membership in the Indonesian state, such as the word people, nation, society, and citizens. Constitutionally insofar as the words are expressly stated in the formulations of the 1945 Constitution, the word people is a dominant term, at least referred to in 8 (eight) contexts, among others in relation to the highest power holders in the state, related to the designation of the institution representative {*vide*: Article 2 paragraph (1)}, and related to prosperity {*vide*: Article 23 paragraph (3)}. The word nation is coupled with the word *nusa* in the context of the president's oath and promise (*vide*: Article 9). Meanwhile, the word community was found in relation to the unity of traditional law, traditional rights, and culture {*vide*: Article 18B, Article 28I, and Article 32 paragraph (1)}. The names of citizens are included among others in the context of equality before the law and government, defense and security, and related to the issue of education guarantee (*vide*: Article 27, Article 30 and Article 31).

In development of state practice in Indonesia, there are two leading cases that stimulated the ongoing discussion about dual citizenship in 2016. *The first*, is Arcandra Tahar who was

appointed as Minister for Energy, Mineral and Natural Resources in August 2016. But he was in office for only twenty days, as the President dismissed him after receiving major criticism from the public based on the fact that Tahar was a US citizen. According to the US Citizenship Act, Arcandra Tahar automatically lost his US citizenship when he took the oath as a Minister, which then led to the issuance of a Certificate of Loss of Nationality by the United States on 15 August 2016. He was stateless. Surprisingly, the Indonesian government proceeded to a 'quick response' to the effect that Tahar reacquired Indonesian citizenship, despite criticism from academics that political motivations had encouraged the government to do so[13]. In September 2016, the Minister of Law and Human Rights 'reinstated' Tahar's Indonesian nationality, and it paved the way for Tahar's appointment as Vice Minister of Ministry of Energy and Mineral Resources. *The second*, case concerned Gloria Natapradja Hamel (a 16 year old senior high school student) who was dismissed from Pasukan Pengibar Bendera Pusaka (the prestigious flag-hoisting team) for the state palace Independence Day celebration. The main reason was that she holds French nationality, because was born from a mixed marriage. Her father holds French citizenship whereas her mother is an Indonesian citizen. As a result of the parents' failure to comply with Article 41 of Indonesian Law of Citizenship 2006 by not reporting to the authorities their choice for Indonesian nationality for the child, Hamel lost her Indonesian nationality.

This article discusses and describe the basic principles of Indonesian citizenship and the meaning of the conception of Indoensian citizenship according to the 1945 Constitution of the Republic of Indonesia.

2. Method

This paper is the result of a review or study of various positive legal documents relating to the themes discussed. The objective of the research is secondary data in the form of primary and secondary legal materials. Therefore, referring to the research methods that exist in the typology of legal research, the methodology in this study purely applies the juridical-normative-doctrinal legal research methods.

3. Result and Discussion

Discuss the principles and meaning of the conception of Indonesian citizenship, in line with the principles and meaning of the concept of general citizenship. In terminology there are several words or terms in foreign languages for the term citizenship, which contain different dimensions of meaning, understanding, and substance. In the perspective of comparative law there are terms of naturality, nationality, and citizenship which all mean citizenship in a united political community or organization of power. There are also terms that have special local meaning such as, *Indigenat* (*German*), *Heimatrecht* (*Austria*), and *Vecindad* (*Spanish*). Like the terms Naturality and Subject subject, these terms tend to indicate territorial relations in local membership rather than national membership which has feudal characteristics (= citizenship in English Legal terminology).

The word nationality and citizenship is a word or term that is popular and is commonly interpreted as citizenship. All of these words or terms have the same meaning, which means membership or citizenship in the country. In other words conceptually, these terms are a concept that shows the same idea or purpose, namely membership in the state (membership of political community) with approaches and affirmations on different aspects. Therefore, the concept of citizenship has a broad dimension, because citizenship contains meaning or has meaning that can be seen from various points of view.

In linguistic citizenship (citizens plus suffixes to and affection) means all matters relating to citizens. Citizenship as any type of relationship between a citizen and a country which results in the obligation of that country to protect its citizens or in the sense of citizenship includes all types of protection by the state.

a. Basic Principles of Indonesian Citizenship

The principles of Indonesian citizenship are basic or general and some are specific. Principles that are basically in accordance with the way of the Indonesian people are generally more concerned with feelings than ratios, because they are intuitive, mystical, and immaterial. At the basic level of Indonesia's original transcendental (religious) mind, it cannot be separated from belief in the power of the One God. The birth and existence of the Indonesian nation and state is a blessing and a blessing from God Almighty. In the conception of citizenship, a nation is created in Indonesian nature, the status of Indonesian citizenship is essentially the destiny of God Almighty. This indicates the basic principle of the spirituality of Indonesian citizenship which is very strongly adhered to in line with the magical-religious customary law community characteristics reflected in the first principle of the Pancasila.

The original view of the Indonesian people, emphasized that the Indonesian state was formed essentially driven by an invisible inner force (*Innere stillwirkende Kraefte*) which grew as the soul of the Nation (*Volkgeist*). In the conception of citizenship, this view underlies the relationship between the Indonesian people and the territory that is eternal, the reciprocal relationship between citizens and the state is very strong bound by factors that exceed mere human will. This view places the national element in a central and primary position in the Indonesian state. The state is not only for the state, but for the benefit of citizens. A state ideology which contains the basic principles of the people as the primary element in the conception of Indonesian citizenship. The nation that led to the birth of the state, the nation is the nation's maker.

The thought of Indonesian citizenship is based on the unity of a community which is engraved on the basis of blood ties, the unity of residence, or based on blood ties with the unity of residence at once. The State of Indonesia was formed to reaffirm the relationship between the people and the state in a wider scope. The Indonesian people not only emphasize the mere aspect of humans, but are holistically seen in relation to their homeland. In the Indonesian homeland Indonesian people are born, live their lives, and when they die their bodies are united with the Indonesian homeland. The original Indonesian perspective requires the unity of Indonesian people and their region and environment. This thinking is the core of the basic principle of oneness between citizens and the Indonesian state.

Politically, the Indonesian people had gathered to build organized collectivity since 1908, so that with the declaration of the establishment of the Indonesian state, it meant that Indonesia's national integration was final. The existence of citizens from various nationalities and ethnicities is a logical consequence of national integration to lead to state integration[14]. So, there is an important basic principle in the conception of Indonesian citizenship, which is the basic principle of integration / unity of the state. This principle implies that a nation that declares Indonesian independence becomes a supporter (citizen) of the Republic of Indonesia.

The general principle of Indonesian citizenship is implicit in the designation of the whole of the Indonesian Nation and which is the construction of a group of native Indonesian people and people of other nationalities. The existence of citizens from native Indonesian people and the presence of citizens from other nationalities must be complementary or complementary in the Indonesian state. The first group can be considered as the main pillar of the building of the Republic of Indonesia, while the second group becomes part of the unity of members of the

country of their own choosing. Contained thoughts to realize a unified citizen as a whole. This shows one of the important principles in the conception of Indonesian citizenship, which is the basic principle of citizens' unity.

The principle of Indonesian citizenship is a constitutional formulation with the categorization and characteristics of Indonesian Citizens originating from native Indonesian people and those of other nationalities who are ratified by law as citizens. In practice, there are groupings of citizens into Indigenous and Non-Indigenous groups which result in differentiation of treatment for citizens.

The mention of the original Indonesian nation and other nations, only applies when determining who becomes an independent Indonesian citizen. The understanding of the nation attached to the expressions of the native Indonesians and other people must be understood in the context of constitutional determination. By law the term nation is related to citizenship, not related to the group of nations in the context of the founding of the Indonesian state, meaning citizens because of the stipulation of laws. The principle of determining citizenship through the enactment of a law (citizen by operation of law) means that all groups are declared citizens of the Republic of Indonesia, by establishing a constitution.

With constitutional arrangements that determine who is a citizen, general law principles are followed in determining citizenship, namely sovereign state. The right of the state determines who becomes its citizens, always paying attention to the principle of real and strong relationships (a close and factual connection). The State of Indonesia determines its citizens based on the structure of society before and at the time the country was born or established. The structure of Indonesian society before the declaration of independence inherited the composition of the population which was deliberately created and created by the grouping of society by law in the field of *Dutch* citizenship.

The native Indonesian people are those who are classified as *Inheemse onderdanen* or *Inlanders* (*Bumiputra*) and their descendants. *Bumiputra* are all people who belong to the native people of Indonesia from the Dutch East Indies and do not switch into other groups of people. *Bumiputra* or native people of Indonesia are often interpreted as a class of people who have been incarnated in the days of *Srivijaya* and *Majapahit*, for generations have inhabited the archipelago for generations. They make the land as a source of life, consider the land to be united with themselves, which has a magical-religious nature, realizing that their spilled land must be guarded and maintained, because it functions as a place to store their bodies after death. The Republic of Indonesia is considered to be the third national state as the restoration of *Srivijaya's* sovereignty as the first state and *Majapahit* fraternity as the second ever victorious state in Indonesia. Supporting these countries are the native people of Indonesia who are the main supporters of the birth of the Republic of Indonesia. *Bumiputra* is a person in the natural sense in terms of citizenship. An individual is called natural if born in that country (a natural of the country is an individual who is born in a city of certain which is located of this country). The term *bumiputra* contains citizenship which is based on the principle of birth according to the regional concept known as the *Ius Soli* principle.

In nationality the word *nasci* is known which means as a birth origin of the same common ancestor or group of people who are a lineage or nationality (nation). The principle of heredity in the original terminology of the Indonesian language is called *wangsa* which is the same as the nation. In the sense of dynasty or nation does not depend on elements or aspects of territorial territory, but is determined by aspects of blood lineage or lineage. Thus, the conception of Indonesian citizenship also applies the principle of *Ius Sanguinis*.

The principle of *solis* and the principle of *ius sanguinis* in Indonesian citizenship is not merely natural. According to the law there has been a fusion of ethnic groups that support the

existence of the Indonesian state into the unity of Indonesian citizens. At the same time, a principle is adopted that every citizen of the Republic of Indonesia within the territory of the Republic of Indonesia is deemed to have no other citizenship (the principle of single citizenship). Parallel with that, it should not be easy for an Indonesian citizen to lose his Indonesian citizenship status against his own will, on the contrary as a citizen has the right to all forms of protection from the State or government wherever located. Every Indonesian citizen has freedom of entry and exit into the territory of the Indonesian state. This is called the principle that once an Indonesian citizen is a permanent Indonesian citizen.

b. The Meaning of the Concept of Indonesian Citizenship

In the realm of legal studies, the notion of citizenship legally rooted in the word *citoyen* (citizenship) is the most popular formulation and is commonly considered standard as a term containing legal meaning[15]. The meaning of citizenship in the perspective of legal science is understood and indicated in the dimensions of positive, negative, active and passive status. The status of positive citizenship gives citizens the right to demand positive measures of protection from the state. Negative status means providing guarantees that the state cannot interfere and act arbitrarily in its personal affairs. While active status gives citizens the right to actively participate in the administration of state affairs through the right to vote and the right to be elected. This is what is commonly referred to as citizenship rights in politics. The passive status is actually an obligation of citizens to submit to and obey all power and state laws[16].

In general, the concept of citizenship has meaning and contains a broad dimension with a series of elements in it. The conception of citizenship shows a strong and special legal relationship in which an individual citizen is determined and committed to living for life and only ties a lasting relationship with a country with all forms of rights and obligations. The relationship can be seen from two polars, namely on the one hand the emphasis from the point of view of individual citizens and the point of view of the state, on the other side. The relationship must be built voluntarily without coercion by both the state and citizens based on agreement.

The conception of Indonesian citizenship is implied both in the general (broad) formulation and in a special (narrow) sense. With a coherent plot, the conception of Indonesian citizenship is implicit in the expressions of all Indonesians listed in the Preamble, the terms nation, people, and the words of citizens in several articles. In the context of an independent Indonesian state the words or terms of the people, nation, society and citizens are basically used to indicate the same thing (= membership in the Indonesian state).

Inclusion of these terms is more placed in the framework of reciprocal relations between members of the state and the state which reflects the existence of rights and obligations. As such, these terms describe membership in the political community or political unity in a juridical, sociological, and political sense.

The preamble of the Indonesian constitution states that the struggle for the Indonesian independence movement will bring the Indonesian people to the front gate of the independence of the Indonesian State, the Indonesian people who declare independence, and the government of the Indonesian state must protect the entire Indonesian nation, and must realize social justice for all Indonesian people.

Preamble of the Indonesian Constitution has something in common with the Preamble of United State Constitution, in term of subject. The Preamble constitution of United State begins with "We the People of the United States" which explicitly means affirmation about subject in the United State of America.

Along with the changes of the United State Constitution, term the people of the United States has strengthened and defined the meaning of being United State Citizen. According to the opinion Edward S. Corwin's, "We, the people of United States", in other words, We, the citizen of the United States, whether voters or nonvoters[17]. The words "people of the United States" and "citizen" are synonymous terms. They both describe the political body who according to our republican institution, form the sovereignty, and who hold the power and conduct the government through their representative[18].

In the Indonesian language, the terminology of a nation or people is the same as a citizen[19]. Thus, the phrase Indonesian people, Indonesian people, and all Indonesian people are one essence with the word people, nation, society, and citizens, identical to a permanent population which means citizens of the Indonesian state.

The constitutional basis of citizenship explicitly states that those who become Indonesian citizens are those who are native Indonesian people and those of other nationalities who are ratified by law as citizens. The terms native Indonesian people and other nationalities, reflect the category of the origin of Indonesian citizens who characterize the conception of citizenship according to the 1945 Constitution. Categorization of these terms is in line with the terms contained in the Preamble to contain meanings and principles basic principles relating to the conception of Indonesian citizenship, among others with regard to the term native Indonesian.

The term nation does not merely have an ethnic meaning and the word people does not only refer to groups of local people who are confronted with the word government. In the context of the establishment of an independent Republic of Indonesia, the terms nation and people must be understood as citizens and the expression of the whole nation means and must be read in the same way as all citizens.

In the terminology literature, the nation is defined as a group of people who are in the same boat and who want to live united together because of equality of fate. The term nation is used to describe the wholeness of one unit of people in relation to the wholeness and unity of other people. Meanwhile, the terminology of the people in the literature contains the understanding as a group of people who are united by a sense of togetherness to jointly inhabit a certain area. Nation and people already existed before the state was established or independent. Long before the Indonesian state was founded or formed, the Indonesian nation had already demonstrated its existence by pledging itself in the Youth Pledge on October 28, 1928. Then on August 17, 1945 together declaring Indonesian independence. As for the people of Indonesia (which are identified with the original Indonesian people) their existence is spread in various tribes and descendants with all forms of customs, culture, language, and beliefs or religions respectively.

The nation and people of Indonesia are the main elements of Indonesian citizens, because those who have lived since time immemorial in the Archipelago (*Dutch East Indies*) after the independence of the Indonesian state were formed automatically by the power of law (in this case the Constitution) changed its status to Indonesian citizens. Therefore, in the conception of Indonesian citizenship, it implies that the existence of Indonesian citizens is in line with the birth of the Republic of Indonesia. They have lived and existed in the territory when Indonesia was founded, together fighting for the country of Indonesia, loyal, and recognizing Indonesia as their homeland forever.

When examined with a theoretical approach, the conception of Indonesian citizenship not only contains meaning as a political-legal denoting membership of state, but also means as a historical-biological denoting membership of nation. In this case, the eternal loyalty (the tie perpetual allegiance) to the Indonesian state is inherent in every citizen. It also indicates that the conception of Indonesian citizenship according to the 1945 Constitution reflects the

characteristics of genuine citizenship which are simultaneously influenced by the concept of citizenship according to the Continental European and Anglo Saxon legal systems.

Membership in the state in the sense of being seen in the same way as biological history (historico-biological) is characterized by the existence of the subjectivity of group sentiments in a unity of people who wish to live together. This element of sentiment is usually considered a factor that forms a race. In the sense of membership like this it is not always necessary to have an element of territory. Membership is biologically a membership based on social facts and various feelings in common as part of fellow groups. Therefore, the conception of citizenship has several common attributes such as language equality, regional similarity, tradition, political entities, and religion. Thus, the meaning of citizenship emphasizes the role of individuals in horizontal relations with each other.

The membership in the state legally and politically has the essence of a person's basic status which is attached to the state by an eternal fabric that is recognized or formally accepted by all parties. The most important conditions that mark it are a very strong vertical attitude of citizens' loyalty to the state and horizontal loyalty among citizens who will strengthen their fellow relationships. With vertical loyalty and horizontal loyalty in the end will create a condition of a vertical relationship that is collective from all citizens to the state as a shade.

The conception of Indonesian citizenship according to the 1945 Constitution implies membership in the state from various perspectives, such as biological history, from legal aspects, and in relation to socio-political aspects.

The meaning of citizenship as is generally known in the field of citizenship field, is also reflected in the perspective and characteristics of the conception of Indonesian citizenship according to the 1945 Constitution. Even more than that, the meaning of Indonesian citizenship has a broader content, because it contains an understanding of citizenship that is characterized by Indonesia as reflected in the in the expression of the native people of Indonesia.

The conception of Indonesian citizenship has a broad meaning because it contains elements and accommodates a variety of state thoughts that have developed since the past and have been generally accepted. In the conception of Indonesian citizenship there are elements of membership relations that are mutualistic, give rise to status, give birth to rights and obligations, are feudal and territorial in nature, and there is an element of eternal loyalty. Judging from the state's thoughts that have been generally accepted, implied by several influences. First, it indicates the influence of ancient *Greek* legal thought that uses the term people identical to citizens who are vis-a-vis with the state. Secondly, it accommodates the concept of citizenship from the Continental European legal system and the Anglo Saxon legal system while simultaneously highlighting aspects of government and territorial aspects. Third, it shows the original Indonesian way of thinking that places local concepts in tandem with political aspects.

4. Conclusion

The 1945 Constitution of the Republic of Indonesia contains the conception of Indonesian citizenship, implied in the formulation of words contained in the Preamble and in the formulation of several articles with specific characteristics. The conception of Indonesian citizenship contains the principles and meaning of citizenship that is different from the principles and meaning of citizenship in general.

The concept of Indonesian citizenship includes a number of principles, such as the principle of a close and factual connection based on birth factors, both according to heredity

(*ius sanguinis* principle) or because of the birth area (*ius soli* principle), nonimmigrant countries (non immigrant state principles), and selective policy.

The meaning of the concept of Indonesian citizenship constitutionally (the constitutional meaning), is mainly reflected in the understanding of the people of the original Indonesian people and those of other nations who are ratified by the law. The terminology of all nations is the same as all citizens, because of any national origin Indonesian citizens must unite and merge in a complementary form personnel substratum (*sokoguru*) Indonesian state. Indonesian citizens are those who have lived within the territory of Indonesia, jointly fighting for the Indonesian state, being loyal, and recognizing Indonesia as their homeland forever. Every Indonesian citizen must establish himself and be determined to live a life and only bind a lasting relationship with the Indonesian state. With all rights and obligations, for every Indonesian citizen there is a permanent relationship with an emphasis on the ties of eternal loyalty (the tie perpetual allegiance) and horizontal vertical-loyalty loyalties. The conception of Indonesian citizenship has meaning as a political-legal denoting membership of state and as a historical-biological denoting membership of nation.

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Method and Strategy of the Universitas Negeri Semarang in Overcoming Student Radicalism

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Abstract. This article intends to study and analyze anti-radicalization methods and strategies at Universitas Negeri Semarang (UNNES) and study and explore appropriate policy programs to close the gap for radical understanding to enter UNNES. UNNES, as an educational institution, also cannot escape the potential of radicalism's target in spreading its ideology. To anticipate the entry of a radicalism doctrine - both radical right and left radical - UNNES has issued several policies. Specifically related to ethics and rules on campus, the Chancellor's Regulation was explained, namely Rector's Regulation No. 44 of 2018 concerning UNNES Student Ethics and Rules (is a substitute for Rector's Regulation No. 19 of 2016 regarding UNNES Student Ethics and Rules). Regarding student communication on social media, UNNES issued Chancellor Regulation No. 11 of 2019 concerning Management of Digital Reputation Synergy of UNNES. To support the Student Ethics and Code of Conduct, a Student Ethics Board was formed, consisting of legal experts and Vice Deans for Student Affairs at UNNES. The UNNES Digital Reputation Synergy Team (SINERGIS) was formed to enforce the rules on Digital Reputation Synergy Management. Specifically, in anticipating radicalism, in 2018, the UNNES Anti-Radical Task Force was formed. Also, UNNES has a Center for Anti-Radicalism and Terrorism Studies at the Faculty of Law, UNNES.

Keywords: Student Radicalism, Method and Strategy Antiradicalism

1. Introduction

Radicalism and extremism are ideological diseases that have lately become a problem for humankind throughout the world. In the Indonesian social order, radicalism/extremism can manifest in the form of the right extreme and left extreme. [1] In the right height, it is often addressed to those who are religious-oriented with intolerant ideas, unable to accept differences of understanding with other religions, even fellow religions. This category includes those who commit to terrorism acts by bombing in the name of *jihad*. While the left extreme is pinned to those, who are Marxist, Leninism and socialism-oriented, this left direction often wants to clash elements of the nation's people with one another. Either the right or left extreme eventually both claim and question the Pancasila as a state foundation, the 1945 Constitution, and the Unitary State of the Republic of Indonesia.

Nationally, radicalism and terrorism have increased. Compared to data in 2017, radicalism and terrorism in 2018 increased by 42%. In 2017 there were 12 cases of radicalism and terrorism, while in 2018, it increased to 2018. Throughout 2018 there were 396 terrorists arrested. [2] The surprising fact is that the perpetrators are generally young people.

It was associated with the potential for the rise of left extreme ideology/communism. [3], [4] [5], [6] It still becomes a polemic. Some figures stated that communism as an ism or ideology is not easy to eradicate, as it will even continue to escalate [7] Therefore, as an effort to anticipate, the State must take tactical steps to avoid being missed.

2. Methods

2.1. Research Specifications and Approach Method

This Research used sociological/empirical/ non-doctrinal research methods, although it still based on the normative analysis. This Research was due to comprehensive legal Research that constantly synergizes various scientific disciplines. [8]

2.2. Data collection technique

Literature/document study and interviews are used in this Research.

a. Literature/document study

This technique was directed to obtain secondary data from primary, secondary, and non-legal material. The tool used for the study of documents is the documentation form. [9]

b. Interview

An interview is a process of obtaining information for research purposes by way of question and answers in face-to-face interaction between the interviewer and the interviewee, both with or without using interview guides [10] Kerlinger formulated an interview as a situation of interpersonal role in a face to face when someone—interviewer—asks questions designed to obtain answers relevant to the research problem, to someone as the interviewee [11] Interviews were conducted with stakeholders of Universitas Negeri Semarang.

2.3 Data Presentation and Analysis

The exact method for understanding the meaning of texts is hermeneutics [12] Legal hermeneutics is a method of interpretation of a legal text, statutory regulations, and the results of legal studies.[13] It includes an understanding of one's perception of doctrine and outlook on life.

3. Result and Discussion

3.1 Preventive Measures

Due to the phenomenon of the spread of radicalism and terrorism, the government has held several steps, mainly the penal measures. The issuance of Law No. 5 of 2018 on Amendment to Law Number 15 of 2003 on Establishment of Government Regulations in lieu of Law Number 1 of 2002 on Eradication of Terrorism Criminal Acts into Laws, is expected to be a strategic measure in mitigating the massive terrorist movement and its spread. Effective and efficient preventive measures, however, have not yet been seen. Therefore, this research is a means to produce a blueprint for overcoming the spread of radicals who have metamorphosed and adapted to the times, particularly the use of electronic media, especially on the UNNES campus.

There is a saying that "prevention is better than cure" seems appropriate to be applied in tackling radicalism. The prevention of radicalism will be better, if before the penal measure (repressive/treatment) is taken, first try alternative non-penal measures (preventive). This is because the factors that drive extremist/radicalized actions are more increased in the nonpenal realm.

The 8th United Nations Congress in document A/CONF.144/L.3 identified conducive factors that could lead to crime and extremism including poverty, unemployment, illiteracy, the absence/lack of adequate housing and education as well as unsuitable training system. Thus in tackling radicalism movement, efforts should be taken to eliminate the criminogen factor. This is where the effort to ward it off, becomes so strategic [14]

Prevention/deterrence is one of the tasks of the BNPT (as mandated in Presidential Regulation No. 46 of 2010 on the National Counter Terrorism Agency), in addition to the duty of repression (legal approach, including penal). Prevention efforts are carried out through a persuasive approach [15] Repressive efforts gradually began to be ruled out. As BNPT

acknowledges, military and violent approaches are not the right answer. The harder physical actions are carried out on radical groups, the more they become militants

According to the author, the prevention of radical movements in society must be carried out simultaneously between the repressive and preventive approaches. The repressive approach must also be accompanied by non-penal efforts [16] [17] [18] [19] And an effective way to prevent/deter is to eliminate the triggering factors as described above. For this reason, efforts to counter radicalism/terrorism are very effective when simultaneously linked to religion, ideology (new fanaticism), eliminating the gap between rich and poor, opening communication taps between the people and the government, reducing the explosion of rapidly increased population, preparing employment (eliminating unemployment) , anticipating the generation of frustration, and preparing the comfort of people's lives.

3.2 UNNES Strategic Measures

Almost certainly, all lines today are not sterile from the target of extremism/radicalism, including Educational institutions. UNNES also did not escape the target of radicalists in developing their doctrines. Some ideologies, both right and left one, have begun to quietly and gradually break into the students' thinking. Intolerant attitude and assuming that their group is self-righteous has penetrated the student groups. Whether we realize it or not, this kind of attitude becomes the entry to radicalism. On the other hand, aspiration and anesthetization that oneself as an "agent of change" often also leads students to start criticizing the existed establishment. It includes starting to question the effectiveness of the Pancasila, the 1945 Constitution, even the Unitary State of the Republic of Indonesia.

In order to anticipate the entry of radicalism – both right and left radical – UNNES has issued a number of policies. The policies adopted by UNNES are:

1. Rector's Regulation No. 44 of 2018 on UNNES Student Ethics and Rules.

The Rector's Regulation is a lieu of Rector's Regulation No. 19 of 2016 on UNNES Students Ethics and Rules. This policy is a central policy in managing students' ethics and rules. In essence, the Rector's Regulation contains two main things, which are student ethics and order. In the realm of ethics, UNNES students must hold a number of ethical rules consisting of

- a. behave and being honest;
- b. respect the rights of fellow students, lecturers, education personnel, and others;
- c. speak no words and/or conduct no actions that degraee a person's humanity, threaten the safety, both physically and psychologically;
- d. respect the property of others by not damaging or misusing, including goods or facilities provided by UNNES;
- e. fulfill financial and other administrative obligations towards UNNES;
- f. dress and behave inappropriately according to ethical manners, customs norms, and religion in participating in activities on campus

In addition to ethics, students are also guarded with equal rights, obligations and prohibitions. Among the most important prohibitions, students shall avoid the following:

- a. follow activities that deviate from religious teachings, Pancasila, and the Constitution of the Unitary State of the Republic of Indonesia in 1945;
- b. engaging and/or spreading radicalism and extremism;
- c. involve and/or become an investigator in a prohibited organization;
- d. hate speech through any media;

In order to ensure that this policy is implemented, it is also strengthened by a number of sanctions for violators. Violations are grouped in 3 categories, which are minor violations (with mild sanctions), moderate violations (threatened with moderate sanctions), and major violations (accompanied by severe sanctions).

- a. mild sanctions is the form of:
 - 1) verbal reprimand;
 - 2) written reprimand;
- b. moderate sanctions is the form of:
 - 1) postponement of proposal seminar, examination proposal, minithesis, thesis, and dissertation during a certain period of time;
 - 2) their rights in student activities will be revoked within a certain period;
 - 3) their rights in obtaining certain facilities/welfare will be revoked within a certain period of time;
 - 4) temporary dismissal as a student (suspension) for a maximum of 2 (two) semesters;
- c. severe sanctions is the form of:
 - 1) cancellation of final project, minithesis, thesis, or dissertation;
 - 2) revocation of title, retrieval of diploma, and withdrawal of transcript;
 - 3) prohibition from participating in all academic activities within a certain period of time;
 - 4) temporary dismissal as a student (suspension) for a maximum of 4 (four) semesters;
 - 5) dismissal of student status with the right to Reference Letter of Discourse (SKPK);
 - 6) cancellation of student status;

In order to enforce the implementation of this regulation, a Student Ethics Council was formed, which consisted of all Vice Deans for Student Affairs from each Faculty, and was chaired by someone who controlled the law. The Student Ethics Board is also assisted by the Secretariat Team.

2. Rector's Regulation No. 11 of 2019 on Management of UNNES Digital Reputation Synergy.

The Rector's Regulation is related to student communication on social media. It is not merely to organize social media communication systems for students, but also for all UNNES citizens (Lecturers, Education Personnel and Students).

Social media that are the object of monitoring the Synergistic team are:

- a. Facebook;
- b. Instagram;
- c. Twitter;
- d. Youtube;
- e. Another online social platform that has multiuser and publicly displayed content.

This Rector's Regulation regulates the uploads of UNNES members by giving prohibition signs not to upload or share:

- a. pornographic and pornoaction content;
- b. hateful or riotous content;
- c. content supporting/blaspheming participants of political contestation;
- d. grievances about self, family, colleagues, leaders, units and institutions;
- e. fake news or hoax; and
- f. other content that falls in the category of violation of applicable law

In order to enforce the rules on Digital Reputation Synergy Management, UNNES Digital Reputation Synergy Team (SINERGIS) was formed. The SINERGIS team consists of 5 people who have competencies in:

- a. Information Technology expert;
- b. lawyer; and

c. communication expert or linguist.

3. State Defense Program

Since 2016 there has been a state defense program by 6 days of education at Rindam IV Diponegoro. All new UNNES students are required to take part in the activity without exception. For students who pass it, they will obtain a state defense certificate. The certificate is one of the considerations in submitting scholarship facilities. This integrity pact program has been held since 2015.

4. Integrity Pact

For new students UNNES, they must sign and promise the integrity pact. This integrity pact was signed and read in unison at the entrance ceremony for new students.



Pict. 1. Integrity Pact of UNNES New Students

5. Declaration from Semarang for Indonesia

In 2017, UNNES became a pioneer in the declaration "From Semarang for Indonesia". This activity is planting momentum to counter radicalism and extremism on campus. The activity, which was attended directly by the Minister of National Education and the Chairman of the BNPT was joined by thousands of UNNES students and representatives of universities in Semarang.

This declaration concludes by signing a large board consisting of :

- a. Uphold the Republic of Indonesia based on Pancasila as the Nation's Life View and the 1945 Constitution;
- b. Keeping the motto of Unity in Diversity;
- c. Anti-radicalism/Terrorism;
- d. Anti-drugs/Illegal Drugs;
- e. Love the Motherland and Defend the Country.



Pict. 2. Signing Declaration from Semarang for Indonesia

6. Antiradicalism Task Force

Specifically, to anticipate radicalism/terrorism, the UNNES Antiradicalism Task Force was formed in 2018. One of the main tasks is to monitor and participate in monitoring and watching over potential of existing radicalism/terrorism.

7. Establishment of the Center for the Study of Antiradicalism and Terrorism (PUSARA Terror)

UNNES also has a Center for Anti-Radicalism and Terrorism Studies at Faculty of Law UNNES, which was formed in 2016.

3. Conclusion

The measures taken by UNNES by preparing legal substance (a number of rector regulations) and supported by the legal structure (the existence of the Antiradicalism Task Force, Student Ethics Board and the Synergistic Team) is clearly a strategic step to tackle the possibility of radicalist ideology in UNNES. However, one main thing, in order to overcome radicalism on this campus to be optimal is that there must be a third element, which is legal culture. Antiradicalisme culture must be instilled in all UNNES. Even though the legal substance and the legal structure are already good, if it is not accompanied by a legal culture, it will certainly not be optimal.

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Interfaith Marriage and The Legal Consequence of Its Validity

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Abstract. The Interfaith marriage often leaves validity of marriage's problem. The concept of interfaith marriage often clash with the concept of human rights which is strengthened by the Constitutional Court Decision Number 68/PUU-XII/2014 in the relation to the judicial review of Law Number 1 of 1974 concerning Marriage which rejects the issue of interfaith marriage. After that, the State consider to curb the freedom of individual human rights to choose a mate and find happiness with their spouses from different religions. This paper will discuss how far the State has a role to solve the validity of interfaith marriage. Through normative legal research method, this paper offers the need for affirmation as well as restrictions from the State as outlined in the policy so that, the suitability of the purpose of marriage is not only private or civil but also religious in nature (involving Allah SWT or Almighty God).

Keywords : Interfaith Marriage, Validity.

1. Introduction

In Islam, marriage is called as *mitsaqan ghaliza* or "solid agreement" which is stated in the Qur'an An-Nisa verse : 21. This bond is named by Allah which involves an agreement between the spouses. This means that marriage is not a treaty that can be played with because it involves a relationship with Allah SWT. The dilemmatic condition seems to be the right condition to describe the situation or condition of marital arrangements in Indonesia today. Law Number 1 of 1974 concerning Marriage (hereinafter referred to as Marriage Law) does not explicitly regulate the prohibition of interfaith marriage, but in Article 2 paragraph (1), it only states that marriage is legal if carried out according to their religion and belief.

2. Method

The research method in this article uses the study of a normative legal research through study and analyze the literature materials which not only identifies written laws as a norm, but also unwritten laws. This research uses primary and secondary data or material which obtained from literature study and through other knowledge media.

3. Result and Discussion

a. Legal Consequence of The Validity Of Interfaith Marriage

As known before, the product of legal policy is the authority of legislators both at the central and regional levels. An interesting idea put forward from an article in a journal that making a legal policies with a level legal for example, such as an act, needs to involve what is called the Religious Council in Indonesia which consists of representatives of all religious organizations throughout Indonesia. Religious Councils have no role by any means in the formation of legal policies related to inter-faith marriage since the Marriage Law had been created before the Religious Councils established. Instead of limiting the cohabitation of inter-faith couples, albeit religious leaders favor or disfavor inter-faith marriage, the practice is still widely flourished and rapidly increased. [1] The implication that arise from the absence of a clear law is that many scholars who are members of Islamic Organizations and other religious leaders, socialize the fatwa about interfaith marriage to the public with the aim to make people understand about the legal position of different religious marriage. In Islam, for example, KH. Siddiq Amien views that interfaith marriage will be burdened with several other sharia laws, for example it will greatly affect the children's education, there will be many tensions about religion that will be adopted by children born between their

parents, then there will be no way or closed about the way to inherit due to religious differences (*ikhtilafuddin*). [2]

Such is not the case in many Islamic countries, The broad body of Islamic Law, known as Shari'a, draws no distinction between sacred and secular. In addition to setting forth God's laws for prayer, fasting, and professing faith, Shari'a also deals with politics, economics, banking, trade, family law, evidence and procedure, sexuality, dress, hygiene, dietary laws, and criminal laws. [3] So, thus, in fact there is no more bargaining or even an expanded interpretation especially regarding interfaith marriage where one of the spouses is a Muslim itself. However, sometimes in the name of modernity, the person who did the interfaith marriage (especially one of whom are Muslims) continue to do so, because their logical frame of thinking views that marriage matters, whom known include one of secular affairs, need to be distinguished from divinity matters. In fact, true marriage is an agreement of sacred ties between men and women before Allah SWT.

Additionally, Shari'a represents a "standard of uniformity" which protects against the inconsistent and contradictory systems that would inevitably result if people were left to legislate according to their local circumstances.

The problem which arises is how about the legal consequence of interfaith marriage validity that are private to its citizen?

In fact, the nature of private law or family law in Indonesia is cannot be rigid like public law such as criminal law. It is actually inconceivable if the State regulates very rigidly about marital law until there is a criminal sanctions' article in the law, except for special cases such as domestic violence which is very important to be regulated separately because to protect the victim (it can be the husband or wife) and there is an element of criminality for the perpetrator.

The definition of marriage in Article 1 of the Marriage Law, put the element of religiousity. Therefore, it's no longer secular, but in practice it will be different if the interfaith marriage happens. A dilemma arises, because on the one hand we have to respect humanity or human rights, on the other hand, there are deviations from the provisions of the Marriage Law which imply a legal marriage based on religion (the condition of marriage in same religion).. Meanwhile, Article 2 paragraph (1) of the Marriage Law is a differential unification and complements the interfaith marriage laws about Islam with the Islamic law and Islamic Compilation of Laws, Christianity with HOCI and Europeans with its Civil Code. Differential means to refer to the respective religious law, including beliefs. [4]

Actually, the Constitutional Court Decision Number 68/PUU-XII/2014 in the relation to the judicial review of Marriage Law, has provided a solution to the problem of interfaith marriage based on the statements of the parties including experts and also representatives of all religious organizations or religious council in Indonesia which on average do not allow interfaith marriage. But, of course, this solution is only from one element of government institution, namely the court institution. Even though it does not need to be responded by the legislators, because no article of an act has been annulmented, it is only necessary to note to all legal stakeholders that, even though religion and the state are prohibited, in practice, interfaith marriage still happens and the implication is that there are some difficulties in matters of administrative registration which can then affect the validity of his marriage. Because, beside article 2 paragraph (1) which regulates marriage is legitimate if it has been performed according to the laws of the respective religious beliefs of the party concerned, there is a cumulative or one "breath" with article 2 paragraph (2) of the Marriage Law which states that each-Every marriage is recorded or registrated according to applicable laws and regulations. This means, if the marriage is not legitimate or valid according to their religion, then the marriage cannot be recorded or registered administratively. As if seen from this, the proof of administrative marriage is the most important evidence to state that marriage is legal or legitimate.

In fact, the state has indirectly "punished" the couple who did the interfaith marriage through "the difficulties in the administration of registration". However, the problem is, this marriage is still continue with the reality of continuity of survival together between the couple who did interfaith marriage. This is show to us about the characterizes of the existence of private law, which has relation with familial, will become slack about the its existence.

For people who are married with different religions, which one of the couple are moslem, strengthen their interfaith marriage with the following opinion: [5]

1. That the plurality of religions is the sunnatullah that can not be avoided, God calls the celestial religions and they bring the teachings of good deeds as people who will be with His heaven in heaven later. Even God also explicitly stated that differences in sex gender and ethnicity can be as a sign that

one knows each other and marriage between different religions can be used as a space, in which between believer can get to know each other more closely.

2. That the purpose of the marriage is to build love (al-mawaddah) and rope of the affection of love (al-rahmah). In the middle of the susceptible interreligious relations nowadays, interfaith marriage can actually be used as a vehicle to build tolerance and understanding between each religion. Starting from the bond of love and affection, knitted with harmony and peace.
3. The spirit which brought by Islam is liberation, not shackles and stages carried out by the Qur'an since the prohibition of marriage with polytheists or worshipper other than God, then paving the way for marriage with Ahl-Alkitab (Jewish and Christian) is an evolutionary stage of liberation and in due course, we must see other religions not as a second class and not ahl-dzimmah (Independent non-Moslem people who live in a country that runs the Islamic Shari'a and receives protection and security), not to suppress them, but treat them as citizens.

Truly, a thought that involves a relationship with God or Allah SWT cannot be based solely on human tastes or desires, without regard to the Islamic Shari'a or God's laws. This should also apply to the rationale for legal policy products.

To be honest, the issue regarding the validity of interfaith marriage also exacerbates the fact that there are two different products of court law regarding these religious differences. There is a contradiction between the Constitutional Court's Decision and the Supreme Court's Decision namely MA Decision Number 1400 K/Pdt/1986 which allows the Civil Registry Office to carry out actual interfaith marriage. The existence of these two court legal products should be a note for legislators to contribute the way out if there is a practice of interfaith marriage.

In fact, in the end, the existence of these two legal avenues adds to the confusion of the legal consequence the validity of interfaith marriage. On the one hand, if it refers to the Supreme Court's Decision, interfaith marriage may become legal and valid according to the laws of the respective religious beliefs of the party concerned, while if they refer to the Constitutional Court Decision, interfaith marriage can become null and void according to the laws of the respective religious beliefs.

Here, we can see that, in terms of the harmonization of law, the reality that occurs is that the products of the judicial law are not yet seen as supporting one another.

In here, the writer as a researcher never mean to judge the couple who did the interfaith marriage, especially if one of them has the same religion with the writer, a Moslem. However, one thing that need to be considered are physical and spiritual peace, convenience of the relationship with God or Allah SWT and the benefit also include the goals and essential elements of a marriage. Moreover, for among the Islamic religion itself, marriage is also a form of worship and refer to realize a half of the religion which means there is an element of involvement of Allah SWT in marital relations.

b. Legal Policy for Legal Solution Regarding The Legal Consequence of Interfaith Marriage : Different Treatment For Interfaith Marriage

What about the interfaith marriage that have already taken place and how about the legal consequence of its validity? There is no firmness from the State which states that it is prohibited or that it must be canceled and then the couple who did the interfaith marriage are subject to sanctions. Perhaps, It is because of the nature of this private law, which seems to make the State still in the territory that is very careful to decide, eventhough, one of the representation of the State through a constitutional court, has implied indirectly that interfaith marriage is illegal according to applicable law.

Apart from the polemic of interfaith marriage, what needs to be considered by legislators and the officials of executive authorities is to make a little assertiveness of the provisions governing legal marriage such as, whether to make slacker for interfaith marriage, or still affirmed based on their respective religions and beliefs without opening the opportunity for further interpretation of the provisions of the article. This is because we cannot rule out the fact that even if it is not permitted, interfaith marriage still exists.

Even, for example, the State still wants to loosen the possibility of interfaith marriage practices, the State needs to regulate the different treatment of those interfaith marriage both in terms of its (specific) legal policy products to the implications and consequence attached to them including the administrative registration issues.

Not intending to punish the couple who did the interfaith marriage, this paper has the aim to rather looking for solutions in the middle of chaotic policies of interfaith marriage that is not clear so that it can have an impact on the illegitimacy of their marriage.

4. Conclusion

Basically Interfaith Marriage is not regulated explicitly in the Marriage Law. However, on the basis of human rights, the practice of interfaith marriage is now widely practiced. The problem is that the existence of interfaith marriage in Indonesia has implications for the difficulties of administrative registration which become a legal requirement for the legitimate of marriage in Indonesia. The Constitutional Court Decision Number 68 / PUU-XII / 2014 in the relation to the judicial review of Law Number 1 of 1974 on Marriage actually indirectly affirms the refusal of interfaith marriage. Actually, the state indirectly provides some kind of compensation to the couple who did the interfaith marriage in the form of the difficulty of being registered administratively. The difficulty of being registered administratively is the legal consequence of the interfaith marriage. Basically family law because its so privately, its nature can not be rigid as a criminal law that can easily provide criminal sanctions to people who are considered to have violated the provisions of criminal law. Regardless of the polemic of interfaith marriage, the thing that lawmakers or legislators and the officials of executive authorities need to pay attention as a legal policy is to make a little firmness about the provisions governing legal marriage, or if the state needs to provide separate legal policies or specifically (different) for the couple who did interfaith marriage, then the State can provide it. At least, so that, their validity is recognized for those who have already engaged in interfaith marriage.

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Integration of Penal and Non-Penal Acts in Tackling *Santet*

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Abstract. *Santet* considered as a prohibited action by some Indonesian because the damage that it costs. Until now, the law enforcement regarding this acts is quite difficult to process since it's relation to things that are irrational. Therefore, the problem in this paper focused on how the positive criminal law in Indonesia enforce against witchcraft acts, and how important is the integration of penalties and non-penalties way in dealing with witchcraft crimes in the future. This research uses literature study for analyzing the object of study. At present witchcraft criminal law enforcement tends consist of partial law enforcement with costly procedure. The future prevention is needed by integrating between non-penal and penal acts. The non-penal acts requires participation of public and law enforcement officials to prevent, condemn acts of witchcraft, and processed to the criminal justice enforcement as a final step, if the prevention cannot be done.

Keyword: non penal efforts, criminal acts, witchcraft, integration

1. Introduction

Witchcraft or *santet* in Indonesia is a belief of some people in certain areas that certain objects could be possessed with some mystical being such as jinn which could cause diseases, hurt or even create death to the targeted victim. In some areas, people still believe that acts of witchcraft will bring a negative impact on their victims and could be used as a means to take revenge. The reaction of this traditional community to acts of witchcraft are varied, some might reported this action to law enforcement officials, but there were also those which provoked and start to persecuted the suspect by themselves which could resulted in death to the suspected perpetrators of witchcraft. There are some areas that are still disputable of practicing this mystical acts such as in certain location within Java.

When talking about witchcraft in Java, Banyuwangi is one of the places that consider as one of the center of witchcraft practice. Banyuwangi was suffering from a grief in July 1998 to December 1998 because about 116 people were accused of being witch doctors. This people that consisted with some local *kyai* or spiritual figure, were killed by some masked vigilante groups in a witch hunt. There were several killings that happened at that time, for example a group of disguised masses broke at night into the house of the suspected witch doctors, then killed them. There are also some cases which carried out during the day and involving the local villagers, namely by accusing and confronting the target with accusations of being a shaman, so that the villagers became furious and helped to torture and kill the accused. Not less than a year

when this incident happened, the case of torture and massacre of someone related to the accusation of a *dukun santet* also broke out in 1999 in Pangandaran [1].

One of the local tribe in Banyuwangi, Using Tribe, divides witchcraft or *santet* into three categories, namely (1) *Ilmu hitam* is a magic that usually contain many negative effects since it used for harming people, and kills people; (2) *Ilmu merah* is a magic that used for attract opposite sex and used especially regarding in sexual matters; (3) *Ilmu kuning* is the magic which have purpose for creating aura of authority to deal with subordinates or the public in general; and (4) *Ilmu putih* is the magic that counter the other three magic. One of the famous *santet* that being used by people is *Jaran Goyang*, that entered into the second kind of magic which is a magic that directed towards sexual and compassion, this is somehow have certain similarity with Islamic teachings known as *mahabbah* [1].

Santet is an acronym for '*mesisan banthet*' which means 'to became broken' and '*mesisan ganthet*' which means 'to became one'. *Santet* or witchcraft in the perspective of "*mesisan banthet*", are happened when a couple who love each other became separated. Meanwhile, the other perspective of "*mesisan ganthet*", happened when two people who are not in love with each other started to became united in a unnatural ways. Like in some Javanese community, Using Tribe usually practiced arranged marriage. This '*mesisan banthet*' witchcraft will come in handy if for somehow one of the children already has a lover. From this kind of family tradition, witchcraft culture then developed and flourish within the community [1]

Someone who wants to do witchcraft for both good and evil things can come to a witchcraft expert or in another language ask *dukun* for help. *Santet* itself is basically a phenomenon that is very close to the lives of various community traditions in Indonesia. In the *Kamus Besar Bahasa Indonesia*, *santet* can also be interpreted as magic [2], *santet* itself has a English translation as witchcraft. Based on Merriam Webster's Dictionary, witchcraft is defined as the use of sorcery or magic [3]. There is also another name related to this kind of irrational matters which is 'occult'. 'Occult' word comes from English language, which has a mysterious meaning, or something that is hidden from normal view. This sentence is also often emphasized by the use of magic, astrology, or other systems that claim to be able to use secret knowledge or supernatural powers [4]. Occultism itself has the meaning of teachings related to various kinds of mystical things, hidden, and can not be digested with human reason [5].

Based on those definition, if this magical power is being used for the benefit of the community, for example helping to unite a family or someone with another, or helping to avoid bad luck in life then it wouldn't be a problem at all, but if this magical power is used to hurt, damage, creating chaos and even death then it must addressed both by the community itself and by the state as a criminal action. Until now the handling of witchcraft within several community in Indonesia usually propagated by incitement, issues and hoaxes which being blown out and resulting in persecution and expulsion of those suspected of doing witchcraft. Thus the state must be present to deal with this uncontrolled anger, while enforcing the law against perpetrators of witchcraft which means protecting the public from crime. Likewise, the state also need to educate the public so as not to play a role in judging suspected perpetrators of witchcraft. The policy to tackle crime especially witchcraft must look at the interests of society and individuals.

Crime prevention policy within the criminal law is divided into two, namely the penal policy and non-penal policy. The penal policy is more on repressive actions after the crime being committed, while non-penal policy focus on the preventive aspect. Both of these facilities have their own weaknesses that result in ineffectiveness in law enforcement, specifically in the

crime of witchcraft. Based on that, this research is considered to be important to being carried out, so that the law enforcement of criminal acts of witchcraft will be integrated both in penal and non-penal policies.

According on the background stated above, the focus of the study is limited into two problems, namely on the criminal law enforcement current regulation in tackling the crime of witchcraft in Indonesia positive law and on how should be the integration of non-penal and penal policies in tackling criminal acts of witchcraft in the future.

2 Methods

The research method that will be used is normative legal research. In normative legal research, a statutory approach within government policies is used. Normative legal research is done by reviewing or examining secondary data in the form of secondary legal sources, which made by compassionate the law as a set of rules or positive norms in the regulatory system governing the society. Normative legal research is legal inspection that places law as a norm structure system. This system is consisted by principles, norms, rules of statutory regulations, jurisprudence by judges, agreements and doctrines (teachings) [6].

The data examined are in the form of primary legal materials namely the criminal law (KUHP), jurisprudence, treaties and so on. Whereas secondary legal material, namely all statements, expert comments or arguments, both loose and systematically written in the form of essays, highlights the presence of what is called *ius constituendum* [6]. For example, the draft law, the draft presidential regulation and so on. The tertiary legal material in the form of an Indonesian encyclopedic, legal dictionary, Kamus Besar Bahasa Indonesia (KBBI), magazines and so on.

3 Discussion

3.1 Enforcement of criminal law in tackling criminal acts of witchcraft in the current positive law.

Criminal law enforcement is a series of procedures ranging from enforcing the law for any prohibited action to the execution of judges verdict. This understanding is within the broad set of many law enforcement policies. Barda Nawawi Arief stated that the criminal law enforcement policy is a series of processes consisting of three policy stages, namely (1) legislative stages / consist on formulating policies; (2) judicative stages / applying policy stage; and (3) executive / administrative policy phase. Starting from those description it can be said, that the criminal law enforcement policy is consisted in the three powers / authorities, namely legislative / formulative power in determining or formulating what actions can be convicted and what sanctions can be imposed; judicial / applicative power in applying criminal law; and executive / administrative power in implementing criminal law [7]. The power to apply criminal law here is in the hand of law enforcement officials such as the police, prosecutors, courts and even reach to the implementation within the executions stages such as prison. Based on that, law enforcement without a doubt is closely related to criminal policy / criminal politics.

Criminal policy / criminal politics are essentially the rational efforts from community to tackle crime. Crime is a problem that disturbs public order, there will always be a crime inside

a society and every crime has its own way of dealing. Therefore, overcoming crime has a true meaning of protecting the community so they might achieve prosperity. The same was stated by Barda Nawawi Arief, that policies to tackle crime are an essential part of attempts to preserve society (social defense) and to achieve social prosperity (social welfare). Therefore, the ultimate goal in the politics of criminal law is "the safeguarding of society in order to achieve the prosperousness within the people" [8].

Sudarto also stated that criminal politics has a primary function which is reasonable and relatively won't cause problems, in the sense that there cannot be a society that can live directly without those politics product which is a policy. Distinctively with criminal law secondary function, namely the regulation of social control that usually being carried out spontaneously and made by the state with its equipment [9].

As stated in the introduction above, tackling crime can be done both by penal and non-penal way. Specifically in this case the focus will be on law enforcement by reasoning according to the current legislation. Based on the Criminal Code (KUHP) which not explicitly explained that there is a witchcraft crime inside it, but there are several acts related to witchcraft crime, that being regulated in Articles 545, 546 and 547 of the Criminal Code, namely:

Article 545:

- 1) Anyone who makes his livelihood, by declare someone's fortune or to make predictions or interpretations of dreams, is threatened with confinement for a maximum of six days or a maximum fine of twenty rupiahs;
- 2) When committing a violation has not passed by one year of permanent conviction due to the same violation, the penalty can be doubled.

Article 546:

Threatened with a maximum confinement of three months or a maximum fine of three hundred rupiah:

- 1) Whoever sells, offers, hands over, shares or has stock to sell or distribute, amulets or objects said by him, has supernatural powers;
- 2) those who study supernatural powers, whose purpose is to create confidence, that they are therefore likely to commit criminal acts without danger to themselves.

Article 547:

A witness, who when asked to provide expert testimony under oath according to the provisions of the law, in court hears using amulets or magic objects, is threatened with a maximum sentence of ten days or a maximum fine of fifteen rupiah.

Based on the above provisions, there are no provisions that prohibit the actions / substance directly to the act of witchcraft, but what is regulated is in those whoever offer, sell amulets or serve an occupation which determining a person's destiny, are the one who can be convicted. By this case, if there are people who commit acts as stated within those regulation by rationally it actually can be proven in the court. However, the substance of the occult acts or witchcraft crime cannot be proven rationally and it is very difficult to determine the factual data and their features.

The difficulty of proving the substance of witchcraft is a problem in this modern world. Indonesian as a cultured nation which follows the development of science and technology does not simply abandon their mystical / occult beliefs such as *santet* or witchcraft. Within the midst of Indonesian society in certain regions there are those who still believe that a crime might be committed by someone due to acts of witchcraft, so the perpetrators of witchcraft must be

responsible for the losses that being suffered by victims of witchcraft. There are quite a lot of cases of witchcraft reported to law enforcement officials, but what is often reported is the substance of the occult / mystical deeds and not offering, selling amulets that are said to be of supernatural power which actually regulated in Indonesian Criminal Code, by this law enforcement officials cannot simply catch the alleged perpetrators. The impact occurred persecution and expulsion by the local community to suspected perpetrators of witchcraft.

3.2 Integration of non-penal and penal acts in tackling witchcraft for the future

Some areas in Java, such as Banyuwangi and Banten, are often touted as areas that are still thick with the practice of witchcraft. Nevertheless, the phenomenon of *santet* or witchcraft is not only known in the Java region but in many tribes in Indonesia. In West Java it is called *teluhganggaong* or *sogra*. In Bali known as *namadesti*, *leak*, or *teluhterangjana*. In Maluku and Papua under the name *namuanguangi*. In North Sumatra it is called as *beguganjang*. In West Sumatra, it is known as *puntianak*. In Kalimantan, known as *perangmaya*, and not only in Indonesia, this kind of mysticism is also happened abroad, such as voodoo practice in Africa. [10].

Every magic has a target and purpose. Based on general classification, magic for practical purposes such as human prosperity or the destruction of another human welfare. Based on these general classifications, magic can be classified into three categories [10]:

1. Productive magic which includes magic for hunting, for fertilizing land, planting and harvesting crops, fishing, shipping, trade and romance;
2. Protective magic includes magic to overcome adversity, debt collecting, maintenance of sick people, safety of travel, and magic to fight against destructive magic;
3. Destructive magic including magic to bring a storm, damage to property rights, magic to bring disease, and magic to bring death.

Relieve capabilities possessed by a *Dukun Suwuk* for example is a mastery that being pursued and obtained through practice from various sorcery experts. While this capacity of *Dukun Prewangan* is inherited from their descendants. The mystical being called *Prewangan* can be passed from one generation to their next generation. This kind of possession inheritance is what becomes the source of ability for a *Dukun Prewangan* [11].

As mentioned by various examples above, the life of Indonesian people who are so closely related to religio-magical elements is a familiar thing in this country. Moreover, the belief in the existence of supernatural powers themselves has indeed been recognized by various religious values held in society. Ni Luh Gede Yogi Arthani explained several reasons why Indonesian people often ask paranormal help in solving their life's problems, with the following description [12]:

1. As an effort to protect themselves from various kinds of bad things that are invisible such as witchcraft. Personal protection is usually carried out using various amulets that have gone through certain ritual processes;
2. To meet certain objectives, for example, to look authoritative, more handsome, beautiful (attract attention), or so other people give some pity. It can also increase the number of customers in a business;
3. The emergence of strange pain such as sudden speechlessness and pain, but only if you are in a room or at certain hours, where these diseases can not be treated medically but can be cured after going through certain rituals;

4. Curiosity about the future. Various future predictions are usually made through the method of divination, tarot, face shape and signature form. The various future predictions are then used as material for consideration in making important life decisions;
5. To win a match, obtain a certain position, become a people's representative, or in order to bring down an opponent;
6. For the sake of knowing the message of someone who has passed away, the desire can be in the form of a message from an ancestor or a character in the past

In a public discussion "Article *Santet* in the Revised Manuscript of the Criminal Code Law" which organized by the Indonesian People's Gerindra Party Faction on April 2, 2013, T. Ronny Nitibaskara, stated that witchcraft in Indonesia was not only institutionalized (institutionalized) but also has been ingrained (internalized). Witchcraft in Indonesian society has been formed as a mechanism to resolve disputes that occur between citizens. Personal conflicts that occur in an unresolved community that have caused quite deep resentment among the parties to the dispute will often be resolved through witchcraft [13].

After reading and examining the various articles which contain magical things contained within the Criminal Code in the previous chapter, then there are some significant differences compared to the regulation of witchcraft contained in the upcoming Criminal Code Draft (RKUHP). One of them is about the criminal threat, where in the old Criminal Code provisions categories of acts that have supernatural elements are more categorized into violations with criminal threats that are less than one year in prison, according to the enactment of these articles in the Third Book on Violations. RKUHP itself basically does not distinguish criminal acts into crime or violation categories.

It is quite correct to say that the provisions regarding the offense of witchcraft in the RKUHP are a constructed form of further development regarding these actions that were previously stipulated in the old KUHP. Moreover, the addition of elements due to actions in the offense in the form of illness, death, or mental or physical suffering can not be found in the serenity in the old Criminal Code. If seen through the comparison it is appropriate if the offense of witchcraft contained in the RKUHP is a new form of action that has not been regulated further in the old KUHP, so that if it can be categorized into the process of criminalization of an act that was not previously threatened by a criminal act which then turns into a threatened act.

In Article 252 of the Criminal Code Draft, it is stated that the actions regulated there are only in the form of recognition from someone who feels that he has supernatural powers and that his power can then help someone else in trying to cause something bad to someone else. Thus the offense regulates the participation of third parties in committing a crime. The third parties who have this magical power can also be referred to as a psychic, shaman, or other designations contained in the traditions of society.

Referring to Barda Nawawi Arief opinion, criminalization efforts related to the offense of witchcraft in RKHUP basically tend to focus more on regulating efforts to prevent actions taken by sorcerers. Due to the criminalization of acts of offering or providing services through the witchcraft to kill or harm someone. This form of regulation itself has weaknesses due to the lack of a strict regulatory concept and its elements are quite difficult to fulfill, due to the element of "recognition of having supernatural powers" [14]. This vague formulation is often misinterpreted by many parties, that what will be criminalized is the offense of "murder / ill-

treatment with witchcraft", whereas in its consideration it is not easy to prove the causal relationship between acts of witchcraft with the onset of death or suffering other people [14].

Criminal imprisonment could also be a criminal factor, since it relies heavily on criminal law as the first response in dealing with crime, which means overestimating the ability of the criminal law itself, that have so many limitations. Meanwhile, non-penal actions could become quite more effective and can support another penal actions inside the framework of criminal politics and social politics [15]. There is also other alternative options to prevent the emergence of criminogenic factors as a result of criminal conviction, for example by avoiding criminal justice processes and applying selective and limitative criminal law [15].

The approach of economic analysis within the formulation of law and law enforcement is the beginning part within the introduction of the analysis regarding criminal law using rational choice theory. The essence of this theory is that, each criminal offense has calculated the benefits of their actions in excess of losses as a result of his actions. Basically this make a punishment will only resulted in the losses of the perpetrators of crime but does not provide "benefits" to victims of their criminal acts either, this kind of cases usually happen in corruption cases within the state [16].

The criminal matters are inseparable from the meaning of criminal acts and criminal responsibility, while the identification of criminal responsibility is always based on the interests of monodualistic balance way of thinking, namely the balance of community interests with individual interests, including subjective and objective interests [17]. The function of criminal law is to protect as well as to maintain the balance of various interests (community, state, perpetrators of crime and victims of criminal acts). At this moment there is a development within the science of criminal law and criminology, i.e. their attention that not only directed at crime and its offenders as happened in the past, but also to people other than them, namely, victims, bystanders, and any other members of the community [18].

According to Muladi [19], in the regulation of criminal offenses, the implementation of a balanced idea should be seriously being concerned, namely:

1. The balance between institutional morality; social morality and individual morality;
2. The balance between "individual rights" and "collective rights";
3. The balance between the interests of the offender and the victim;
4. The balance between objective aspects (actions) with subjective aspects (mental attitude);
5. The balance between legal certainty, flexibility and fairness;
6. The balance between national values and universal values;
7. The balance between formal legality and material legality that gives room to the living law, which is sourced from:
 - a. post-independence legislative policies;
 - b. scientific interactions and agreements in various national scientific meetings;
 - c. sociological aspirations;
 - d. universal aspiration of civilized society

4 Conclusion

In conclusion, crime prevention has not been able to comprehensively address the crime of witchcraft, while the criminal law enforcement alone tends to be repressive, partial problem solving, with a high cost and if being used inappropriately can become a major threat in human life. That is because the crime of witchcraft is a mystical, irrational and very contradictory action in the midst of modern society that always requires facts and data which made those kind of act became difficult to prove in the court. Therefore a combination of non-penal and penal action is still needed, with the provision that non-penal measures take a first precedence to prevent the public from being vigilant towards perpetrators. The non-penal concretization in overcoming this criminal acts of witchcraft could also by involving police officers, community leaders and religious leaders to reprimand and ordered the perpetrators to stop doing witchcraft activities by way of deliberation. However, if they still conducts witchcraft activities, then only use the means of punishment by arresting and processing the perpetrators to be proven in court. Thus, there is a warning beforehand as a form of non-penal conflict resolution, but if this action are not working, the case will be processed by law enforcement officials in court as a means of resolving in a penal manner. Non-penal and penal integration in dealing with the crime of witchcraft is more selective and just, in solving this problem within the community.

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Criminal Policy to Combating Cyberterrorism in Indonesia

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Abstract. Technological progress has both positive and negative impacts. The internet, as part of technological advancements, also has positive and negative impacts. The positive impact is that the internet facilitates human life in all fields, e-commerce, online banking, and various other fields. In contrast, the negative impact of the internet can trigger cybercrime. One form of cybercrime is cyber terrorism. Some say that cyber terrorism is part of a crime that uses cyber; some say that cyber terrorism is part of cybercrime. In eliminating cyber terrorism needs criminal policies in order to prevent and overcome them. Policies require to combat cyber terrorism, namely through criminal law policies or penal policies. This policy can be pursued by formulating cyber terrorism as an act that is prohibited and threatened with criminal action. While policies to prevent can be done using non-penal policies. This non-penal policy is a policy outside of criminal law. It can be done with other fields of law or social policy as crime prevention

Keywords : Criminal Policy, Criminal law, Cyber terrorism, Indonesia

1. Introduction

Technology is growing as an essential part of human life today. The development of technology in this era takes place very quickly. Also, The scope of information in the present era has unlimited space and time. The computer network which was initially only limited to the space network connected by cable, is now unlimited, because it is connected to the internet network, and can be connected to the entire world, anytime and anywhere. Internet information technology has a positive side, where internet technology makes it easy for someone to carry out activities both for communication, the world of commerce, the economy, transportation, and various other fields. Internet technology can transcend national borders so that all kinds of activities can be done immediately through the internet. Nevertheless, the development of internet technology was also followed by negative impacts other than positive impacts. The negative impact is in the form of internet abuse for a crime. The abuse of the internet for crime is known as cybercrime. Cybercrime types include cybersex/cyberporn, data diddling, carding, viruses, cybergambling, cyber defamation, cyberterrorism. The emergence of various types of cybercrime is none other than a change through the evolution of the internet's use. Initially, the use of the internet can only be done by the military. However, as time goes by, the internet can be used by all humans. Among scientists, business people, and even criminals also use the internet as part of their life activities.

Cyberterrorism is one of the negative impacts of the internet, in the form of terrorist crime through the cyber world. The dependence of human life in general at this time on the use of the internet, makes the country think about protecting the interests of human law in the internet / cyber world. The state also inevitably, when all state interests, vital objects of the state use the internet as a means to be interconnected, must think about protecting the vital objects of the state/state interests in the cyber world. Protection acts of terror against the interests of the state where all state affairs, in general, use the internet, need to be thought of as an anticipatory step and a countermeasure step.

Cyberterrorism in various literature is a form of terror attacks through the cyber world. Some interpret that cyberterrorism is a form of internet abuse that causes widespread computer network damage without spreading actual fear. Various definitions of cyberterrorism make experts interpret that cyberterrorism is an act of terrorism also as ordinary cybercrime crimes. The meaning of cyberterrorism, which classifies that cyberterrorism is an ordinary cybercrime crime, influences how it is handled or anticipated. How to handle it seems slow and less dangerous. If seen, the cyber / internet world is very likely with the transformation of the terror network that the initial membership is limited to certain areas turned into mass and global scale..

From the description above, it is necessary to anticipate the handling of cyberterrorism through criminal policy by understanding the meaning of cyberterrorism comprehensively. The network is positively correlated to terror propaganda and massive computer network attacks that can paralyze life's connections.

2. Method

The method in this article is a normative juridical method [1], using literature study. The legal material used in this article is legislation both domestically and abroad. The approach in this article is a policy approach with a comparative approach.

3. Result and Discussion

3.1. Cyberterrorism Crime Countermeasures Policy through Penal Efforts

a. Positive Criminal Law Instrument

One effort to tackle crime is to establish an act as a criminal offense. Indonesian criminal law regulates cybercrime in Law Number 11 of 2008 concerning Electronic Information and Transactions (EIT law). The formulation of cybercrime can be found in criminal provisions stipulated in Chapter XI Article 45 to Article 52, where criminal provisions in the EIT Law are formulated separately between prohibited acts and sanctions. For prohibited acts regulated in Chapter VII Article 27 to Article 37. The act of cyberterrorism can be identified in Article 30 in conjunction with Article 46 of the ITE Law, namely accessing computer networks without rights (unauthorized access to computers and services). Then Article 31 jo Article 47 of the ITE Law, which regulates illegal hacking and tapping. Then Article 33 jo Article 49 of the ITE Law, where acts that are prohibited and threatened by criminal actions are acts that cause computers not to work properly (cybersabotage). These actions if carried out on vital infrastructure such as transportation, telecommunications, banking and other infrastructure that control the lives of many people can be categorized as cyberterrorism. Moreover, these actions cause widespread fear.

b. Comparative Study

Some countries regulate cyberterrorism in the provisions of the Criminal Law Act. Like Australia, Germany and Turkey[2].

Australia regulates cyberterrorism in the Australian Penal Code (Criminal Code Act 1995). The Criminal Code Act 1995 includes terrorist acts from The Security Legislation Amendment (Terrorism Act 2002) in Article 100.1 (1) and Article 100.1 (2). Terrorist acts in Article 100.1 (1) are: (1)

(a)

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State,

Territory or foreign country, or part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public. ‘

The Criminal Code Act (s. 100.1 (2)) further states that an action will fall within the definition of a 'terrorist act'

if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not

limited to:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system. '

Further explanation regarding cyberterrorism is emphasized in Article 100.1 (2), where a terrorist act is a cruel act of entering, disrupting or damaging an electronic system that is not limited to information systems, telecommunications systems, financial systems, government service systems, vital public systems, or transportation systems.

Cybercrime and abuse of computer networks in Germany are listed in several Articles in Strafgesetzbuchs. Some articles that can be identified as cyberterrorism offenses are Article 202 a: Data Espionage, 263 a: Computer fraud; 269 Fraud or falsification of legally relevant data; 270 Deception or cheating in legal relations through data processing; 303 a: Alteration of data, 303 b: Computer sabotage.

Cyberterrorism in Turkey is regulated in Articles 243 and 244 of the Turkish Penal Code. (2)Article 243 Turkish Penal Code regulates Access to data processing systems. Article 244 "Hindrance or destruction of the system, deletion or alteration of data" is cybercrime, but if carried out by terrorists or aimed at terror, then cyberterrorism can be categorized as a cybercrime. However, when these crimes are committed by terrorists or reaching the aims of terrorists, they can be called cyber terror offenses.

c. Draft Criminal Code (Ius Constituendum)

The Penal Code draft defines the expansion of the territorial principles in Article 4 (c) for criminal offenses in the field of technology and information or other criminal offenses, which are consequently experienced or occur in Indonesian territory or Indonesian ships or aircraft. Then the passive national principle Article 5 (b-7) protects the country's interests related to the safety or security of electronic communication equipment. Meanwhile, offenses that can be categorized as cyberterrorism are regulated in Chapter V Criminal Acts Against Public Order, among others: 1. Tapping speech in a closed room with assistive or technical tools (article 302); 2. Install technical aids for listening / recording the conversation (Article 303); 3. Recording (owning / broadcasting) pictures with technical aids in the room for the public (Article 304). Then Chapter VIII (Crimes that endanger the Public Interest for People, Goods, and the Environment): 1. access computers without rights (Article 378); 2. Article 381 (Accessing computers without rights by damaging).

Based on the description above, the regulation of cyberterrorism, based on studies in the ITE Law, comparative studies, Germany, Turkey, and the Criminal Code Draft, classifies cyberterrorism as part of cybercrime. However, Australia, classifying *sui generis*, cyberterrorism is part of a criminal act of terror that uses computer facilities and cyberspace. Thus, To overcome cyberterrorism, if it has done by terrorists, cyberterrorism should be categorized as a criminal act of terror that uses computer/cyberspace facilities.

2. Policy on Preventing Cyberterrorism Through Non-Penal Means (Non-Criminal Law)

a. Non-Penal Policy in The ITE Law

The ITE Law regulates non-penal policies in preventing cybercrime, which in this case, also includes cyberterrorism. It is regulated in chapter VIII of civil dispute resolution and Chapter IX regarding the government and the community's role. Dispute resolution is regulated in Articles 38 and 39 of the ITE Law, whereas Article 38 (1) of the ITE Law regulates claims for compensation against parties who operate the Electronic System and use Information Technology that causes losses. Then Article 38 (2) stipulates that each community may file a lawsuit in a representative manner against the party that organizes the Electronic System and/or uses Information Technology, which results in detrimental to the community, by the provisions of the Laws and Regulations. Article 39 (1) states that a civil claim is carried out by the applicable laws and regulations, then Article 39 (2) regulates the settlement of disputes through the arbitration body and other alternative dispute resolution solutions. In Chapter IX, Article 40 states that the government is obliged to facilitate, protect the use of technology and information, and determine agencies or institutions that have strategic electronic data that must be protected, and agencies or institutions that have strategic electronic data are required to make electronic documents and make backups and then connect them to a particular data center. Article 41 of the ITE Law regulates public participation in the use of information technology by forming consultative and mediating institutions.

It appears in the ITE Law Articles 40 and 41 using a technological approach in securing electronic data. Given the limitations of criminal legal means in preventing crime. Factors that can provide loopholes / opportunities for the occurrence of cyberterrorism are not enough to be done utilizing criminal law but the positive use of technology needs to be done.

b. Deradicalization and Utilization of Educated Staff Policies

Terrorism is inseparable from a wrong understanding of studying religious teachings or interpreting something wrong concerning particular political views. Therefore the need for de-radicalization of religious views that are not following what should be. It can be achieved by strengthening social ties (family, community, educational environment), giving a real understanding of the teachings of religion so that defending religious teachings does not need to hurt or kill other people who are not faithful. Then, cyberterrorism is caused by smart human factors but not utilized. Increasing the number of people who have no hope because of the process of social integration, also worsening social inequalities. (3) Then, cyberterrorism is caused by smart human factors but not utilized. Increasing the number of people who have no hope because of social integration also worsens social inequalities.

3. Conclusion

Based on the discussion above, the conclusions that can be drawn in this paper are:

1. Cyberterrorism prevention/control policies through means of punishment can be viewed from the attitude of some countries in regulating actions that can be categorized as cyberterrorism. Cyberterrorism criminal acts in positive criminal law have not been explicitly criminalized but can be identified in which actions fall into the category of cyberterrorism such as Law No. 11 of 2008. Likewise, with some comparative studies such as Germany and Turkey as well, also in the Criminal Code Concept. Generally, it still categorizes actions that can be identified by cyber terrorism as a type of ordinary cybercrime. Australia is slightly different in formulating cyberterrorism acts. Australia formulates cyberterrorism as an act of terrorism using computer facilities and cyberspace so that Australia considers cyberterrorism to be part of an act of terror. Considering the nature and danger of acts of terror, the Indonesian government should place cyberterrorism as part of a terrorism crime.

2. The policy of preventing cyberterrorism through non-penal means (non-criminal law) is carried out through civil lawsuits in Articles 38 and 39 of Law no. 11 of 2008, then Articles 40 and 41 concerning the role of government and society, where the government protects the use of technology and information by establishing agencies and institutions with strategic data and information. The community also participates in the use of technology and information by forming consultative and mediating institutions. Then the approach of deradicalization and utilization of educated personnel is a policy effort.

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The Legal Impact of Communal Land Registration For The Indigenous People of Lombok West Nusa Tenggara

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Abstract. The regulation of Minister of Agrarian and Spatial Planning Regulation No. 10 of 2016 arrange that customary law communities can submit applications for communal land determination to the Regional Head. The study was conducted using the Socio Legal method qualitatively. Based on research results in Lombok, West Nusa Tenggara is no longer known for customary rights because it has become a Village Land. Now there are indigenous peoples' communal lands that have been privately included in the National System for Complete Systematic Land Registration held by the government. The legal consequences of the registration of communal land in Lombok, West Nusa Tenggara, will give guarantee legal protection and legal certainty to land rights holders from conflicts between members of indigenous peoples regarding land tenure and certificates can be used as debt guarantees.

Keywords: registration, communal land, indigenous peoples, Lombok.

1 Introduction

Land in human life has a very important meaning, because it functions as a place to live for humans and a source of livelihood to make a living in meeting the basic needs of the family. Every person who controls a piece of land with land rights on it requires legal certainty on his land, including: (a) Legal certainty covered the subject of legal rights to land (person/legal entity); (b) Certainty covered the location, boundary, measure/size of land or certainty regarding the object of rights; (c) types/kinds of land rights, which form the basis of the legal relationship between land and people/legal entities. Judging from the aspect of legal categorization, the referred data can be classified in 3 (three) categories, namely concerning the subject of rights, the object of rights and the legal relationship between the object and the subject of that right. The granting of legal certainty regarding land rights is done by registering for the land.

Land registration includes measurement of land ownership and bookkeeping, the transfer of these rights and admit certificates of rights, registration of land rights, as the real evidence. Land registration is an obligation for the government and those who are entitled to the land. So that with the registration of land, right holders can easily prove the rights to the land under their control.

Indigenous people existed before Indonesian Republic was formed and its existences recognition regulated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, as a result of the first amendment, stating that “The State recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of the community and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the Law“. The provisions are strengthened by the provisions of Article 28 I paragraph (3) of the 1945 Constitution that ”Traditional cultural and community identities are respected in accordance with the development of time and civilization. Whereas the provisions of Article 3 of Land Law states that the implementation of customary rights and similar rights of peoples, as long as in reality they still exist, must be such that they are in accordance with national and state interests, which are based on national unity and may not be contrary to other laws and regulations that are higher. Thus based on the constitution of the 1945 Constitution of the Republic of Indonesia and the Land Law as the basis for national land law, the land rights of the indigenous people are recognized. Thus based on Article 3 of the Land Law, indigenous people can have land rights.

Minister of Agrarian and Spatial Planning Regulation No. 10 of 2016 in Article 5 paragraph (1) arranged that indigenous peoples can submit applications for the determination of communal rights over land to the Regent/Mayor or Governor. The request was submitted by the head of customary or community representative who is in a certain area.

2. Theoretical Framework

Research related to the registration of comunal land indigenous people will be analyzed with three components of the legal system by Lawrence M. Friedman consisting of components “structure, substance, and culture”. The structural components are the parts that move in a mechanism, for example in implementing a land registration policy. Substance components are actual results issued by the legal system and include unwritten legal norms. While the culture component is the values and attitudes that bind the legal system together and produce a form of law enforcement in the culture of society as a whole.

3. Problems and Objectives

From the background of the problems mentioned above, the scope of the main problems in this study are : (1) How is the registration of communal land of the indigenous people of Lombok, West Nusa Tenggara? (2) What are the legal consequences of the communal land registration of the indigenous people of Lombok, West Nusa Tenggara ?

4. Research Method

The study uses the constructivist paradigm with the Socio Legal method. According to Satjipto Rahardjo, that “with social science methods and theories about law to help researchers conduct analysis”. This study uses qualitative research methods which are expected to find hidden meanings behind objects and subjects to be studied [1]. According to Zamroni, a

qualitative research method approach is carried out to understand the law in the context of the community [2].

Data in this study were obtained through activities of observation, interviews, interpretation of documents and personal experience. According to Sanafiah Faisal [3], qualitative research methods, types and methods of observation are used as a type of observation that starts from the way of descriptive work, then observations focus and ultimately observations are selected. The researcher is the main instrument because the researcher himself directly participates in observing data collection. In-depth interviews are conducted with open ended questions but may closed questions will be carried out, especially for informants who have a lot of information but there are obstacles in elaborating the information.

In addition to utilizing documentation and observation, data collection is mainly done through interviews with respondents. Data collection activities include, first looking for primary data and then secondary data. Secondary data is data that has been collected and systematized by other parties [4].

Techniques for finding primary data, conducted through interviews in a free/open or unstructured manner directly with the respondents encountered, were deemed important to provide data in this study. Although there are statistical data obtained through secondary data and integrated interviews, this research is more field research using a *verstehen* or hermeneutic approach. Based on interviews and observational findings, it is then discussed in depth both with the informants/respondents and with key informants [5].

5. Communal Land Rights Registration for Indigenous Peoples in Lombok West Nusa Tenggara

The indigenous people of Lombok, West Nusa Tenggara, the majority of the population is muslim. Influential figures are the village head and customary leader whose task is to lead all the traditional ceremonies carried out by the Lombok West Nusa Tenggara indigenous people.

The indigenous people of Lombok, West Nusa Tenggara depend their lives on agricultural produce from forests that have been planted for their basic needs. The government makes policies in the field of land in the customary law community. In this case *beschikingsrecht* with the right to control or use the land according to Van Vollenhoven that is functioning inside and out for the common good. In the life of indigenous peoples there are individual or individual rights to the land referred to in current regulations as communal land.

In the context of the tenure of customary land rights based on Land Law, it can be seen in Article 2 paragraph (4), which states that "The controlling right of the State can be empowered to *swantantra* areas and indigenous peoples, merely necessary and not in conflict with National interests, according to Government Regulations". Whereas Article 3 of the Land Law states that "... the exercise of customary rights and similar rights of indigenous and tribal peoples insofar as in reality they must still be such that they are in accordance with National and State interests, which are based on national unity and must not conflict with higher laws and regulations". In Article 22 paragraph (1) "Occurrence of ownership rights according to customary law is regulated by Government Regulations".

The communal land of the indigenous people of Lombok, West Nusa Tenggara, was privately attached to the National Complete Perfect Land Registration Program (or *Prona PTSL*) held by the government. The communal land rights are non-transferable (*onvervreemdbaarheid*). The magical-religious value of the indigenous people of Lombok, West Nusa Tenggara, which makes the principle strongly applicable among them. However, even

though communal land has been in the name of an individual by a member of an indigenous community, the right-holder still must require the village head's permission to transfer his rights. In the customary environment of West Nusa Tenggara Lombok, the control of land rights is carried out by the customary head and the village head. Thus, the tenure of indigenous peoples' land rights in Lombok, West Nusa Tenggara, has been progressing with the individual community's communal land certification. This happens because of the times. Individual communal rights in the indigenous people in Ngadisari Village resulted in the loss of customary rights in Ngadisari Village because they had blended into 'tanah kas desa' (village government land). In the context of communal land registration in the adat community of Lombok, West Nusa Tenggara, it is held based on Government Regulation Number 24 of 1997 concerning Land Registration, which states that the object of Land Registration is (1) Plots of land that are owned with Ownership Rights, Business Use Rights, Building Use Rights and Use Rights, (2) Land Management Rights, (3) Waqaf Land; (4) Proprietary Rights in Flat Units; (5) Mortgage Rights (6) State Land.

Before the communal land of the indigenous people of Lombok in West Nusa Tenggara is certified, it is first carried out definitively according to adat and the communal land is divided before being registered. Then asked for a land certificate at the Ngadisari village office signed by the Village Head, so that there was an individualization process of individual communal land ownership rights by members of the Lombok West Nusa Tenggara indigenous community.

Communal land in the name of the person is registered by accommodating local wisdom in the form of a prohibition to sell the land to outside parties of the indigenous people of Lombok, West Nusa Tenggara. The manifestation of local wisdom in the registration of the land is the existence of an underhand agreement between the members of the Lombok Nusa Tenggara Barat indigenous community who will obtain a communal land certificate in his name with the Village Head and is known to Customary Head and witness.

The certification of the communal land of the indigenous people of Lombok, West Nusa Tenggara, into private property is held based on Minister of Home Affairs Regulation No.52 of 2014 and must be determined in advance by the Regional Head. Subsequently the communal land was registered in accordance with the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 10 of 2016. In this regulation, customary rights to land are known as communal rights to land, namely joint ownership of land. Certain areas are forest or plantation areas.

Determining communal rights over customary law community lands and communities in certain areas is also regulated. Article 5 paragraph (1) regulates that customary law communities or communities within a certain area submit applications for the determination of communal land for customary law communities to Regents/Mayors or Governors.

An application for the determination of the communal land of the indigenous people of Lombok, West Nusa Tenggara is submitted by the Customary Head within a certain area to the Regional Head by completing the requirements including the history of the customary law community and the history of the land issued by the Ngadisari village office; photocopy of the traditional leader's identity card; a statement from the Village Head.

After receiving the request, the Regional Head forms a Land Acquisition, Ownership, Use and Utilization Inventory Team to determine the existence of the indigenous people of Lombok, West Nusa Tenggara.

The members of the Lombok Nusa Tenggara Barat indigenous community who wish to register their land must first make an application to the customary head and the village head to be registered or certified. Whereas the land registration process is carried out by the Land Agency with the release of communal rights based on a letter of customary release as the basis

for evidence of ownership rights of indigenous peoples. Relinquishment of adat as a condition of obtaining affirmation of rights/recognition of rights in the issuance of certificates of communal land rights on behalf of individuals, namely members of the Lombok Nusa Tenggara Barat indigenous people (interview with the General Section Head of the Lombok Land Agency).

During the process of relinquishing the customary rights, it was carried out in a customary manner by the customary leader in the presence of the village head and the land release letter was signed by the village head as a witness. After the traditional ceremony is completed, the land is registered through the National Land Registration Program with the letter of release of the land as a proof of rights accompanied by the documents needed, a declaration letter, a statement of physical mastery of the plot of land, a community identification card, family card and others (interview with Village Head).

Based on the research results of the process of registering land originating from customary land in the West Nusa Tenggara Lombok region carried out by the Lombok Land Agency referring to the provisions of the Minister of Agrarian Regulation/Head of the National Land Agency Number 3 of 1997 concerning the Implementation of Government Regulation Number 24 of 1997 about Land Registration. The registration of communal land for the indigenous people of Lombok, West Nusa Tenggara is done individually.

Based on the research results of the process of registering land originating from customary land in the West Nusa Tenggara Lombok region carried out by the Lombok Land Office referring to the provisions of the Minister of Agrarian Regulation/Head of the National Land Agency Number 3 of 1997 concerning the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration. The registration of communal land for the indigenous people of Lombok, West Nusa Tenggara is done individually.

Procedure for registering communal land for indigenous peoples of Lombok, West Nusa Tenggara individually, including :

1. The land owner submits the application for land registration to the Head of Lombok Land Agency by attaching a letter of waiver from the customary leader signed by the witness of the head of the village, a photocopy of the landowner's identity card that is still valid, the original history of the land to be registered (certified) issued by the village office, original statement of physical mastery of the plot of land, a photocopy of the Land and Building Tax Form of the last year the land to be registered.
2. Measurement of land parcels to be registered by the measuring officer of the district/city land agency whose working area covers the location of the relevant land. Measurements are made in the context of making a soil measuring image to be registered. Minutes of measurement of land parcels are signed by the applicant, the owner of the adjacent land, and the Village Head.
3. Juridical data collection and research on land parcels and determination of boundaries in the form of evidence documents is carried out by the Head of the Land Measurement and Registration Section at the Lombok Land Office.
4. Announcement of physical data and juridical data, and ratification. Physical data and juridical data of land parcels and maps of land parcels concerned are announced at the Lombok Land Agency and Village Hall for 60 (sixty) days. At the end of the announcement period, the local Village Head signs a letter introducing the announcement of physical and juridical.
5. Bookkeeping rights and certificate issuance by the Lombok Land Agency.

According to the author, in the Land Law, as a National Land Law, it does not regulate communal land of individual indigenous people but customary rights are regulated.

Communal land is not an object of land registration and indigenous peoples are not subject to land rights laws governed by the Land Law. Land Law only provides mechanisms for registering customary lands through conversion institutions, namely the adjustment of old land rights to land rights as stated in the Land Law, which are property rights, business rights, building rights, and use rights for Indonesian citizens and legal entities domiciled in Indonesia and according to Indonesian law. However, it should be understood that the mechanism of conversion of land rights means changing the relevant land entity, which was originally a customary land recognized as land rights in Article 3 of the Land Law to land rights as stipulated in the Land Law as long as it still exists. Thus, communal land is not one of the land rights regulated in the Land Law that can be registered.

6. Legal Impacts of Communal Land Registration for The Indigenous People of Lombok, West Nusa Tenggara

The communal land registration of the indigenous people of Lombok, West Nusa Tenggara, in accordance with article 9 of the Land Law, can guarantee legal certainty of land rights to the fullest if they meet the requirements, namely:

- a. Land Registration maps that are made prove the boundaries of the land parcels specified therein as legal boundaries. This requirement relates to the issue of Land Registry with the power of evidence.
- b. Public registrations held in the context of registering rights prove that the rights holders registered therein are legal rights holders.
- c. Each land title and its transfer are listed in a public register, so the lists provide a complete picture that matches the actual state of the land rights.

Land registration aims to provide legal certainty to holders of land rights. By registering customary land based on the applicable land policy will get a certificate of ownership and ownership of land in the form of a certificate of land rights which is a strong evidence for holders of land rights.

Land tenure as evidenced by written evidence can also be referred to as a basis for rights. The basis of rights is interpreted as evidence of legal jurisdiction over land. Based on the provisions of Government Regulation Number 24 of 1997 and Regulation of the State Minister of Agrarian/Head of National Land Agency Number 3 of 1997 Concerning the Implementation Provisions of Government Regulation Number 24 of 1997 Concerning Land Registration, the basis for such rights is in the form of strong evidence that guarantees legal certainty and legal protection for holders their rights are called land title certificates.

The legal consequences of registration of land rights as stipulated in Article 3 paragraph (1) of Government Regulation no. 24 of 1997, not only provides legal certainty guarantees, also provides legal protection to holders of land rights. The certificate of Communal Rights issued to the Lombok West Nusa Tenggara indigenous people is a form of recognition of the rights of indigenous peoples even though the certificate above is called one person. As a result of the communal rights of the indigenous people of Lombok, West Nusa Tenggara is certified, it will get legal certainty over land ownership. Land certificates can also be used as collateral for debts such as land rights as stipulated in the Land Law. Moreover, the certificate is in the name of the personal name of a member of an indigenous community with the status of ownership rights.

The status of the customary land of the indigenous people of Lombok, West Nusa Tenggara, which was originally the common right of indigenous peoples, became the property of individuals. According to Regulation of the State Minister of Agrarian/Head of National Land

Agency No. 10 of 2016, due to the law the granting of individual communal rights certificates can provide legal protection for customary law communities and can reduce conflicts between members of indigenous peoples and third parties.

According to the author, based on Article 16 of the Land Law on communal land it is not land rights regulated in the Indonesian Land Law. In the provisions of Article 9 Government Regulation number 24 of 1997, communal land is also not an object of land registration.

7. Conclusion

The control of the land rights of the indigenous people of Lombok, West Nusa Tenggara, by the Village Head and the Customary Head, however, many are now individually certified at the National Complete Perfect Land Registration Program held by the government. The communal land rights are non-transferable (*onvervreemdbaarheid*). The magical-religious value of the indigenous people of Lombok in West Nusa Tenggara that makes the principle apply strongly between them. Even though the communal land has been named individually by members of the customary community, the holder of the right must still require the village head's permission to transfer his rights later. In the traditional environment of Lombok, West Nusa Tenggara, the control of his land rights is carried out by the customary head and the village head. Thus, the mastery of the land of the indigenous people of Lombok, West Nusa Tenggara, has experienced development with the existence of an individual communal land certification, this is due to the development of the times. Individual communal rights in the indigenous people of Lombok in West Nusa Tenggara result in the loss of customary rights because they have been mixed into village land.

The legal consequences of land registration not only guarantee legal certainty, but also provide legal protection to holders of land rights [6]. This also applies to the communal land certificate of members of the Lombok West Nusa Tenggara indigenous community. Due to the legal rights of the indigenous people of Lombok, West Nusa Tenggara is registered as a communal land of individual members of the indigenous people of Lombok, West Nusa Tenggara, the land can be used as collateral for debt, such as land rights as stipulated in the Land Law.

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Study of The Omnibus Law Method to Create Responsive Laws in Indonesia

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Abstract. Laws and regulations are an important element in formal legal countries (rechtstaat) including Indonesia. In addition, to become the base and limitation for the authorities to act, laws and regulations are also become an instrument to solve the nation and state problems. However, Indonesia's laws and regulations that aim to ensure legal certainty causes legal uncertainty itself. This case is happened because of overlapping law and there are still multi-interpretation rules. The issues discussed in this article are about how the omnibus law method can create responsive laws in realizing justice, utilities and legal certainty in Indonesia. The method used in this article is the conceptual approach and comparative approach. The implementation of the omnibus law in Indonesia must be based on Law No. 12 of 2011 concerning the Formation of Legislation. Finally, in order to create a responsive law, the formation process must involve participation and accommodate the aspirations of the public which is then manifested it into the law and regulations, so that the laws created are appropriate with the public legal needs.

Keywords: Omnibus Law, Laws and Regulations, Responsive

1 Introduction

As a newly independent country for 75 years, there have been many ups and downs on Indonesia constitutional experienced. History records that we once lived under the authoritarian new order regime of President Soeharto. During the new order regime, the power of law-making which was centered on the President caused the substance of the law to be arranged in the interests of and protecting the President. While the authority of the house of representative only has limitations to approve or reject the bill proposed by the president. The right of house of representative members to submit a bill is complicated by the many requirements in the code of conduct. Therefore, it cannot be denied if many laws were born because of the political will of the President (*executive*) only.[1]

Until its peak in 1998 the public was in turmoil because the authoritarian leadership of President Soeharto made a multidimensional crisis that stopped him. The transition period from the new order era to the reform era is one of the important events in the journey of the Indonesian nation, one of the demands for reform is the amendment to the Indonesian Constitution 1945 which is considered to be a tool for the new order to perpetuate executive heavy authoritarian rule. Amendment to the constitution change the constitutional order both institutionally and in authority.

One of the articles in the 1945 Constitution which is considered crucial and urgent to be amended is Article 5 paragraph (1) of the 1945 Constitution which states that the President has the power to make laws, which should be a function of the House of Representatives as a branch of legislative power if seen from pure presidential system. The article was amended through Amendment to Phase I of the 1945 Constitution which was stipulated in the General Session (SU) of the MPR-RI in October 1999 to "The President has the right to submit a bill to the House of Representatives". These provisions cause the transfer of power to form laws, which were previously in executive power divided equally with legislative power.[2]

The checks and balances mechanism in the process of forming laws in the reform era is actually an antithesis of the new order mechanism which produces many repressive law. Mechanisms in the reform era are more directed towards the formation of responsive law, which are adjusted to the public legal needs. One of the responsive law requirements is public participation, this has been formally regulated in Article 96 of Law No. 12 of 2011 concerning Formation of Regulations and Regulations.

Legislative problems then emerge, many laws are not really needed by the community, the quality of the product is inadequate, there are still many laws that conflict with each other, are not well integrated from the start, and laws regarding the public interest are often cause problems. [3] Another crucial issue, namely hyper regulation, needs to know the current number of regulations reaching 42,996. The details are 8,414 central regulations, 14,453 ministerial regulations, 4,164 non-ministerial government institutions and 15,965 regional regulations.[4]

Responds to hyper regulation problem whose effects are like snowballs. In the inauguration speech of President Joko Widodo during his second period of government, the president introduced Omnibus Law as an effort to overcome hyper regulation. The bill drafted using the Omnibus Law method is the Cipta Lapangan Kerja Bill which is now the Cipta Kerja Bill and the Pemberdayaan UMKM Bill. Each of these bills will become an Omnibus Law, a law that also revises several laws, even dozens of laws, aimed at increasing investment and opening up many new jobs.[5]

Omnibus Law is actually widely applied in countries with a common law system, whereas Indonesia itself adheres to civil law. But this is not really a problem, the real challenge is how the laws created through the Omnibus Law method create laws that are responsive and beneficial to society. Considering that the law using the Omnibus Law method regulates various fields so that it has the potential to create conflicting interests of many parties.

2 Method

The method used in this article is the conceptual approach, based on how the law is ideally able to realize the goals of the state and protect each citizen, but in reality so many overlapping legal rules actually lead to multiple interpretations and harm citizens. Besides, this article uses a comparative approach method, by comparing and studying the best practices of the omnibus law method in several countries. Seeing its application in various countries, the actualization omnibus law can be a model of formation to resolve overlapping legislation.

3 Discussions

3.1 Hyper regulation problem in Indonesia

Hyper and overlapping regulations will result in delays in accelerating development and improving public services because of the long bureaucracy created by regulations. The formation of these regulations was out of control ranging from laws (UU), government regulations (PP), government regulations in lieu of laws (Perpu), presidential regulations (Perpres), to ministerial regulations (Permen). During President Joko Widodo's government from 2014 to October 2018 alone, 8,945 regulations were issued. In detail, there are 107 laws; 452 Government Regulations; 765 Presidential Regulation; and 7,621 Ministerial Regulations.[6]

Not only occurs at the central level, regional levels also experience such conditions. Even the Ministry of Home Affairs in 2016 at that time, canceled 3,143 Regional Regulations (Perda) which were considered problematic. [7] However, the Ministry of Home Affairs' authority was later reviewed in the Constitutional Court. The decision also stated that the authority to revoke the Regional Regulation fully became the authority of the Supreme Court through the Judicial Review.

The beginning of the hyper regulation problem starts from the statutory regulations whose types and hierarchy are under the Law regulated in Article 7 Paragraph (1) of Law No. 12 of 2011 concerning Formation of Legislation, namely government regulations (PP), presidential regulations (Perpres) and regional regulations (Perda).

Affirmed in Article 12 and Article 13 of Law No. 12 of 2011, the substance of government regulations (PP) is to implement the laws as it should. As for the presidential regulations, the substance is what is ordered by law, the material for implementing government regulations, or the material for carrying out governmental powers. So we can conclude that government regulations and presidential regulations take a big role in governance. Even constitutionally in Article 5 Paragraph (1) of the 1945 Constitution, as the highest executive power holder, the president has the authority to determine government regulations to implement the law accordingly.

In addition, laws and regulations that are outside the hierarchy, one of which is ministerial regulation, is also a factor causing hyper regulation. As a product whose existence is recognized and has binding power, hyper regulation is caused by an increase in the number of ministerial regulations not only because their formation is ordered by higher regulations, but also because of the authority held by ministers and / or ministries. Because of the quite extensive power in forming regulations, it is not impossible that the material contained in ministerial regulations can deviate because it ignores the principle of forming legislation. In the end, legal certainty in the administration of government is increasingly difficult to obtain. One of the causes of the emergence of legal uncertainty is that the formation of ministerial regulations does not go through a harmonization process as is the case for the formation of government regulations and presidential regulations. Therefore, both vertically and horizontally, substantively, ministerial regulations are very likely to present regulations that are not harmonious and out of sync with the type and hierarchy of other statutory regulations, including conflicting with the law. [8]

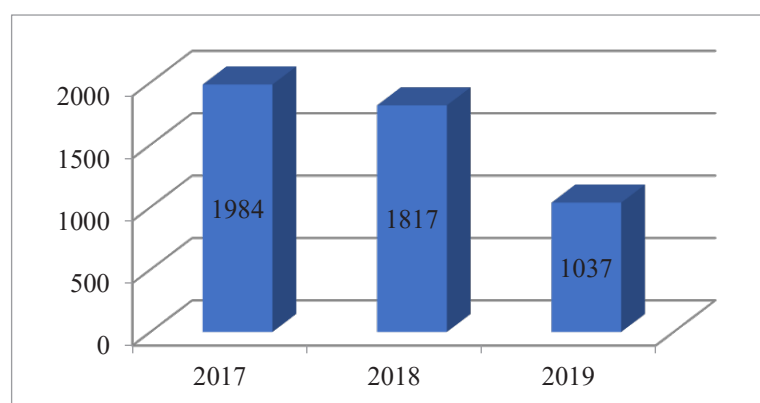
Disharmonization or overlap between legislation both vertically and horizontally which causes legal uncertainty makes investors think many times to invest in Indonesia. In connection with the large number of state institutions that have the authority to form laws and regulations, it is not uncommon for disharmony and incompatibility between one legal norm and another.

Therefore state institutions that have the authority to form laws and regulations also have an obligation to harmonize.

Law harmonization is a scientific activity towards the process of harmonizing written law based on philosophical, sociological, economic and juridical values. In its implementation, the harmonization activity is a comprehensive study of a draft legislation with the aim of finding out whether the draft regulation in various aspects reflects harmony or conformity with other national legislation, with unwritten laws that live in society, or with international conventions and agreements, both bilateral and multi-lateral that have been ratified by the Government.[9]

From 2017-2019 (as of september 2019) there are 4,838 ministerial / head of non-ministerial government agencies with the following details:

Table 1. Number of ministerial regulations since 2017-2019 (as of September 2019)



Source: Direktorat General of Legislation Ministry of Law and Human Rights, 2019

Sectoral ego between ministries and / or institutions and then regional autonomy which gives local government authority to make regional regulations is the main cause of hyper regulation because of the harmonization of laws and regulations. To break the disharmony chain, in fact the government through the Ministry of Law and Human Rights has issued Minister of Law and Human Rights Regulation No. 22 of 2018 concerning Harmonization of Draft Laws and Regulations Formed in the Regions by the Drafters of Laws and Regulations of the Minister of Law and Human Rights No. 23 of 2018 concerning Harmonization of Ministerial Draft Regulation, Draft Regulation of Non-Ministerial Government Institutions, or Draft Regulation of Non-Structural Institutions by Drafting Legislation, besides that the house of representatives and the government revised Law No. 12 of 2011 as amended by Law No. 15 of 2019 concerning Formation of Legislation as a serious effort to overcome the regulatory problem.

3.2 Omnibus law method as a solution

To reorganize regulations that were much, President Jokowi chose to use the Omnibus Law method, based on the Oxford Dictionary of English, the word "omnibus" means "a volume containing several books previously published separately". Literally, "omnibus" comes from the Latin "omnis" which means "every" or "all", or rather "all, every, the whole, of every kind". In the Black's Law Dictionary 10th, the term "omnibus bill" is interpreted as follows:

- 1) *a single bill containing various distinct matters, usu. drafted in this way to force the executive either to accept all the unrelated minor provisions or veto the major provision;*
- 2) *bill that deals with all proposals relating to a particular subject, such as an "omnibus judgeship bill" covering all proposals for new judgeships or an "omnibus crime bill" dealing with different subject such as new crimes and grants to states for crime control.*

Maria Farida Indrati defines the omnibus law as a (new) law containing or regulating various substances and various subjects for the simplification of various applicable laws. It is not appropriate if the omnibus law is equated with the umbrella law (*raamwet, basiswet, moederwet*), which is the law which is the core of other laws so that its position is higher than the sub-core law because this umbrella law bestows various further arrangements by delegation to other laws.[10]

Generally, the Omnibus Law is a new law that contains or regulates a variety of materials and subjects that aim to simplify various laws that still apply. The Omnibus Law method in forming legislation is mostly adopted by countries that adhere to the Anglo-Saxon or Common Law traditions, such as the United States of America, Canada and Ireland which in 2008 issued a law that repealed 3,225 laws.

In Canada, there is one phenomenal omnibus law, the 120-page Criminal Law Amendment Act, which was approved in the period 1968-1969. The omnibus law was passed during the leadership of the Minister of Justice Pierre Trudeau, he considered the law to be "the most important reform in the applied criminal law". These rules legalize homosexuality, abortion, lottery, restrictions on possession of weapons, to regulate driving rules. Gunter considered that the government at that time was trying to minimize the negative impacts that must be borne. [11]

The omnibus law method is most likely to be successfully implemented if it is guided by the concept of single subject clause (the law of one theme). [12] As a reference, we can see in the constitution of one of the states of the United States of America, Minnesota, in Article 4 Section 17 of the Constitution of the State of Minnesota emphasizes:

Laws to embrace only one subject. No law shall embrace more than one subject, which shall be expressed in its title.

As with Minnesota, the state of California even limits the use of Omnibus Law. The Constitution of the State of California in Article 4 Section 24, emphasizes:

Every Act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an Act which shall not be expressed in its title, such Act shall be void only as to so much thereof as shall not be expressed in its title...."

Indonesia needs to learn from the application of omnibus law in these countries, because the Omnibus Law used in the Cipta Kerja Bill is not a single subject clause, Substantially there are 11 different clusters of subjects that have an impact on 82 Laws and 1,201 articles. The 11 clusters of the Cipta Kerja Bill include:

- 1) Simplification of land licensing
- 2) Investment requirements
- 3) Employment

- 4) Ease and protection of MSMEs
- 5) Ease of business
- 6) Research and investment support
- 7) Government administration
- 8) Imposition of sanctions
- 9) Control of land
- 10) Ease of government projects
- 11) Special Economic Zones

The first challenge that must be anticipated in the formation of the Omnibus Law is that, with enough clusters, it will be difficult and less effective if the Omnibus Law is submitted to several ministries. A single institution is needed to formulate the omnibus law bearing in mind that the omnibus law is a law that contains substance or material to negate previous legal norms that are spread in several laws, needing careful preparation by ruling out sectoral egos. [13]

The formation of the institution has even been mandated by Law No. 15 of 2019 concerning revision to Law No. 12 of 2011 concerning the Formation of Laws and Regulations, Article 99A affirms:

“Pada saat pembentukan kementerian atau lembaga yang menyelenggarakan urusan pemerintahan di bidang Pembentukan Peraturan Perundang-undangan belum terbentuk, tugas dan fungsi Pembentukan Peraturan Perundang-undangan tetap dilaksanakan oleh menteri yang menyelenggarakan urusan pemerintahan di bidang hukum.”

This institution will also later review and tidy up all the technical rules that are formed to implement the Cipta Kerja Bill, because automatically there will be a lot of technical regulations that must be synchronized in the form of ministerial regulations, ministerial decrees, and so on. Because it would be futile to use Omnibus Law if the implementing regulations are not implemented, this will actually aggravate Hyper Regulation.

The second challenge, legally the Omnibus Law method is not legally clear, in Law No. 12 of 2011 neither the article nor the appendix regulate the method. If the government and the House of Representatives impose it, then this will set a bad precedent because both of them violate the provisions they made themselves. So the solution is to first revise the law and then include rules regarding the Omnibus Law method.

The third challenge, according to US journalist Lorne Gunter, is that the Omnibus Law is anti-democracy because in its process of limiting debate and control over its application, in the past Omnibus Law has often been used to pass controversial rules. [14] So it can be said that Omnibus Law is likely to produce repressive legal products that are misused to benefit certain interest groups and cause harm to the community. An example of the controversial Omnibus Law is Prime Minister Trudeau's Bill C-94, the 1982 Energy Security Act, which angered the Conservative Progressive opposition.[15]

This must be avoided by Indonesia because we must learn from the new order, in a modern democratic country now, the laws needed are responsive characters that provide benefits and meet the legal needs of society. The process of establishing laws that use the Omnibus Law method must be participatory in order to produce responsive laws. Regarding responsive law concept will be discussed in the next section.

3.3 Responsive law concept

Philippe Nonet and Philip Selznick divide the three character of the law applied in society. First, the law as servants of repressive power (repressive law). Second, the law as a separate institution capable of taming repression and protecting its integrity (autonomous law). Third, law as a facilitator of various responses to social needs and aspirations (responsive law). In this section the author only discusses the character of responsive law, but to make it easier to understand the differences between the three legal characters can be seen in the following table:

Table 2. The three characteristics of law

	Repressive Law	Autonomous Law	Responsive Law
Purpose	Order	Legitimacy	Competence
Legitimacy	Social security and nation goals (raison d'état)	Procedural justice	Substantial justice
Regulation	hard and detailed but weak against lawmakers	Extensive and detailed; binding both the law maker and the ruled	Subordinate to principles and policies
Consideration	Ad hoc: makes it easy to achieve goals and is particular	Very attached to legal authority; vulnerable to formalism and legalism	Purposive (goal oriented); expansion of cognitive competence
Discretion	Very wide; opportunistic	Limited by regulations; narrow delegation	Wide, but still in accordance with the objectives
Coercion	Extensive; weakly restricted	Controlled by legal restrictions	Positive search for alternatives, such as intensive, self-sustaining liability systems
Morality	Communal morality; legal moralism; "Morality limitation"	Institutional morality; that is, filled with the integrity of the legal process	Civil morality; "cooperation"
Politic	Law is subordinate to power politics	"Independent" law is separate from politics	Integrated legal and political aspirations; power integration

Hope for Obedience	Unconditional; disobedience is punished as insubordination	Deviations of justified regulations, for example to test the validity of laws or orders	Disobedience is seen from the aspect of substantive danger; seen as a lawsuit against legitimacy

Source: Philippe Nonet and Philip Selznick, *Law and Society in Transition : Toward Responsive Law*, 1978.

According to the Indonesian Dictionary, the law is the laws, regulations, and so on to regulate social life, [16] and responsive means fast (like) respond; responsive. [17] responsive law according to Philippe Nonet and Philip Selznick in their book "*Law and Society in Transition towards Responsive Law*". Responsive law is a critique of legal theory that emphasizes the formality side and overrides reality (repressive law and autonomous law), the ideal law must be competent and also fair, it should be able to recognize the public desires and be committed to achieving substantive justice rather than procedural. [18]

It can be concluded that responsive law is a legal character that receives as much legal input as possible and then takes a solution which can be a meeting point for the legal interests of the community in general. Responsive law in principle is an accommodative and aspirational law of the desires of the people who will be governed.

Related to the application of the Omnibus Law in Indonesia, this is a challenge that must be resolved together, many cross-sectoral arrangements will certainly have the potential for a conflict of interests involved in the formation of the Omnibus Law, House of Representatives and the Government must not only submit to political interests, both must absorb aspirations and open space for public participation in forming laws. So that the Omnibus Law produced has responsive legal characteristics that are a solution to meet the legal needs of the wider community. Maria Farida Indrati provided several points of recommendations that must be considered so that the Omnibus Law law can bring justice, expediency and legal certainty. First, the fulfillment of the principles of openness, prudence, and public participation. Second, broad socialization is needed, especially for officials and parties involved in the substance of the bill, legal practitioners, and academics; Third, the discussion process in the House of Representatives must be transparent with regard to input from parties related to the bill, and not to rush into the discussion; Fourth, consider the effective period of enactment of the Omnibus Law; and Fifth, consider the applicability of existing affected laws.[19]

4 Conclusion

Regulatory reform was a priority during the second period of President Joko Widodo's government, he chose to form an Omnibus Law to revise several laws as well as a way to organize regulatory problems, but many issues must be considered in implementing the Omnibus Law because this method is pragmatic, less democratic and limit the space for participation, this can be seen from other countries that have applied before. Because the Omnibus Law method has not yet been regulated in Law No. 12 of 2011 concerning the Formation of Regulations and Regulations, the law should first be revised to include the Omnibus Law mechanism. Further notes, it is feared that it would not be effective if the Omnibus Law was formed if submitted to several ministries. A single, specialized institution that handles regulation is needed because it requires carefulness, prudence and minimizing the sectoral ego in its formation. It is expected that each law product specifically formed through the Omnibus method will always be open to public participation and receive their aspirations, so that the resulting law is responsive in character to meet the legal needs of each community, not only the authorities or certain interest groups.

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Internet Blocking Policy in Indonesia: Between Realities, Pros and Cons?

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Abstract. The telematics has rapidly progress, especially related to the use of the internet, also gives some negative impacts besides having positive ones. The irresponsible use of the internet such as propaganda or even racism of racial, ethnic, religious, and organizational issues by some parties often disturbs the stability of the country's security. In recent years, there has been an increase in the blocking of internet sites with negative content. Pros and cons occur over the internet blocking policy in Indonesia which then requires further analysis related to the legal study. The legislation only regulates the government's authority to block content with certain themes, such as pornography, blasphemy, and hate speech. However, these rules do not explicitly provide the scope, boundaries, mechanisms, and efforts to fight and complain about the blocking. It needs to be regulated in more detail related to internet blocking in Indonesia involves the human rights as stipulated in the provisions in Article 28F of the 1945 Constitution.

Keywords; telematics, internet blocking, negative content.

1. Introduction

In the millennial era, life cannot be separated from technological development. Technology always exists and is needed at all times, in any place, and by anyone. Major changes in technological developments have pushed Indonesia as a modern democratic country to embody its electronic system in the public interest. This was concretized by the existence of Law No. 14 of 2008 on Public Information Openness (KIP Law) and Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law) Juncto Law No. 19 of 2016.

Further arrangements related to the Electronic System cannot be separated from the laws of telematics. There are confusing opinions about a law that covers all regulations in the field of telematics, starting from the ITE Law, the Telecommunication Law, or other legislation such as the Criminal Code. It is certainly important to know together, starting from the understanding of telematics as a law for the development of the convergence of TELEMATICS (Telecommunications, Media and Informatics) in the form of organizing an electronic system, both connected through the internet (cyberspace) or not connected to the internet including aspects of law related to the existence of information systems and communication systems, especially those that are carried out with the implementation of electronic systems [1]. Therefore, it is not appropriate to say that telematics is part of telecommunications. On the contrary, telecommunications is the one becoming a part of telematics convergence.

In its development, telematics has progressed so rapidly that it could not be separated from every field in society in a country. The information technology advancements, especially related to the use of the internet, also gives some negative impacts besides having positive ones. The irresponsible use of the internet such as propaganda or even racism of racial, ethnic, and religious issues (*SARA*) by some parties often disturbs the stability of the country's

security. The spread of news with sources and data that cannot be accounted for has caused unrest among people and even led to disputes between citizens which indirectly disturb security stability that affects economic, social, cultural, political, and security conditions. This prompted the government to restrict the use of the internet on the grounds of maintaining the unity and integrity of the Indonesian Nation, for the sake of security and order created in the community.

In recent years, there has been an increase in the blocking of internet sites with negative content or that are considered breaking the law (illegal content). At the end of March 2015, at the request of the National Counterterrorism Agency (BNPT), the Ministry of Communication and Informatics (Kemenkominfo) blocked several internet sites calling for Islamic da'wah which was considered to be radically charged. They are said to be Islamic da'wah sites because of their names; these sites use names or attributes related to Islam [2]. In 2015, the government blocked 766,395 negative sites. In 2016, 773,097 sites were blocked which contained pornographic material [3]. Meanwhile in early 2017, the Ministry of Communication and Information has moved 6,000 social media accounts that contain elements of hate speech, slander, and hoaxes [4].

Southeast Asia Freedom of Expression Network (SAFENet) said that blocking internet access is one of the repression tools in the digital age of the 21st century. Until now, the government has blocked internet access and social media three times in Indonesia, namely during riots around Election Supervisory Agency (Bawaslu) building in late May, riots in Papua in August, and riots in Wamena, Monday (23/9). SAFENet further as an organization that fights for digital rights in Southeast Asia, urged the government to restart the internet in Wamena as it is used to, stop the practice of Internet Shutdown throughout Indonesia and comply with existing laws and respect the rights of citizens to access information as required protected by Article 19 of the UDHR and Article 19 of the Covenant on Civil and Political Rights. The pros and cons related to internet blocking are quite interesting to be discussed further. Therefore, the author will discuss related to: Is the policy on internet blocking in Indonesia in accordance with existing legal methods?

2. Method

The research method used in this paper is the normative legal research method, using the statute approach. The purpose of the statute approach is an approach based on a review of legal regulations related to the problem being discussed.

3. Result and Discussion

Interconnecting networking or the internet can simply be interpreted as a global network of computer networks, with its global characteristic and spread within broadly unlimited reach [5]. The internet is a network that connected and contains information with common protocols with powerful features, connected through a communication network, regardless of creation, operating system or location with widely distributed resources and network management [6]. Internet resources can be divided into 2 (two), namely: IP address and Domain Name. Meanwhile, if we observe further the inseparable resource is the existence of every data and/or information that crosses the internet, especially the Personal Data of every person who makes a transaction. In internet governance, the applicable legal provisions are community law. The government does not have authority to regulate IP Addresses and Domain Names so that the rules for self-regulatory provisions are known, as well as the existence of a system for recording IP addressing and Domain Names [7].

Some Legal Standing on Digital Issues

- a) Law No. 19 of 2016 Juncto Law No. 11 of 2008 on Electronic Information and Transaction

Article 15 paragraph (1) of Law No 11 of 2008 Juncto Law No. 19 of 2016: every electronic system provider must operate its electronic system reliably and safely and be responsible for the proper operation of the Electronic System. In paragraphs (2) and (3), it is stated that the Electronic System Operator is responsible for the Electronic System Operation, unless an urgency, error, and/or negligence of the electronic system user is proven.

In the context of the internet, the terms of the limitations are regulated in the provisions of Article 40 paragraph (2), paragraph (2a), and paragraph (2b) of Law No. 19 of 2016 on amendments to Law No. 11 of 2008 on Electronic Information and Transactions. In the provisions of paragraph (2), it is stated that the government protects the public interest from all types of disturbances as a result of misuse of electronic information and transactions that interfere with public order, in accordance with statutory regulations.

In the provisions of paragraph (2a), the government is obliged to carry out prevention, dissemination, and use of electronic information and transactions that have prohibited contents in accordance with statutory regulations. Provisions in paragraph (2b) state that in conducting prevention as referred to in paragraph (2a), the government has the authority to terminate access and/or order the electronic system operator to block access to information or electronic documents that have unlawful contents. The limitation on internet access is only intended if the information or electronic documents have contents violating the law, especially violations of criminal law. The authority to restrict the internet to constitutional rights is in the hands of the president, but the limitation is stated openly before the public, and it must also be stated the time limit on the rights.

b) Law No. 40 of 1999 on Press

Freedom of the press is right granted by the constitutional or legal protection relating to the media and published materials such as disseminating, printing, and publishing newspapers, magazines, books, or in other materials without any interference or censorship from the government. In Article 4 paragraph (1) of Law No. 40 of 1999 on Press, it is stated that press freedom is guaranteed as a human right of citizens, in paragraph (2) that Towards national press no censorship, prohibition or restriction of broadcasting will be imposed upon., paragraph (3) that to ensure freedom of the press, the national press has the right to seek, acquire, and disseminate ideas and information and paragraph (4) that in holding accountable before the law, journalists have the right to refuse even as stated in the UUD 1945 (1945 Constitution), among others, in Article 28F that everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process and convey information using all types of available channels. The Press Law does not cover social media, search engines, and e-commerce sites. In the Press Law, there is also no legal standing for blocking the internet.

c) Law No. 32 of 2002 on Broadcasting

The Broadcasting Law does not fully regulate media such as Youtube which does not use electromagnetic wave infrastructure. This law does provide guidelines for broadcasting behavior as stipulated in Article 48 of Law No. 32 of 2002 on Broadcasting and sanctions provided in the event of a violation of the provisions in this Broadcasting Law as referred to in Article 55 (administrative sanctions), criminal provisions as regulated in Articles 57, 58 and 59. However, the said provisions do not include internet sanctions that can be imposed by the state in this matter.

d) Law No. 36 of 1999 on Telecommunication

The provisions of Telecommunication Law also only regulate telecommunications operators, rights and obligations of the organizer and the public, licensing, tariffs, and telecommunications security, which are related to administrative and criminal sanctions. There is no regulation related to internet blocking that can be done by the state.

e) Law No. 14 of 2008 on Public Information Openness

This law was born as an example of the existence of Article 28F of the 1945 Constitution which regulates the right to communicate and obtain information [8]. The Law on Public Information Openness guarantees all people to obtain information that constitutes Human Rights as a manifestation of democratic national and state life. This law regulates the right of every person to obtain information; Public Agency's obligation to provide and service requests for information in a fast, timely, low-cost/proportional, and simple way; exceptions are strict and limited; and the obligation of the Public Agency to improve the documentation and information service system. It is also regulated in Article 7 paragraph (3) of the Public Information Openness Law. However, the Public Information Openness Law does not regulate internet blocking policies that can be carried out by the state.

f) Law No. 25 of 2009 on Public Services

The Law contains regulatory provisions on the definition and limitations of public services administration; the principles, objectives, and scope of the administration of public services; guidance and arrangement of public services; rights, obligations and prohibitions for all parties involved in the administration of public services; aspects of the administration of public services which include service standards, service announcements, information systems, facilities and infrastructure, service costs/tariffs, complaint management, and performance appraisal; community participation; settlement of complaints in the administration of services; and sanctions. However, the Public Service Act does not regulate state authority in internet blocking.

g) Law No.44 of 2008 on Pornography

This law explicitly stipulates the form of punishment for violations of the making, distribution, and use of pornography that is adjusted to the level of violations committed, namely severe, moderate, and mild, as well as giving weight to criminal acts involving children. In addition, weights are also given to the perpetrators of criminal acts committed by corporations by multiplying the main sanctions and providing additional penalties. To provide protection for victims of pornography, this Law requires all parties, in this case, the state, social institutions, educational institutions, religious institutions, families, and/or the community to provide guidance, assistance, social recovery, physical and mental health for every child who is a victim or perpetrator of pornography.

Article 19 of the Pornography Law stipulates that in order to take precautions as referred in Article 17, the Regional Government is authorized to: a. terminating the network of making and distributing pornographic products or pornographic services, including blocking pornography through the internet in its region; b. supervising the making, dissemination, and use of pornography in the region; c. carrying out cooperation and coordination with various parties in the prevention of the making, dissemination, and use of pornography in the region; and d. developing a communication, information, and education system in the context of preventing pornography in the region.

As explained in Article 18 letter a and Article 19 letter a, what is meant by "blocking pornography through the internet" is blocking pornographic goods or pornographic services' providers. In Law No. 44 of 2008 on Pornography, there are provisions relating to internet blocking, but only for matters relating to pornography.

h) Government Regulation No.52 of 2000 on Telecommunication Operation

Further elaboration of the arrangements regarding telecommunication operations, it is deemed necessary to draw up implementing regulations in the field of telecommunication operations. This Government Regulation stipulates that telecommunications network operators in conducting their business are required to build and/or provide telecommunications networks in accordance with the Technical Basic Plan. The Technical Basic Plan referred to is further stipulated by the Minister. The Government

Regulation on Telecommunication Operation does not regulate internet blocking provisions.

- i) Government Regulation No. 71 of 2019 on Organisation of Electronic Systems and Transactions revokes Government Regulation No. 82 of 2012 on Organization of Electronic Systems and Transactions.

Explanation of Government Regulation No. 71 of 2019 on Organisation of Electronic Systems and Transactions states:

"The stipulation of this Government Regulation is intended to further regulate several provisions in Law Number 19 of 2016 on Amendment to Law Number 1 of 2008 on Information and Electronic Transactions that were formed to guarantee recognition and respect for the rights and freedoms of others and for meet fair demands in accordance with considerations of security and public order in a democratic society Some provisions that need further regulation are: a) the obligation for each Electronic Systems Provider to delete irrelevant Electronic Information and/or Electronic Documents under his control at the request of the Person concerned based on a court decision; and b the role of the Government in facilitating the use of Information Technology and Electronic Transactions, protecting the public interest from all types of disturbances as a result of the misuse of Electronic Information and Electronic Transactions that disturbed public order, and prevent the dissemination and use of Electronic Information and / or Electronic Documents which have prohibited contents in accordance with the provisions of the legislation ".

Provisions in Article 3 paragraph (1), each Electronic System Operator must operate the Electronic System reliably and safely and are responsible for the proper operation of the Electronic System. Paragraph (2), the Electronic System Operator is responsible for the operation of the Electronic System. The provisions referred to in paragraph (2) do not apply if conditions of force, error, and/or negligence of the Electronic System Users can be proven.

Article 4 from letter a to letter e, as long as no other statute is specified, each Electronic System Operator must operate the system by meeting the minimum requirements.

Article 5 paragraph (1), Electronic System Operator must ensure that its Electronic System does not contain Electronic Information and/or Electronic Documents that are prohibited under statutory provisions. Paragraph (2), the Operator of an Electronic System must ensure that the Electronic System does not facilitate the dissemination of Electronic Information and/or Electronic Documents that are prohibited under statutory provisions.

In Government Regulation No. 71 of 2019 on Organization of Electronic Systems and Transactions has been regulated related to the operation of Electronic Systems which must comply with statutory provisions and be conducted reliably and safely and responsibly. Although there are no provisions that govern directly related to internet blocking, with the existence of this Government Regulation there is a reference for the organizers of the Electronic System in carrying out its Electronic System to provide benefits and not violate the law.

- j) Regulation of Minister of Communications and Informatics No. 19 of 2014 on Controlling Internet Websites Containing Negative Content

The legal standing for blocking internet network access refers to the Regulation No. 19 of 2014 on negative content. Based on that rule, blocking the internet is a new form of filtering negative content. Indonesia already has censorship (filtering content) in the form

of the Ministry of Communication and Informatics Regulation No. 19 of 2014 which is about negative content, this is its new form (internet blocking).

Regulation about Controlling Internet Websites Containing Negative Content, under Article 2 letter b written negative content filtering, aims to "protect the public interest from internet content that has the potential to have a negative or detrimental impact." There is procedure in viewing the Regulation, there are First, Reporting from the public on: negatively charged internet sites; Reporting submitted by the public to the Minister c.q. Director-General through the facility for receiving reports in the form of e-mail complaints and/or site-based reporting provided; Reporting from the public can be categorized as emergency reporting when it concerns personal rights, child pornography, and rapid negative impacts on the community and/or special requests.

Regulation No. 19 of 2014, in Chapter IV Role of the Society and the Government, Article 10 and Article 11 states that; The procedure for receiving reports and requests for blocking as referred to in Article 5 paragraph (2) must have been assessed by the relevant ministry or agency by loading the site address, type of negative content, type of violation and information.

- k) Regulation of Minister of Communications and Informatics No. 36 of 2014 on the Procedure of Registration of Electronic System Operator. This provision only regulates procedures for the registration process of electronic system operators. It does not contain provisions relating to the authority granted to the state to restrict or revoke prohibited content.
- l) Regulation of Minister of Communications and Informatics No. 20 of 2016 on the Protection of Personal Data in Electronic System. This regulation does not regulate the authority related to internet blocking, but rather regulates the protection of personal data and other provisions.
- m) Regulation of Minister of Communications and Informatics No. 7 of 2018 on Electronically Integrated Business Licensing Service, which only regulates related to licensing procedures for electronic, licensing, and telecommunications operations services, not related to state authority in limiting or blocking internet usage.
- n) Presidential Instruction No.6 of 2001 on Telematics Development and Productivity
This Presidential Instruction regulates the use of telematics technology and information flow aimed at improving the welfare of the community, including eradicating poverty and inequality, and improving the quality of life of the people. In addition, regulating telematics technology must be directed to bridge political and cultural gaps, and improve harmony among the people. However, the Presidential Instruction No. 6 of 2001 on Telematics Development and Productivity does not regulate the Government's authority in blocking or limiting internet in Indonesia. This Presidential Instruction regulates policies related to Telematics, the use of telematics technology and information flow must always be aimed at improving the welfare of the community, including eradicating poverty and inequality and improving the quality of life of the community. In addition, telematics technology must also be directed at bridging political and cultural gaps and enhancing harmony among the people.
- o) Circular Letter of the Minister of Communication and Informatics No. 3 of 2016 on the Delivery of Application and/or Content Services through Internet (Over the Top)
In this Circular letter is regulated related to service provider obligations (over the top) and content that is prohibited to be provided
Obligations of Over the Top Service Providers
5.5.1 comply with monopoly prohibition provisions, prohibitions on unfair business competition and other relevant regulations;

- 5.5.2 conduct data protection under statutory provisions;
- 5.5.3 do content-filtering under statutory provisions;
- 5.5.4 implement censorship mechanism under statutory provisions;
- 5.5.5 use a national payment gateway incorporated in Indonesia;
- 5.5.6 use Indonesian internet protocol numbers;
- 5.5.7 provide guaranteed access to legal tapping of information (lawful interception) and retrieval of evidence for the investigation or investigation of criminal cases by the competent authority under statutory provisions; and
- 5.5.8 include information and/or instructions for use of the service in Indonesian under statutory provisions.
- 5.6 Over the Top Service Providers are prohibited from providing services that have the following content:
 - 5.6.1 contrary to Pancasila and the 1945 Constitution of the Republic of Indonesia, threatening the integrity of the Unitary State of the Republic of Indonesia;
 - 5.6.2 cause conflicts or contradiction between groups, between ethnic groups, between religions, between races, and between groups (*SARA*), insulting, harassing, and/or tarnishing religious values;
 - 5.6.3 encourage the general public to take actions against the law, violence, narcotics, psychotropic, and other addictive substances, degrading human dignity, violating decency and pornography, gambling, insults, extortion or threats, defamation, hate speech (hate speech), infringement of intellectual property rights; and/or
 - 5.6.4 contrary to statutory provisions

- p) Circular Letter of the Minister of Communication and Informatics No. 5 of 2016 on the Limitations and Responsibilities of Platform Providers and Merchants in E-Commerce Using User-Generated Content Platforms

In this provision, prohibited content is any type of material and/or content that violates the provisions of the legislation. This provision governs the obligations and responsibilities of the UGC Platform (User Generated Content), including carrying out the removal and/or blocking of prohibited content.

- q) Joint Regulation of the Minister of Law and Human Rights and Minister of Communication and Informatics No. 14 of 2015 and No. 26 of 2015 on the Implementation of Closing Down Content and/or a User's Right to Access over Copyright Infringement and/or Related Rights in an Electronic System.

In this regulation the closure of content and/or access rights are only for content that violates Copyright and/or Related Rights (Article 1 number 5). Related to the provisions of closing content and/or access rights regulated in Chapter IV, Article 13 (1), the Minister who organizes governmental affairs in the field of communication and informatics closes the internet.

Article 15, the closure of access to content that violates copyright and other regulated rights. Article 16, in the case of the closing of an internet site or blocking as referred to in Article 13 paragraph (1) concerning the period of internet blocking. In this regulation there are provisions relating to content restrictions or internet blocking specifically for violations of Copyright and/or Related Rights on the official website of the ministry.

Internet Blocking in Indonesia

In the Indonesian context, the Press Law cannot regulate social media, search engines, and e-commerce sites. The Press Law only regulates online news sites that contain journalistic content. The Broadcasting Law also does not reach out to regulations on new media such as YouTube that do not use electromagnetic wave infrastructure. The presence of new media has so far been regulated in the Information and Electronic Transactions Law. The problem is that the Electronic Information and Transaction Law has not fully taken into account the different positions, functions, and impacts of new types of media, such as social media, search engines, and e-

commerce sites. The dynamics of the development of new media are too broad and complex to be regulated by just one law [9].

In the midst of the dynamics of the development of new media that are too broad and complex and have not been balanced with the regulations with existing laws in Indonesia, furthermore, no less important needs to be discussed concerning the internet blocking itself, how is the regulation in existing laws in Indonesia.

In its development, the state provides a stronger legal standing to overcome the pros and cons associated with internet blocking in Indonesia. The Government established Law No. 19 of 2016 which replaced Law No. 11 of 2008 on Information and Electronic Transactions, providing the basis for internet blocking policies as stipulated in Article Article 40 paragraph (2), paragraph (2a), and paragraph (2b).

The legal standing for internet blocking, especially related to sites with negative content, is based on the Ministry of Communication and Informatics Regulation No. 19 of 2014 on Controlling Internet Websites Containing Negative Content. The Minister's Regulation is intended to answer the legal vacuum based on the internet blocking policy in Indonesia, but instead it has given birth to a separate polemic.

Content restrictions or internet blocks containing pornography are also contained in the Law on Pornography. As explained in Article 18 letter a and Article 19 letter a, what is meant by "blocking pornography through the internet" is blocking pornographic goods or pornographic services' providers. In Law No. 44 of 2008 on Pornography, there are provisions relating to internet blocking, but only for matters relating to pornography.

In the Joint Regulation of the Minister of Law and Human Rights and the Minister of Communication and Informatics No. 14 of 2015 and No. 26 of 2015 on the Implementation of Closing Down Content and/or a User's Right to Access over Copyright Infringement and/or Related Rights in an Electronic System, there are provisions relating to content restrictions or blocking internet specifically for violations of Copyright and/or Related Rights on the official website of the ministry.

Examples of Cases of Blocking Internet Access in Wamena by the Ministry of Communication and Informatics

Quoted from the news channel *www.cnnindonesia.com*, Acting Head of the Public Relations Bureau of the Ministry of Communication and Informatics Ferninadus Setu said the circulation of a suspected video of racism of racial, ethnic, and religious issues (*SARA*) of a teacher in Wamena who issued harsh words and was mocked became the start of blocking internet access. The harsh words allegedly offended the black people in Wamena. The video was widespread to the point of triggering a demonstration in Wamena resulting in considerable riots in Wamena. The increasingly widespread dissemination of the video results in the disruption of security stability so that the National Police and the Indonesian National Military must calm the masses who demand insults in the video distributed for trial. The Ministry of Communication and Informatics then took action so that the news would not spread by blocking internet access in Wamena [10].

Analysis of Blocking Internet Access Conducted by the Ministry of Communication and Informatics

When viewed from the laws and regulations governing content restrictions on the internet, according to the author the content in the video distributed on Wamena has violated the provisions as described in Act Number 19 of 2016 on Information and Electronic Transactions (ITE Law).

Content that is prohibited in the ITE Law can be described as follows:[11]

Regulations	Content definition	Information Dissemination Medium	Scope of Prohibited Content				Protection Mechanism
ITE Law	The sound of one or a	Electronic Data	• Content	that	is	•	Instruct

set of electronic data, including but not limited to writing, sound, images, maps, designs, photographs, electronic data interchange (EDI), electronic mail (e-mail), telegram, telex, telecopy or the like in the form of letters, numerical signs, access code, or perforation	- considered violating decency • Content that contains gambling content • Content that contains elements of insult and/or defamation • Content that contains extortion and/or threats • Content that spreads false news, causing consumer losses • Hateful content based on the racism of racial, ethnic, and religious issues (SARA). • Content that contains violent threats	Electronic system operators to terminate access • Criminal Acts for Perpetrators

Based on the data presented in the table it is clear that the videos distributed in Wamena can be categorized as prohibited content where the content creates hatred based on the racism of racial, ethnic, and religious issues (*SARA*). Then the action taken by the Ministry of Communication and Informatics by blocking internet access in Wamena is under the protection mechanism stipulated in Article 40 of Law No. 19 of 2016 on Information and Electronic Transactions.

Even though in Article 40 of Law No. 19 of 2016 on Electronic Information and Transactions the Government has the authority to terminate access and/or order the Electronic System Operator to terminate access to Electronic Information and/or Electronic Documents that have unlawful contents, however in the process of its implementation the government is obliged to conduct socialization on the use of the internet or social media, how exactly the way to use the internet and social media so that the general public can filter themselves against negative content or destructive hoaxes. The limitation of internet access is only shown if the information or electronic documents that have contents that violate the law, especially violations of criminal law. The authority to restrict the internet to constitutional rights is in the hands of the president, but the limitation is stated openly to the public beforehand, and it must also be stated also the time limit of the limitation on that right.

In Law No. 19 of 2016 on Information and Electronic Transactions, there is no transparency regarding the indicators and parameters of internet restrictions, as well as the less conducive situations such as what requires blocking. It does not explain the gradient of urgency and its duration so that people feel that human rights related to freedom of communication have been seized and restricted by the State as stipulated in Article 28E of the 1945 Constitution states that everyone has the right to freedom of association, assembly, and expression. But of course, the enactment of Article 28E of the 1945 Constitution cannot be separated from the provisions of Article 28J of the 1945 Constitution which states that there are restrictions to guarantee respect for the rights of others in accordance with fair considerations and the values of security and public order in society. Therefore, it is considered legitimate when the government considers that the conditions that have occurred are likely to be anarchic and destructive, the government has the authority to limit the rights of its citizens [12].

In addition to Law No. 19 of 2016 on Information and Electronic Transactions, statutory regulations that expressly authorize the government to block internet content, are the provisions of Article 18 of Law No. 44 of 2008 on Pornography, which states: *"For taking precautions as referred to in Article 17, the Government has the authority to: a. terminating the network of making and spreading pornographic products or pornographic services, including blocking pornography through the internet, etc. "*

The Government's authority in this matter is carried out by the Ministry of Communication and Informatics related to internet blocking technically stated in the Regulation of the Minister of

Communication and Informatics of the Republic of Indonesia No. 19 of 2014 on Controlling Internet Websites Containing Negative Content. In implementing the provisions containing the internet blocking authority, the Ministry of Communication and Informatics must refer to the existing mechanism, which is as contained in Chapter IV Government Regulation No. 19 of 2014 which regulates the procedures for blocking and normalizing the blocking. These blocking and normalization procedures are the guidelines for dealing with negative internet sites. The mechanism is upheld to avoid pros and cons responses in the community.

Steps taken by the Ministry of Communication and Informatics (Article 14 of Regulation of Minister of Communications and Informatics): carry out report management before asking internet service providers to block. The management includes storing the original report file into a database, placing the addresses of sites that are requested to be blocked on the blacklist, and taking some sample images on the sites that are requested to be blocked.

As an example of blocking content that is considered radical, in following up on the request report from the National Counter Terrorism Agency (BNPT), the Ministry of Communication and Informatics will only take action as stated above. The Ministry of Communication and Informatics does not assess the sites that are requested to be blocked, whether they are radical sites or not as stated by BNPT. The assessment of these sites is entirely entrusted to the assessment of BNPT [13]. This certainly raises back the pros and cons of the people over-blocking sites that are considered radical.

Access to the internet is related to freedom of expression which is part of human rights [14]. Based on some of the cases that have been stated, between the riots in Wamena and the blocking of radical sites, it can be said that they do not fulfill the sense of justice of internet users because they do not involve public participation at the beginning as stated in Chapter III of Article 7 of the Regulation No. 19 of 2014 on Controlling Internet Websites Containing Negative Content. Getting information through social media is everyone's right and part of human rights.

The authority of the Government in blocking the internet cannot be separated from the provisions of Article 28 of the 1945 Constitution on Human Rights and also Article 19 of the ICCPR which states, "Everyone has the right to hold opinions without interference and everyone has the right to freedom of expression". That right includes freedom of communication too. Law No. 12 of 2005 has ratified the ICCPR and restricted access to social media to protect human rights.

Referring to Frank La Rue's report, the act of blocking internet content falls into the category of violation, if the action is carried out in the following situations: *First*, the special conditions that justify the blocking are not contained in the law, or regulated by law but the regulation is very broad and indirect, causing wide and arbitrary blocking of content; *Second*, blocking is not carried out to fulfill the objectives described in Article 19 paragraph (3) of the ICCPR, and the blocking list is generally kept confidential so it is difficult to determine whether access to the restricted content; *Third*, even when the justification for blocking is carried out, the blocking action has created unnecessary and inappropriate tools to achieve the goal because such actions often do not have sufficient objectives to be carried out and cause the content to be inaccessible because it is considered illegal; and *Fourth*, blocking is carried out without intervention or the possibility of retesting by a court or an independent body [15].

The act of blocking social media has also violated Law No. 8 of 1999 on consumer protection. The blocking violates the most basic public rights of getting information and even harming economically. Indeed, the government has explained that social media blocking measures have been taken to prevent the spread of hoax or hoax news since the riots of May 22, 2019. However, blocking must still have a clear legal standing because it is related to public rights. The ITE Law still cannot be a strong legal standing for internet blocking in Indonesia.

Regarding the internet blocking policy, there are several problems faced by Indonesia at this time, although several laws and regulations have governed the internet blocking policy, but there are no adequate regulatory provisions regarding procedures, including complaints against blocking content. The legislation only regulates the government's authority to block content with certain contents, such as pornography, blasphemy, and the spread of hatred as stipulated in the ITE Law, Pornography Law, Regulation of Minister of Communication and Informatics No. 19 of 2014 and

the Joint Regulation of the Minister of Law and Human Rights and the Minister Communication and Informatics No. 14 of 2015 and No. 26 of 2015 on the Implementation of Closing Down Content and/or a User's Right to Access over Copyright Infringement and/or Related Rights in an Electronic System. However, these rules do not explicitly provide the scope, boundaries, mechanisms, and efforts to fight and complain about blocking. Of course it needs to be regulated in more detail related to internet blocking in Indonesia, given clear parameters about procedures, community participation, gradient of urgency and duration, as well as including complaints against blocking content.

4. Conclusion

Based on the analysis described previously, conclusions and suggestions can be given as follows:

The government has made laws and regulations that provide the authority to block internet content that is negatively charged, based on Article 28 A - J of the 1945 Constitution and also Article 19 of the Covenant on Civil and Political Rights associated with restrictions on the application of human rights, the Law No. 19 of 2016 Juncto Law No. 11 of 2008 on Information and Electronic Transaction (ITE), Law Number 44 of 2008 on Pornography, the Regulation of Minister No. 19 of 2014 on Controlling Internet Websites Containing Negative Content, and Joint Regulation of the Minister of Law and Human Rights and the Minister of Communication and Informatics No. 14 of 2015 and No. 26 of 2015 on the Implementation of Closing Down Content and/or a User's Right to Access over Copyright Infringement and/or Related Rights in an Electronic System related to the provisions in Law on Copyright. The government gives blocking and screening authority to Internet Service Provider (ISP) to protect the public interest from all types of disruption or misuse of information and electronic transactions that disturb public order, with the existence of a trusted institution to guarantee accountability and transparency as part of the protection of rights consumers or users of internet content, which is a derivative of statutory provisions and government regulations that form the basis for the application of blocking measures in the prevention of crime based on electronic media content.

Suggestion:

- a) Internet blocking in Indonesia needs to be regulated in more detail, given clear parameters about procedures, community participation, the gradient of urgency and duration, as well as including complaints against blocking content.
- b) In regulating internet blocking, it is necessary to respond to concepts from international standards and pay attention to all values and contexts in their entirety. Thus, the government's restrictions and controls on the internet content in Indonesia can be done to protect the public interest from all types of disruption or misuse of electronic information and transactions in the future and a good community can be created both in the present and in the future.
- c) Gives great attention to the measures and objectives of the policy, namely by communicating to the implementers and the consistency or uniformity of the basic measures and objectives that are communicated with various sources of information. This is done to make the policy measures and objectives be implemented as expected.

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Legal Protection Against Criminal Fraud from Contractual Relationships According to Justice Principles

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Abstract. The agreement was made to fulfill the interests of the parties. However, in practice there are many violations committed by the parties to the agreement. This study uses normative juridical research methods and it can be concluded: (1) If there is a ruse, a fake situation and a series of false words by one of the parties, then this is called "fraud" in Criminal Code and "fraud" in Civil Code if there are defects in the will of them: mistakes, coercion, and fraud, (2) Implementation of the law and its implementation rules related to criminal acts of fraud arising from contractual relations in jurisprudence there is no common reference, understanding and interpretation, (3) In the concept of an ideal legal protection in the settlement of fraud cases arising from contractual relations, implementing concept of restorative justice is an effective way with the assistance of law enforcement.

Keywords: Legal Protection, Criminal Act, Fraud, Contractual, Justice.

1 Introduction

Humans are individual creatures as well as social creatures, as individual creatures, they have unique characters different from one another. Whereas as a social creature, humans need other human beings, they need a group in its minimal form, which recognizes its existence, and in its maximum form, that is the group on which it can depend. As social being's humans cannot live alone, humans need togetherness in their lives. All of that is in order to give and benefit from one another.

In the realm of law, humans as legal subjects who live in groups in a particular community in a particular area are called society, in their lives based on an interaction with each other. The relationship was born by nature as a reflection of the needs that must be met. Interacting like that means involving two parties, in the sense that each party wishes to obtain benefits. This is due to the two parties becoming intertwined, so that what is done by all groups is certain that the existence of ties that arise will require the existence of rules. Because if there are no clear rules, there will be a conflict of interest which can lead to disorder in group life.

To safeguard the interests it protects, the law is distinguished above public law and private law. Law governing interest's individuals and also the interests of the state which are not in their position as a ruler is private law, whereas law is regulate / protect the interests of the state as ruler is public law [15]. Humans as legal subjects interact with each other so 2 raises ties between

them, clearly these activities are private [20]. Remembering this private nature, in Indonesia these rules can be found in the Civil Code or *Burgerlijk Wetboek* (BW), the problem of binding committed by all members of the public can be found in the rules in Book III of the Agreement, the provisions are regulated in Article 1233 The Indonesian Civil Code is stated that the engagement can be born from laws and agreements.

Every member of the community in their daily lives will always be bound by other parties, it could be due to the Law but also because of the agreement. If someone is bound to another because of the law, then the will element of those who are bound does not take part [20]. Different if they are bound by interaction due to the contract, the parties knowingly and deliberately want to obtain benefits or benefits that have been in the first place desired and calculated. Private law as a provision accommodating an agreement is an effort to create order between people in contractual relationships. Previously important to stated, although some law scholars place contracts / agreements into a narrower meaning because it is addressed to a written agreement only, According to Subekti [16] said that agreements and agreements have the same meaning, whereas the contract term is narrower because it is addressed to written agreement, and the words of the contract and the agreement are placed in the same sense.

In legal cases related to contracts, it often happens that those who have made a contract have broken a promise, failed to carry out the rights and obligations that have been agreed between the two parties, the result of which could have resulted in the achievement of one of the parties not being carried out. Thus, legal problems will arise, even the solution is not so easy and fast even in protracted practice, and in the end boils down to a court that requires a judge's ruling.

The principle of justice is simple, fast and low cost one of the principles in justice system in Indonesia. The existence of this principle has existed since Law Number 14 of 1970 concerning the Basic Provisions of Judicial Power which is no longer valid. The principle now stipulated in the Act Number 48 of 2009 concerning Judicial Power wherein in article 4 paragraph (2) reads: "The court helps justice seekers and tries to overcome all obstacles and obstacles to achieving a simple, fast and low-cost trial" [19].

In essence, the purpose of this principle is a judicial process which is not convoluted, the event is clear, easy to understand and the cost is affordable by lower level society though. But in its implementation, this principle apparently it is still difficult to do. Many cases are processed in a given time quite long and not simple at all due to the many levels the judiciary, and costs that cannot be said to be light especially if it comes to the cassation court [4].

In the principle of a quick, simple trial and the cost of ripples from observers the researchers are still far from expectations, in handling cases both for criminal cases, civil, state administration, or other cases examined by the court to arrive at a decision that has legal force permanent (*in kracht van gewijsde*) takes many years and costs are not small for justice seekers. For example, in civil cases decisions that have legal force still require the determination of execution. The issue of execution is no less complex, many facts show the party won cannot directly obtain their rights but still have to pay a large fee. For example, in debt payments, land / house evacuation executions and other cases, the party won in the decision to obtain their rights still requires a significant cost for the execution itself, in other words declared winning "on

paper". Even the winner in the execution of the execution faces obstacles, namely the existence of resistance from being executed by following the court's decision to pay the debt that should be paid in accordance with the court's decision or mobilizing the masses and obstructing court officials as executors of the execution itself. So that the execution of the execution is hampered or even canceled, this is because the situation and conditions do not allow the execution to be carried out, if forced the execution of new problems will arise that will actually harm the winner of the execution.

Thus, the party won in a court decision that already has permanent legal force (*in kracht van gewijsde*) still cannot obtain and enjoy the expected achievements. This still requires quite a long time, therefore in the execution of the execution of the court and the winner always need help and the participation of the Police to secure the execution. Without the support and participation of the Police, the hope of justice seekers to obtain legal certainty will be in vain.

There is no guarantee that a court decision in a civil case effectively enforced in a rational time can result low public interest, especially business people, to use the court as a dispute resolution mechanism. Research conducted by the Judicial Independence Research and Advocacy Institute (LeIP) that uses literature and field study methods can provide data that from 2012 to 2018 in fifteen district courts in Indonesia showed that not all requests for execution of civil disputes before the court were finished. Book II of the 2015-2019 National Medium-Term Development Plan (RPJMN) states, the factors inhibiting the completion of business contracts are the difficulty of the decision execution process, the length of the case settlement process, and high case costs [5].

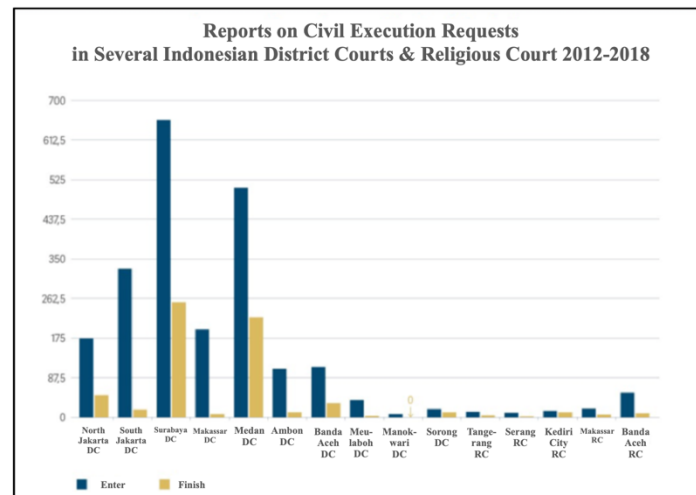


Fig. 1. Reports on Civil Execution Requests in Several Indonesian District Courts & Religious Court 2012-2018 [5]

Weak public trust in the judiciary is marked the lack of civil cases, including business contract disputes, were submitted to court. The delay in completing business contracts is also one factors affecting Indonesia's ranking in ease of doing business. Data Ease of Doing Business (EoDB) is released annually by the World Bank shows that in 2019 Indonesia only ranked 73 out of 190 countries with a score of 67.96. Based on indicators related to court, Indonesia is ranked 146th for contract law enforcement (enforcing contract) and rank 36 for handling bankruptcy (resolving insolvency) [5].



Fig. 2. Indonesia's Achievements in the 2012-2019 Ease of Doing Business Survey [5]

This is somewhat different from the implementation of executions in criminal cases which are relatively easier and faster. With regard to these two conditions, in law enforcement practices relating to contracts, one must immediately obtain his right to find a shortcut, one of which is by reporting to the Police (criminal case). The contractual relationship becomes interesting to talk about considering the contract which is the realm of civil law, but when in its implementation the achievements of the agreement are not fulfilled and then resolved using the mechanism of criminal law. The simple argument put forward by justice seekers to report to the Police is that the opposing party is "daunted" or "afraid" of the imposition of criminal sanctions that they will face, and in the end, it will not be too long to get an achievement soon.

The tendency to settle cases related to contracts, such as cooperation contracts, lending and borrowing, buying and selling, leasing, debt and so on by reporting to the Police, seems at first glance is a civil case but requested settlement through criminal channels. Therefore, law enforcement officers (police, prosecutors, judges and lawyers) must always be able to distinguish the legal areas of each field of law itself, namely criminal law and civil law and other

regulations. The loss of the barrier between criminal law and civil law is unavoidable. When law becomes a part of a grand narrative of postmodern culture, the loss of barriers between disciplines within it is a necessity. This situation will cause the conditions of attraction between the principles of various scientific disciplines science and culture, meant in this case the law itself [17].

The use of public legal mechanisms in resolving a problem that is within the domain of private law, one of which is the settlement of defaults through the mechanism of criminal prosecution for fraud. A default is basically the inability of one party to fulfill the performance required of him by an agreement with the other party. If it relies on the legal logic of an agreement, what must be done is to sue the contracting party to fulfill its contractual obligations, or if the party is unable to fulfill its obligations, then the agreement between them can be requested for cancellation by those who feel aggrieved, and are accompanied by a lawsuit for compensation.

The discussion about the boundary between fraud and default is very important to solve for legal certainty, on the other hand this problem often occurs in law enforcement practices related to legal issues arising from contractual relations. In connection with this problem there are differences in interpretation and understanding between law enforcer. There were also differences in understanding and interpretation, between the first level of court, the level of appeal and the level of cassation, there was no reference or guidelines relating to legal relations that arise from contractual relationships, so that many cases of fraud that arise from contractual relationships do not get the fairness they should.

2 Method

The research method used in this study uses a normative juridical problem approach through statute approach, case approach, historical approach, comparative approach, and conceptual approach [10]. This research is descriptive in nature with the aim of obtaining a comprehensive, complete and systematic picture of the problem under study. The data used is sourced from secondary data. Secondary data uses primary legal materials in the form of relevant laws and regulations, secondary legal materials and tertiary legal materials. Data collection techniques used in this study were literature study and interviews. Data processing methods through the editing process, and data analysis is done qualitatively.

3 Result and Discussion

a. Arrangement of Fraudulent Criminal Actions Arising from Contractual Relations According to the Regulations

Criminal justice is a broad and complex study. More than that, the criminal justice system is an interesting area in scientific disciplines relating to crime and perpetrators of crime. The criminal justice system is also one of the most important social issues now and in the past in

history. In fact, the criminal justice system is perhaps the most important mirror of society. With the exception of how people choose their leaders, there is no human activity that demonstrates more clearly the values, behavior, civilization and character of a nation than the process in the criminal justice system [13].

The discussion regarding fraud is inseparable from the rules governing the act namely, criminal law. Derived from the word "criminal" means the thing that is criminalized, namely by the ruling agency delegated to a person as something he feels uncomfortable and also things that are not every day delegated. Criminal law in general is divided into objective criminal law that is, the whole of the prohibitions and imperatives whose violations by the state or by any other public law community have been associated with suffering in the form of punishment, whereas in the subjective sense the state imposed its power to impose penalties based on regulations first [8].

Criminal Law made in writing, in the form of an Act that aims to provide penalties in the form of capital punishment, imprisonment, fines, closing penalties for offenders (Article 10 Indonesian Criminal Code). So that the creation of security, order, calm and protection of certain interests in society, as well as avoiding vigilantism against criminal offenders [20]. Crime or *strafbaar feit* in Dutch is a criminal act that refers to the meaning of a human behavior that causes certain consequences that are prohibited by law where the culprit may be subject to criminal sanctions. For those who do the deed [12].

Not all criminal offenders can be convicted. To be able to impose a crime against someone who has committed a crime, he or she has a mistake. According to Roeslan Saleh that those who could be responsible could fulfill the requirements, could realize the meaning and the reality of their actions, could realize that their actions were not deemed appropriate in the community, were able to determine their intentions or wills in carrying out the actions. There is another opinion which says that being able to be responsible means being aware of the nature of violating the law of his actions and according to his conviction that his will can be determined [14].

The element with the intention of having the desired goal of the perpetrator or knowing the consequences that will occur, or in other words there is an element of intentionality against the law, accompanied by knowing and realizing that the benefits obtained are unlawful objectives. Intentionality is knowledge, so there are actually two features of intentionality, namely intentionality as certainty and intentionality as a possibility. In this theory there is difficulty in determining intentionality as a possibility. Then to find out this is used the theory of *inkauf nehmen* or what may be made. This theory states that intentionality is based on the likelihood of occurring if the defendant is aware of the consequences / circumstances which constitute offense and the attitude towards that possibility if the word really occurs, is what is possible, can be agreed and dares to bear the risk [11].

The element of whoever does not constitute an offense but a legal subject, what is meant by who here is all the citizens of the Republic of Indonesia itself and foreigners, by not distinguishing gender or religion, position or rank and dignity who commit criminal acts in the region Unitary State of the Republic of Indonesia (NKRI), subject to criminal law regulations in force in Indonesia, except those who have the right to immunity as the right to impunity. This

principle is one of the characteristics of our criminal law, namely the territorial principle (Article 2 of the Criminal Code (KUHP)) [7].

Nature against the law itself according to Scaffmeister there are several types. First, the nature of violating common law is as an unwritten condition to be convicted. To be convicted of an act that is against the law and violates the interests of others. For example, taking the lives of others. Second, the specific unlawful nature which has an understanding against the law in writing to be convicted. For example, Article 378 of the Criminal Code (KUHP) expressly states "against the law" as part of the offense. So that it is against the law to prove someone suspected of committing a criminal offense in the trial process, an act against the law must be listed in the indictment. If it cannot be proven, then the decision is free (*Vrijspraak*) [21].

In connection with the term against the law and unlawful acts, in practice and academics there has been a kind of tacit agreement regarding the use of the term that is the mention of the term "unlawful" (*wedderrechtelijk*) used in criminal law, while the mention of the term "unlawful" (*onrechtmatigdaad*) is used in civil law.

Acts against the law in a fraud case is a legal relationship that is always preceded or preceded by a contractual legal relationship. A legal relationship that begins with a contractual is not always a breach of contract, but it can also constitute an act of criminal fraud as in Article 378 of the Criminal Code. When a contract is closed before there is a ruse, fake circumstances and a series of lies from the perpetrators that can cause harm to others or victims, this is fraud [20].

The concept of fraud in criminal law or known by the term (*bedrog*) contained in Article 378 of the Criminal Code is a criminal act or offense, if violated will get a prison sentence [7]. There are still various opinions and interpretations of the term, According to Marpaung gives the term or "*strafbaar feit*" (Dutch); "*delictum*" (Latin), "criminal act" (English), which means an act that is prohibited by criminal law and is subject to criminal sanctions for those who violate it [9].

Fraud in civil law, occurs because one party does not carry out obligations that have been agreed with in bad faith, this fraud always begins or is preceded by a contractual legal relationship. This legal relationship is a concept of fraud in civil law or in other words is a 'characteristic' of fraud in civil law.

Fraud in criminal law as regulated in Article 378 of the Criminal Code [7] and fraud in civil law regulated in Article 1328 BW [6] constitutes 2 (two) corridors of this law can be taken by someone who suffered a loss due to contractual relations, which is known when closing a previous contract carried out with guile and hoaxes, fake situations. In these circumstances a person can prosecute criminally by reporting to an authorized official (the National Police) related to the deterrent effect regarding criminal sanctions and can also file a civil suit related to compensation incurred by one of the parties in closing the contract.

Provisions governing defaults are found in Article 1328 of the Civil Code and also in Article 1239 of the Civil Code [6]. Basically, the default is negligence or non-fulfillment of obligations. In default, negligence in question is negligence in meeting matters mutually agreed upon by the parties. Thus, default arises as an excess of the agreement of the parties on

something or things. Negligence in legal actions based on Article 1365 of the Civil Code, namely responsibility for negligence or carelessness.

If the debtor (debtor) does not do what he promised he would do what he promised he would do, then it is said that he did "default". He is "negligent" or "negligent" or a broken promise. Or he also violates the agreement, that is if he does or does something he is not allowed to do. The words "default" come from Dutch, which means poor performance. Default (negligence or negligence of a debtor can be in four types [16]:

1. Not doing what he is committed to do;
2. Doing what was promised, but not as promised;
3. Doing what he promised but too late;
4. Do something that according to the agreement cannot be done.

For negligence or negligence of the debtor (the debtor or debtor is the party that is obliged to do something), threatened with several sanctions or penalties, namely [16]:

1. Paying losses suffered by creditors or shortly called compensation;
2. Cancellation of the agreement or also called solving the agreement;
3. Risk transition;
4. Paying the court fee if it is brought before the judge.

The contract is made as a means in business relations between the parties agreed specifically to regulate the legal relationship between interests that are private or civil, especially in making contracts. The interests between individual communities in social life, if violated will lead to a conflict of interest between rights and obligations. Violations that occur in the making of the contract, due to the bad intention by one of the parties. Thus, there is a default or break a promise from one of the parties that causes a loss on the contract that has been made or closes a contract.

Relationship between contract law agreed by both parties. This legal relationship can be known "its characteristics" [20], that is "always preceded or preceded by contractual relationships. In overcoming this problem, it is necessary to have a legal rule governing contractual relations. By understanding the characteristics of contractual relationships theoretically there are several legal issues concerning the characteristics of default arising from contractual relations, may be submitted as material for review, especially those concerning the validity and application of the general principles of contract law made by the parties. Contracts made by the parties should be carried out according to the wishes of the parties in protecting the interests between rights and obligations.

b. Implementation of the Law and its Implementation Regulations Against Fraud Crimes Arising from Contractual Relations

As applied in the legal system in various countries, the criminal justice process in Indonesia follows four stages, which include pre-investigation, investigation, prosecution and trial. The first two stages are under the authority of the police, and the last two stages are the

authority of the prosecutor and the court. In terms of the process, the pre-investigation stage is a series of investigative actions to look for and find an event that is suspected as a criminal offense to determine whether or not further investigation can be done. In the case of contractual problems, this stage is a complex process that is prone to generating incorrect or incorrect conclusions. The main problem is related to the complicated and difficult aspects of criminal law and civil law for the police and ordinary people in general. In fact, the conclusion at this stage will determine whether or not the pre-investigation process continues to the investigation stage. If the results of the investigation by the police produce conclusions about the event turn out to be wrong, then the potential for legal problems is even greater. The limited ability of the apparatus, mainly due to lack of sufficient knowledge in the field of business and business law / agreement in general, is a major obstacle that must be addressed properly and wisely.

If the results of the pre-investigation continue with the investigation, the police will conduct an investigation. Namely, the police will conduct a series of police investigative actions to find and collect evidence as well as possible. With this evidence the police will get clarity about the anatomy or a description of the crime or violation that occurred. After that, the investigator will determine the status of the suspect.

The third stage is the prosecution stage which is the authority of the Prosecutor. What the prosecutor is doing is checking the files sent from police investigators. If there is doubt and insufficient evidence is included or attached, the Prosecutor will return the file and request it to be completed. The completeness of the file can be completed immediately but can also be returned to the police repeatedly. When complete. The prosecutor will submit a criminal case to the competent district court in accordance with the provisions stipulated in the criminal procedure law with a request that it be examined by a judge at a court hearing. Considering the complexity of the process and the difficulty of obtaining sufficient evidence, the prosecution process often requires quite a long time. In terms of legal certainty, the process must indeed be taken. However, in terms of time, energy and cost, it will be very draining and tiring if one of the parties involved in a contractual relationship is made a suspect but is not supported by sufficient evidence.

The next stage is the judicial process through trial in court. The criminal trial process is a litigation process that is not short and simple. Many procedures must be followed and defenses formulated, including providing evidence and clarification from fact witnesses and expert witnesses. In matters of contractual relations, the difficulty is more multiplied. In the trial, the panel of judges will examine based on the indictment. Namely, a letter from the Public Prosecutor who appoints or brings a criminal case to the court based on sufficient reasons to prosecute the suspect. The indictment contains events and information regarding *Locus* and *Tempus* where the act was committed, and the circumstances of the defendant who committed the act, especially the circumstances which alleviate and aggravate the accused's guilt.

Next is the exception and objection filing or objection. That is, a defense tool with the aim of avoiding the decision of the decision on the subject matter, because if the exception is accepted by the District Court, then the subject matter does not need to be examined and decided.

Admittedly, district court decisions at the first instance are rarely acceptable to parties. Although criminal cases position the state as the party responsible for enforcing the law, namely through the prosecutor. But still in this criminal event there are two parties, namely the party who violated the law or the defendant and the party whose rights were harmed from the act of violation of the law or commonly called a victim witness.

Normatively, legal remedies are the right of a defendant or public prosecutor not to accept a court decision of the first instance. The right to refuse a court decision is part of human rights. Such rights are recognized and must be opened for further action. Because, a court decision is not free from errors. Occasionally, the verdict takes sides. Therefore, for the sake of truth and justice of each judge's decision it is possible to be reexamined so that the mistake of the decision can be corrected. This is the correction instrument available in the justice system.

By considering the process of handling criminal cases which are often tiring and time-consuming, including the consequences of inexpensive costs, the problem becomes serious to be questioned. What are the benefits for victims to report cases of fraud that arise from criminal contractual relations with the police. It should be noted that in criminal justice, the position of the reporter is only the witness of the reporter and does not get any profit. If the court sets a fine, then the fine must go to the state treasury and does not become the right of the victim of a criminal fraud as a reporter. In terms of examinations in court proceedings, criminal procedural law regulates classification into ordinary case hearings, brief hearings and quick hearings.

If the court determines imprisonment, it also does not provide any benefit to victims of criminal fraud. Even if there is, it is only in the form of satisfaction because the perpetrators of criminal acts of fraud have received a punishment commensurate with mistakes that harm victims of fraud. If that satisfaction factor is sought, then the court will only be considered as a means to take revenge. Ethically, it is not in line with the culture of the nation which has been developing teachings of compassion, not vengeful and do not like to be hostile or litigate.

Based on the above considerations, the logic of criminal justice is not an optional procedure for resolving contractual cases. Civil procedure is more advisable because it will provide economic recovery if the compensation suit is granted by the court. In accordance with its purpose, replace loss becomes an appropriate remedy to answer the needs and interests of fraud victims. Because, the essence of a contractual case is actually an action taken by a fraudulent party in a contractual relationship, which interferes with his interests or causes harm, both morally and materially.

One of the legal issues that might arise in the litigation before the court is the retraction of the lawsuit. In contractual disputes, something like that might happen. The victim as the plaintiff must rethink to continue his lawsuit in court. Moreover, the prospect of winning a case is very slim. The reasons for withdrawing a lawsuit vary greatly. Among them, due to reasons for retracting a lawsuit because the lawsuit filed is imperfect or the argument of the lawsuit is not strong or the argument of the lawsuit is contrary to the law and other relevant considerations. For example, due to peace efforts or mediation procedures, certainly the Civil Code / HIR does not regulate the provisions regarding the retraction of a lawsuit. The legal basis for withdrawing a claim is regulated in Article 271 and Article 272 of the *Reglement op de Rechtsvordering* ("Rv"). The provisions of Article 271 of the Rv regulate the plaintiff's right to revoke his case

without the defendant's consent on condition that it must be done before the respondent submits his response [6].

Implementation of Legal Protection Against Fraud Crimes Arising from Contractual Relations in the jurisprudence of cases arising from contractual relations, there has not been the same reference, understanding and interpretation, between judges of District Court, High Court and Supreme Court. One party states that the legal relationship is an act of "fraud", on the other hand is an act of "default". Therefore, there has been an 'inconsistency' of the Supreme Court Judge of the Republic of Indonesia in deciding a case arising from a contractual relationship. One party claimed to be proven to be an act of fraud, on the other hand stated it was not a criminal act or breach of contract. There is an inconsistency of the judge in deciding a case, as a reference and guideline as well Judge's rationale (*ratio decidendi*) related to the issue of default and fraud arising from contractual relations, this is to protect private interests and the public interest, with the hope that in the future justice, benefit and legal certainty will be created for the community. To find out the difference between fraud and default is the '*tempus delicti*' (time) when the contract is closed. If after the '*post factum*' contract is closed, it is known that there is a ruse, a fake situation or a series of false words from one of the parties, then the act is an interpretation. If a contract after being closed turns out to have previously been '*ante factum*' there are a series of lies, false circumstances, and deception from one of the parties, then the act is a fraud of Article 378 of the Criminal Code Jo. Article 1328 BW.

c. Ideal Arrangement in Settlement of Criminal Cases Fraud arises from contractual relationships

Legal protection for citizens in a country especially Indonesia is a must because protection is an integral part of human rights that are regulated and guaranteed in the constitution and international human rights instruments that have been ratified by the government. As a concept, human rights have a very broad meaning, bearing in mind that the issue of human rights is universal, recognizing national, political, economic, social, cultural and legal boundaries. As a gift from God Almighty, human rights is a fundamental right granted by God Almighty to mankind without questioning differences in social, cultural or cultural, political and economic backgrounds [2].

Discussing the law enforcement system that provides protection for the community certainly cannot be separated from the theory of legal protection as a pillar. Legal protection theory sees that the concept of legal protection must be born from a legal provision and all legal regulations given by the community which basically constitute the community's agreement to regulate the behavioral relationship between community members and between individuals and the government that are considered to represent the interests of the community.

The effort to get legal protection is certainly what is desired by humans is order and regularity between the basic values of the law namely the existence of legal certainty, the usefulness of law and legal justice, although in general in practice, the three basic values are often disputed, but must be sought for the three values these grounds together.

The primary function of law is to protect the people from danger and actions that can harm and tell their lives from others, society and the authorities. Besides that, the law also functions to provide justice and be a means to bring prosperity to all people. Such protection, justice and welfare are aimed at legal subjects, namely supporters of rights and obligations [1]. Legal protection which is interpreted dynamically is believed to provide guarantees of access to justice for all people regardless of their background. Justice must be distributed by the state to all people, and the law which has the duty to guard it so that justice reaches all people without exception. Whether capable or poor people, they all have access to the same justice.

Based on the explanation above, the researcher draws the conclusion that the law enforcement system in the criminal justice system that provides protection according to the researcher can be interpreted as all efforts made by the integrated criminal justice subsystem consisting of the police, prosecutors, advocates, judges, and correctional institutions to provide a sense of security, both psychologically and physically to every person who enters the criminal justice system. Talking about the protection given to every person who enters the criminal justice system, certainly cannot be separated from the discussion on legal protection in the criminal justice system in Indonesia with reference to the applicable laws and regulations.

For example, Law Number 23 Year 2004 concerning the Elimination of Domestic Violence is one of the many positive laws or laws in Indonesia that define or provide an understanding of what is meant by protection. In this Law, what is meant by protection is any effort aimed at providing a sense of security to victims carried out by the family, advocates, social institutions, police, prosecutors, courts or other parties both temporarily and based on the court's determination. The protection referred to in Government Regulation No. 2 of 2002 concerning Procedures for Protection of Victims and Witnesses in Serious Human Rights Violations, what is meant by protection is a form of service that must be carried out by law enforcement or security forces to provide a sense of security both physically and mentally, to victims and witnesses, from threats, harassment, terror, and violence from any party, which is given at the stage of investigation, investigation, prosecution and / or examination at a court hearing.

True law must provide protection for all parties in accordance with their legal status because everyone has the same position before the law as stipulated in the constitution. Every law enforcement apparatus in the criminal justice system is clearly obliged to enforce the law and with the functioning of the rule of law, the law will indirectly provide protection for every legal relationship or all aspects of people's lives governed by the law itself. Legal protection is an illustration of the operation of the legal function to realize the legal objectives of justice, expediency and legal certainty. Legal protection is a protection given to legal subjects in accordance with applicable law, both those that are preventive and in the form of repressive, both written and unwritten in order to enforce the rule of law (in this case criminal law).

Conceptually, the legal protection provided to the Indonesian people as well as legal protection for someone who enters the criminal justice system is an implementation of the principle of recognition and protection of human dignity based on the Pancasila and the 1945 Constitution [18] and the principles of the rule of law based on the Pancasila. Furthermore, according to Romli Atmasasmita, a democratic rule of law can be formed if it is consistently

met with three pillars, namely rule by law, protection of human rights, and access to justice for society (access to justice) [3]. In the Indonesian context, the three pillars must be bound by Pancasila as an ideology, outlook on life and the soul of the Indonesian nation. The Pancasila Association is the highest value system in changing norms and social justice systems.

Restorative justice is the process of resolving criminal cases with the aim of achieving justice that is fully carried out and achieved by perpetrators, victims, and the wider community. It is said so because the approach or concept of restorative justice (restorative justice) is a form of justice that puts forward a process of involvement of all parties who are actively involved in a particular crime. Crime in the view of restorative justice (restorative justice) is interpreted as a violation of humans and human relations as well as violations of social relations. Therefore, in solving problems (resolving criminal cases), they will be returned to the victims and / or their families, perpetrators, law enforcement officials as facilitators and the community or other parties who feel disadvantaged to jointly solve the problem based on family, awareness, and conviction with a sense of tolerance, mutual understanding and upholding human dignity to improve social life that is how to deal with the consequences of the crime with an orientation to improve (empower the recovery process), create reconciliation and satisfy all parties, both now and for the future . Likewise, the measure of justice in restorative justice, justice is no longer based on retaliation from victims to perpetrators (whether physical, psychological or punishment); however, the criminal act committed by the perpetrators is restored by providing support to the victim and requiring the perpetrator to be responsible with his awareness. Therefore, good faith or mutual agreement between the perpetrators and victims and the wider community in this case has a very important role. This will certainly benefit all parties and this will further ensure the fulfillment of a sense of justice between victims, perpetrators and the community, but can still prevent the re-occurrence of criminal acts in the future. If the settlement of the case with the approach or concept of restorative justice is not reached, then the state is authorized to impose criminal sanctions on the perpetrators. With this concept, criminal law and punishment can be used as the ultimate remedy (*ultimum remedium*).

As recognized, up to now the regulation regarding fraud that arises from contractual relations has not yet harmonized understanding and interpretation in the Criminal Code and the Civil Code which constitutes the legal basis. In terms of regulation, there are differences in understanding "Fraud" in the Criminal Code and "Fraud" in the Civil Code. So as a result of these regulations make several institutional components in the criminal justice system in Indonesia such as the Police, Prosecutor, Judge and Advocates have different answers when facing fraud cases arising from contractual relations. If we can implement a restorative justice system, the Police, Prosecutors' Court, Courts and Advocates can participate in helping to solve this problem by harmonizing understanding related to criminal acts arising from contractual relations. Of the four interviewees who have interviewed, they have their own answers to this research topic.

Based on interviews with the Indonesian National Police, Immanuel Larosa. Immanuel Larosa said that as a police officer he could not refuse or limit if there were people who came to seek justice by making a police report so that if there were cases related to fraudulent criminal acts arising from contractual relations, he would carry out Standard Operating Procedure in

accordance with regulations applicable law in the police force by conducting a brief interview with the reporter in order to know the picture of the reported case more clearly.

From the results of the interview the police can find out whether the report from someone is a criminal domain where it has been appropriately reported to the police or a civil domain which is not the authority of the police to take care of the problem. The speaker said that what he usually does is ask " Have you ever sent a subpoena / warning letter?" (Immanuel Larosa, personal communication, 11 March 2020). Because in practice if the party that sent the subpoena / warning letter will get a reply letter that will generally convey when the payment will be carried out, so if it is not in accordance with what was submitted will meet the elements of Article 378 of the Criminal Code. However, as stated by Immanuel Larosa, if a subpoena / warning letter has not been done because the criminal elements have not been fulfilled, the prospective reporter is required to complete a number of requirements that were asked before.

Different from the opinion of the second interviewees, Paulus Joko Subagyo, himself as a prosecutor, argues that prosecutors should be involved in the investigation process as stated in the RKUHAP, where prosecutors can participate in summoning reported parties or reporters so that they know the details related to cases under investigation by the police. is it true that a criminal matter (fraud) or a civil problem (broken promises / defaults) (Paulus Joko Subagyo, personal communication, March 10, 2020). Because according to the opinion of the prosecutor, the prosecutor has only examined the files submitted by the investigator, which is the police, where if all the criminal elements have been fulfilled, then the matter will be brought up by a criminal and will begin trial, whereas if the investigation file is incomplete, it will be asked to complete it.

The third interviewees, Rahmi Mulyati, as a Judge herself argued: "This depends on the circumstances of the case, must be examined in accordance with the evidence submitted by both parties. There are those who feel themselves cheated, because when making an agreement one party promises things that make other parties persuaded to make the agreement, such as the case of First Travel The defendant promised the victim that he would send the Umrah at a low cost so that if there was no element of fraud in the case, a legal relationship occurred because of the willingness of both parties, if one did not carry out the agreement, then the other party could sue in the civil court, which the authority to settle is a Civil Judge and not a criminal case". (Rahmi Mulyati communication via Email, March 16, 2020)

As we can see as a Judge, the interviewees argued that the judge / court could not reject the case that was filed with him due to unclear legal reasons. The judge must consider each case submitted to them, listen to the testimony of witnesses supported by evidence presented at the trial, pay attention to the basis of the occurrence of legal events, whether it is a criminal act (fraud) or civil (broken promise / breach of contract). Back again to the case that was submitted to the Court, if it was filed criminally, the judge had to consider whether the criminal element was proven in the case's indictment. If criminal elements can be proven, then they must be decided criminally. However, if in the case there is no element of a criminal act, but the existence of a promise is broken, the judge must declare the case not a criminal case.

And the fourth interviewees, Lelyana Santosa, as an advocate, if faced with a fraud case arising from a contractual relationship, will ask the victim one question "Has the perpetrator

ever made payments, or installments?" (Lelyana Santosa, personal communication, 12 March 2020). Lelyana Santosa is of the opinion that if in a criminal act of fraud arising from a contractual relationship in the course of the case, if the perpetrator has never made a payment or installment even though then it is more towards a criminal act (fraud) but if he has ever made a payment then it is a civil which is default), because there is a good intention to pay off but has not been resolved for one or two things.

Dissenting opinions and views of law enforcement officials such as the Police, Prosecutors, Judges and Advocates prove that criminal acts of fraud arising from contractual relations require Regulation of Harmonization of Understanding among Components of Institutions in the Criminal Justice System, it is expected that with the participation of the government, law enforcement officers and the public This can provide legal protection, legal certainty and justice in law enforcement in Indonesia.

4 Conclusion

From this study, it can be concluded that the principle of regulation of Fraud Crimes Arising from Contractual Relations in the legal system in Indonesia, whether it is a criminal act of fraud or default, has the same characteristics, which are both preceded or preceded by contractual legal relations. The difference lies when the contract is closed if previously known there are tricks, false circumstances and a series of lies by one of the parties, then this legal relationship is called 'fraud' which is regulated in criminal law Article 378 of the Indonesian Criminal Code and is called 'fraud' in civil law Article 1328 BW of the Indonesian Civil Code (there are defects in the will including: glitches, coercion and fraud). Implementation of Legal Protection Against Fraud Crimes Arising from Contractual Relations in the jurisprudence of cases arising from contractual relations, there has not been the same reference, understanding and interpretation, between judges. One party states that the legal relationship is an act of "fraud", on the other hand is an act of "default". Therefore, there has been an 'inconsistency' of the Supreme Court Judge of the Republic of Indonesia in deciding a case arising from a contractual relationship. In the conception of an ideal legal protection regulation in the settlement of fraud criminal cases arising from contractual relations, it is expected that Law Enforcement Officers such as the Police, Prosecutors, Judges and Advocates will play a role in helping provide an appropriate legal explanation for the public about the importance of a proof principle related to the development of the use of evidence in the form of a contract / agreement letter, in order to have the same thought about the value of the evidence evidentiary power contained in the Criminal Procedure Code whether the crime can be criminally acted and categorized as a criminal act of fraud or breach and can be impose or implement an approach or concept of restorative justice that is considered capable of "humanizing humans" such as the concept of dignified justice, which is an effective way and is considered to be able to overcome various problems that have so far been in the settlement of criminal acts of fraud arising from contractual relations. With the approach or concept of restorative justice, the problem can be cut or resolved from the initial process in accordance with the principle of justice that is simple, fast and low cost, assisted by the participation of law enforcement. So that all elements of the Indonesian justice system have integrity and can provide legal protection, legal certainty and justice can be achieved, especially in the implementation of restorative justice.

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Government Policy on Water Resources Management

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Abstract. The government's policy on water resource management in Indonesia is about upholding the human and constitutional rights of every person to access water, as well as a means to realize sustainable development and environmentally friendly. According to this reason, it is the responsibility of the state to oversee the objectives of the management of water resources that can be achieved so that people's welfare can be realized. Because of this conception, this research carried out to examine the government's water resource management policy. This research is normative legal research with conceptual, statutory, and analytic approaches. Secondary data collection is carried out through legislation, literature studies, and analyzed qualitatively.

Keywords: water, management, policy.

1. Introduction

In 2002, an international meeting about sustainable development held in Johannesburg, World Summit on Sustainable Development (WSSD), encourages all countries by the end of 2005 to have had an IWRM plan and water efficiency strategy, as can be seen at Article 26 on Implementation Planning Meeting. The strategy aims to achieve sustainable development goals which include reducing poverty, food security, economic growth, protecting ecosystems, and addressing issues related to drought, flood, seizure of water, and sanitation [1].

The Legitimacy of the government of Indonesia in implementing the improvement and application of water is conveyed in Article 33 (3) of the 1945 National Constitution of Republic of Indonesia, include: "Land, water, and raw materials therein shall be managed by the government and used for the people's welfare". The regulation is a constitutional foundation in managing water.

The implementation of water management has not been able to meet the demands of society equally, while people who have the financial ability (both individuals and businesses) gain easy access to the water sources to gain an advantage. It happened because of rapid population growth and the increase in development activities, so that water demand is also increasing both in urban and rural areas [2].

Recognizing that national development activities on one side will contribute to improving the quality of life on people's welfare, but on the other hand, it also causes fear on the decline in the availability of raw materials, including water permanently in long term. Therefore, in the context of national development, especially in the field of raw materials (including water), required a law setting a clear and comprehensive in dealing with an extensive range of difficulties in managing water. This research focuses on: How does the government's policies in maintaining the water resource?

2. Data and Method

This research is a normative legal research. Normative legal research is a research that gives a systematic explanation on an agreement that regulates a certain legal classification; scrutinizes the correlation between rules, legal principles, and legal doctrine. Reviewing the applicable laws and put on a certain legal problem [3]. The laws and regulations referred to water management. The approach used is a conceptual, statutory, and analytic approach. This legal approach used to learn, explore, and examine the policies applied to water management from a legal perspective.

The specification of this research is descriptive analytic which the results obtained in certain populations can be explained systematically, factually, and accurately [4]. This research will be describing the analysis result of government policies in water management.

The research data used is secondary data. The secondary data include primary and secondary legal material. Primary data used as follow:

1. The 1945 State Constitution of The Republic of Indonesia;
2. Indonesian State regulation No.11/1974 on Irrigation;
3. Indonesian State regulation No.7/2004 on Water Resources;
4. Indonesian State regulation No.17/2019 on Water Resources;
5. Indonesian Government Act No.121/ 2015 on Commercial Usage of Water;
6. Indonesian Government Act No.122/2015 on Potable Water Supply Network;
7. The Ruling of The Constitutional Court N0.85/PPU-XI/2013;
8. Circular Letter of The Minister of Public Works and Public Housing No.04/SE/2015 on the usage of water and collaboration between government and private enterprise;
9. Presidential Decree No.38/2015 on The Government Cooperation with Corporations about Providing Infrastructures;
10. Central Java Province Local Regulation No.3 of 2018 on Groundwater Management.

Secondary legal material is taken from literature books, journals, and relevant papers based on the issue of this research. The data analyzed with qualitative research with finding the laws and regulations and also library material. All the materials were presented in the description form.

3. Result and Discussion

The definition of the policy itself will be explained before the explanation of the water management policy. Etymologically, policy, or wisdom is the Indonesian translation of legal terms from Dutch language *rechtspolitiek* (*recht* and *politiek*) [5].

According to several authors, the definitions of policies were quite diverse. As noted by James E. Anderson that policy is: "A purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern". ("A series of measures has a specific purpose followed and implemented by an actor or group of actors to solve a specific problem"). Furthermore, Harold D. Lasswell and Abraham Kaplan gave the sense of policy as "a projected program of goals, values, and practices". ("A program to achieve the goals, values, and practices that targeted") [6].

The negligible difference from the opinions of Drupsteen, which gave the sense that the overall load policy goals and the means of specific actors. The policy is simply answer to a question about what was achieved by a person, through what way, and by what means it is implemented [7]. According to the opinion obtained that the policy contains an element of intent, goals and targets to be achieved or aspired. The word "policy" associated with "political policy", so it means a country planned to achieve specific goals aspired in the legal field.

Political law is "a legal policy to be applied or implemented nationally by a government of a particular country" or "basic policy of state officials in the areas of law which is continuously and derived from the values in society to achieve the aspired state". Mahfud MD states that "political law is the legal policy or law directory which will be enforced by the state to achieve the state's purpose; it could be making a new law and the replacement of the old law". Therefore, the politics of law should be based on the state's purpose and the legal system in the country

concerned that the Indonesian context and purpose of the system is contained in the opening of The 1945 UUDNRI, especially Pancasila, which release the guiding principles of the law [8].

When it linked with water management, the meaning of water management policy is a policy of state or government that regulates the practices of managing water. This policy has specific goals and objectives as well as what the act of managing water has done to achieve the objectives and targets.

The policy of water management is also intimately related to laws (natural resources laws) because laws or regulations are an indicator of policy and simultaneously lay the groundwork for public policies [9]. According to the argument above, the policies of water management were made and implemented under laws or regulations.

The term "water management" is not regulated in Act No.11/1974, but in Article 1, item 6 knew as "water management system" it is every efforts to regulate the supervises such as ownership, control, management, use, exploitation, and control over water and its sources, including inorganic materials contained within, to achieve maximum benefits in fulfilling the lives and livelihood of the people. Further, it can be seen that in Article 1 paragraph 7 Act No.7/2004 on Water Resources, the term "water management" is an effort to strategize, implement, oversee and assess the application of water preservation, utilization of resources; water, and control of water damage"; then after being replaced by Act No.17/2019 on Water, the definition of the term "water management" does not change as stipulated in Article 1 paragraph 8 Act No.7/2004 on Water Resources.

In a general explanation of Act No.17/2019 on Water Resources Management mentioned that water management was organized based on the principle of public benefit, affordability, fairness, balance, independence, local wisdom, insight into the environment, conservation, sustainability, integrity and harmony, and transparency and accountability [10].

Subsequently explained that the management of water demands the development of an integrated system in a form of a national policy of water management, it should be implemented in strict principles and consequences from central to a local level.

The purposes of the regulation of water as defined in Article 3 Act No.17/2019 on Water Resources are as follows:

1. Providing protection and ensure that people gain of water;
2. Safeguard the sustainability of water availability and water to provide equitable benefits for society;
3. Guarantee the preservation of water and water to support sustainable development;
4. Ensuring the creation of legal certainty for the implementation of public participation in supervising the utilization of water from the planning, implementation, and evaluation of utilization;
5. Ensuring the protection and empowerment of communities, including indigenous peoples in the conservation of water and water sources; and
6. Controlling the destructive power of water that includes prevention, mitigation, and recovery.

Focused on Article 33 paragraph (2), (3), and (4) of 1945 UUDNRI and Presidential Decree No.33/2011 on National Policy of Water Resources Management can be seen that the state policy regarding water management contains aspects following:

1. Water management should provide protection and fulfillment of the rights of every people's access to water;
2. Water management is the responsibility of the state, on the right to control the state, the state makes the rules and policies of usage of water;
3. The welfare of the people became the philosophical and sociological basis for all the activities and management of water;
4. Water management must be sustainable and environmentally friendly; and
5. Their delegation further guidance on water management with the law.

Therefore, if it associated with the objectives of water management to the fifth aspect, it can be seen that the policy of water management in Indonesia is in order to fulfill the rights of every people to access to water, as well as a means to achieve sustainable development and environmentally friendly. Therefore, the state is responsible for the escort of the purpose so that the setting of water management can be achieved and the people's welfare can be realized. For that reason, we need the support of legal instruments in the form of regulation regarding water which is able to realize the fulfillment of people's right to water.

The 1945 State Constitution of The Republic of Indonesia as the highest law in practice as the reference implementation of the state policy covers various aspects of both the legal, economic, political, social and other fields. One aspect that is regulated in The 1945 State Constitution of The Republic of Indonesia is about the soil, water, and raw materials contained therein as stated in the regulation of Article 33 (3) should be used for the welfare of the people. Based on this act, the regulations on soil, water, and raw materials in the regulation under the 1945 State Constitution of the Republic of Indonesia should also guarantee that it will be used for the welfare of the people.

The privilege to water is a fundamental right that has been guaranteed by The 1945 State Constitution of The Republic of Indonesia. As one of the fundamental rights, which is one of the human rights, the main state is compelled to respect, safeguard, and fulfill. In this context, the government established a policy relating to water management, with the hope that can protect to fulfill public interest for daily needs and other needs.

The presence of water as a source of community life, are naturally dynamic and flowing into the lower place without knowing the administrative borders. The presences of water following the hydrological cycle are closely related to weather conditions in an area, causing uneven water availability every time and every region. It requires water management is done in full from upstream to downstream with the river basin basis. Based on state control on the water, the central government and/or regional governments both provincial and district/city are given the duty and authority to regulate and manage water, including the responsibility to fulfill the daily minimum on the water needs in the community.

Emanated from the outcome of the research that has been done, the government has issued several policies on water management sector in the form of legislation, state regulations, local regulations, Presidential, and related regulations. Water management policy can be seen in some of laws and regulations as follows:

a. *Alegemeen Water Reglement 1936*

Before independence, the Dutch colonial government issued a regulation on water resources is *Algemeen Water Reglement 1936* which is the principle of water management to support the culture plan. In these regulations contain water management policies, among others, the water group on the rainy season, pasten system of water irrigation (the allocation of water among the three commodities are grown in an area that is irrigated rice, and sugarcane), and scheduling of water distribution. The setting is more specifically regulated in *Provinciale Water Reglement* for Java and Madura as decentralization, which the government's tasks in the field of irrigation department submitted to the provincial level.

b. *The Regulation of The Republic of Indonesia No.11/1974 on Irrigation*

In the independence era, the political welfare of the colonial era to continue until the publication of the Regulation of the Republic of Indonesia No.11/1974 on Irrigation in lieu *Algemeen Water Reglement 1936* which is considered inadequate to support development purposes. The irrigation laws in effect giving a wider scope than the *Algemeen Water Reglement* in 1936 and gave authority to the government in various dimensions of development and management in the field of irrigation include groundwater development and utilization of water for various purposes. Act irrigation consists of 17 chapters divided into 12 chapters consisting of (1) Definition, (2) Function, (3) Tenure and Privileges, (4) Planning and Technical Planning,

(5) Development, (6) Concessions, (7) Exploitation and Maintenance, (8) Protection, (9) Financing (10) Criminal Provisions, (11) Transfer Policy (12) Final Provisions. Considering Act No.11/1974 on Irrigation limited to loading concept / philosophical foundation and does not regulate the substantive, the government issued Government Regulation No.22/1982 on Water Management and Irrigation, followed by the issuance of Government Regulation No.20/1990 on Water Pollution Control, Government Regulation No.27/1991 on the Swamp, and Government Regulation No.35/1991 on the River. In a third development of these regulations are still not able to meet the demand for water management arrangements are more complex problem, note that in all three of these government regulations do not refer directly to the agencies responsible for water management. To complement these deficiencies, then the government issued on Government Regulation No.82/2001 on managing water quality and water pollution control, which was followed by the issuance of Presidential Decree No.83/2002 on Management Coordination Team of Water Resources replace Presidential Decree No.123/2001 on Coordination Team for Water Resource Management.

c. Regulation of the Republic of Indonesia No. 7 of 2004 on Water Resources

Furthermore, it is known that on 18 March 2004, the government issued Act No.7/2004 on Water Resources is replaced by Act No.11/1974, on the basis that the rules on the water, either statute or regulations already inadequate to regulate the issue of water. The Act No.7/2004 on Water Resources was approved by the Parliament on 19 February 2004, which contains 18 chapters and 100 articles. Article 7 of Act No.7/2004 on Water Resources provides restrictions on water rights, include the privilege to use water and water exploitation rights. The water utilization cannot be leased or transferred either partially or entirely. Moreover, in Article 8 of Act No.7/2004 on Water Resources provides the privilege to use water attained without consent of the owner to fulfill day-to-day minimum needs for individuals and agricultural irrigation systems for farms owned by individuals. However, if the usage is done through altering the natural condition of water, to be used in large quantities, or to farm outside of the irrigation system, then it must get a permit issued by the appropriate government or local government authority. The implementing regulations of Act No.7/2004 on Water Resources include: The Government Regulation on Development of Water Supply System; Irrigation Implementation; Groundwater; Dams; River; Swamp and Right to Water.

The government on Act No.7/2004 has arranged for the management of water is not compartmentalized as one that integrates conservation, utilization and control of water damage. Water are managed by the state and used for the welfare of the people; therefore it is not enforced property rights but the rights to the water. Water rights with the understanding that only limited to the right to obtain and use or commercialize number (quota) of water in accordance with the allocation set by the government to water users, both of which must obtain a permit or not compulsory licenses.

The Act No.7/2004 on Water Resources is a lot of opposition from various parties for changing the function of the water of social objects into an economic object. The contradictory provisions are regulation including the operation of water and water rights. The articles related to the more emphasis on commercialization and privatization of water and eliminate the role of government as the party is obliged to manage water. Act No.7/2004 on Water Resource contained the domination and monopoly of water resource which opposite with the state's principle and used for the people's welfare as the constitutional mandate in Article 33 paragraph (2) The 1945 State Constitution of the Republic of Indonesia. The arrangements that give priority to commercial interests then trigger horizontal conflicts and eliminating the state's responsibility in meeting water needs.

d. Constitutional Court Decision No.85 / PUU-X/2013

On February 18, 2015, by the Constitutional Court Decision No.85/PUU-XI/2013, Act No.7/2004 on Water Resources has been canceled by the consideration that the policy of the law has not to warrant restriction of water management by private parties, so it is believed to be

contradicting against the 1945 State Constitution of the Republic of Indonesia. Therefore to circumvent a legal vacuum, re-enacting the Constitutional Court Act No.11/1974 on Water until the establishment of the new legislation is the best course of action. In Constitutional Court's decision, there are four considerations in water management, as follows:

- 1) Correlation between the state, people, and water;
- 2) Guarantee basic rights to water in the regulation on Water;
- 3) Control over water by the state;
- 4) Restrictions on water utilization.

With the cancellation of Act No.7/2004 on Water Resources consequences to non-enforcement of regulations are The Government Regulation No.16 of 2005 on the Development of Water Supply System; No.20 of 2006 on irrigation; No.42 of 2008 on Management of Water Resources; No.43 of 2008 on Groundwater; No.38 of 2011 on the river; The Government Regulation No.73 of 2013 on the swamp.

According to the Constitutional Court judgment that water is a vital part of human life that governs the livelihood of the people, must be managed by the state (vide Article 33 (2) and (3) of The 1945 State Constitution of The Republic of Indonesia). Following these concerns, in utilizing water there must be very strict restrictions to maintain the endless supply of water for the prosperity of the nation (vide Article 33 paragraph (4) of The 1945 State Constitution of The Republic of Indonesia). The principal values are the following restrictions:

- 1) Every commercial use of water should not obstruct, override, and eliminate the people's right to water;
- 2) The state must fulfill people's privilege to have access to water;
- 3) Conserve the environment for continuity of water availability;
- 4) As an essential part of production which affects the livelihood of the people, water must be managed by the state and used for the welfare of the people, the surveillance and management by the state over water is absolute;
- 5) As an extension on the privileges to control the water by the state, and because water is an essential part for the livelihood of people, the top priority given for commercial use of water are State Owned Enterprises and Municipality Owned Corporations;
- 6) If all these limitations are met and there is still water availability, the government has the privilege to give the permit to private enterprises to commercially use the water with certain conditions and limitations.

The cancellation of Act No.7/2004 on Water Resources and the reintroduction of the Act No. 11/1974 on Water Resources by the Constitutional Court, then the Government issued Regulation Government Regulation No.121 of 2015 on Exploitation of Water Resources and Regulation Government Regulation No.122 of 2015 on Water Supply System set on December 28, 2015 were used as the legal basis for private companies managing water. In Article 59 of Government Regulation No. 121 of 2015 on Exploitation of Water Resources states that permit commercial use of water or licenses issued for commercial use in the surface water sectors and permit commercial use of groundwater that has been granted before the enactment of Government Regulation No.121 of 2015 on Exploitation of Water Resources, shall remain valid until the period of validity of the license expires.

Furthermore, the government issued two policies:

- 1) Circular of the Minister of Public Works and Public Housing No.04/SE/2015 on License to Use Water Resources and Contract Public Private Partnerships in Water Supply System Piping, to provide legal certainty for business license holders the use of water and the parties in the public private partnership contracts in the water supply system piping.
- 2) Presidential Regulation No.38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Infrastructure, to deliver a clear legal basis for the growth of investment cooperation potable water supply system which is intended to raise the benefit for the people's welfare.

e. Regulation of the Republic of Indonesia No.23/2014 jo. Regional Government Act No. 9/2015 on the Second Amendment to Act No. 23/2014 on Regional Government

Pursuant to the attachment of Act No.23/2014 on Regional Government as amended by Act No.9/2015, the law divided into government affairs in the field of energy and mineral resources. In geology, the Central Government has the matter in the determination of groundwater basins, the conservation zone of groundwater in groundwater basins cross provincial and cross country, protected areas of geology and geological heritage (*geoheritage*), status and early warning of the dangers of the volcano, status and advance warning of potential ground motion, balance resources and mineral and energy reserves nationwide, and the establishment of geological disaster-prone areas. While the Provincial Government has the determination affairs groundwater conservation zones in groundwater basin in the Province, the issuance of permits drilling, excavation permits, user licenses, and permits the exploitation of groundwater in the Province. The survey results revealed that the Government of Regency / City does not have governmental affairs division of the field of geology. It is known from the assertion in the Attachment Act No.23/2014 on Regional Government that groundwater extraction permits related to the affairs of the Provincial Government, while irrigating the fields located in the field of public works and arrangement of space.

The authority of local governments in managing water is decentralized authority from the center of the stricken area and for independently performing water management to be enjoyed by the whole society. It means that the water must maintain and preserve the upper watersheds and water catchment areas, so the quality and quantity of water is preserved. Furthermore, local governments conduct surveillance against employers who have been given permission to manage water, in order to manage not only prioritizes profit alone without any effort for preservation of the watershed. Similarly to the community, both individuals and businesses that utilize water without permission also must be done strictly controlling.

f. Regulation of the Republic of Indonesia No.17/2019 on Water Resources

On October 15th 2019, the President has approved Act No.17/2019 on Water Resources and entered into force on 16 October 2019. Act No.17/2019 on Water Resources repeal Act No.11/1974 on Water Resources and declared invalid. As for the consideration of the establishment of Act No.17/2019 on Water Resources is to address the imbalance between the availability of water that tend to decline and increasing water demand. Therefore, water needs to be managed with due regard to a social function, environment, and economy in harmony to achieve synergy and cohesion between regions, sectors, and between generations to fulfill the needs of the people on water. It is based on the understanding that water as part of water resources is an essential production branch and govern the livelihood of the people are managed by the state to be used for welfare of the people by the mandate of The 1945 State Constitution of the Republic of Indonesia. Act No.17/2019 on Water Resources is composed of 16 chapters and 79 chapters is the commitment of government and Parliament to assert state control over the meaning of the water. In the legislation emphasized that water is a public good and should be managed by the control and mastery of a strong state, therefore there are three policies:

- 1) The government has the broadest authority to control and exploit the water resources that will be distributed to the public by priority to meeting the basic needs of daily and agriculture.
- 2) Permission for use of water for the needs of the business by the private sector will be given after the people's needs are met and priority was given to the state, enterprises, BUMDes, Cooperative, and afterward to the private sector and individuals.
- 3) Paying for management cost according to the benefit gained are compulsory for beneficiaries of water management services, with the exception of the water for everyday basic needs, agricultural folk, and non-commercial use.

g. Indonesian Government Regulation No.43 of 2008 on Groundwater

In setting the groundwater, it is known that the use of groundwater for various intentions (particularly regarding for the industrial sector), is the second choice when the water level is not sufficient, concerning the conservation, requirements include the prevention of environmental damage. Further in Government Regulation No.43 of 2008 regarding the Groundwater regulated control of water damage on the ground aimed at preventing, tackling saltwater intrusion, and restore the condition of groundwater due to saltwater intrusion, and to prevent, stop, or reduce the occurrence of land subsidence. Ground control of water damage done by controlling the extraction of the ground and increase the amount of groundwater recharge to prevent/reduce the rate of decline in groundwater levels.

4. Conclusion

The policy of water management in Indonesia is dynamic with several rounds of changes to the legislation which is caused by the demands to respond to the water crisis that occurred from time to time. The development of government policy in the water management is done through the issuance of legislation covering Act No.11/1974 on Water Resources and its implementing regulations, which are then replaced by Act No.7 of 2004 on Water Resources, the Constitutional Court ruling No.85/PUU-X/2013, which subsequently reinstated the Act No.11/1974 concerning irrigation equipped with Regulation implementing, and finally revoked Act No.11/1974 concerning irrigation with the enactment of Act No. 17/2019 on Water Resources.

Based on the situation above, it takes a development of water management policy that is more comprehensive, equitable, and instills democratic values for demanding arrangements that are truly able to protect the interests of the community. The government should immediately draw up the implementing regulations for water management and followed up by issuing regulations both at provincial and regency/city. Local governments should undertake the water management for the needs of everyday people in a professional manner.

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Understanding of The Decision of Court As A Basis of Cancellation of Land Rights

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Abstract. This Article aims to analyze the cancellation of land rights as a Decree of the Head of the Land Office and the Head of the Regional Office of the National Land Agency (Kanwil BPN) is done in the first two things, namely because of an error in the issuance of land rights. Second, because there is a Court Decision that must be implemented. This research is an empirical nondoctrinal/juridical research with a qualitative approach. The results showed that in the cancellation of Property Rights Number 1362 / Jabung BPN Regional Office of Central Java Province did not implement the decision, but made the Criminal Decision No. 222 / Pid.B / 2016 / PN.Smg. Jo 209 / Pid / 2016 / PT.SMG Jo 1412K / Pid / 2016 as supporting data in the cancellation study to prove an error in the registration of land rights, so that the Head of the Regional Office of the Central Java BPN can issue a decision on the cancellation of land rights without prior to the cancellation decision. from the State Administrative Court in accordance with the principle *contrarius actus*. The cancellation authority lies with the Central Java BPN Regional Office so that the Head of the Semarang City Land Office submits the results of the analysis to the Central Java BPN Regional Office for review, field inspection and exposure. Then the Head of the Regional Office of BPN in Central Java Province issued a decree on the cancellation of land rights number 07 / Pbt / BPN.33 / IX / 2019.

Keywords: Court Decision; Cancellation of Land Rights

1. Introduction

Utilization of the function of the earth and water and the natural resources contained therein is intended to achieve the greatest prosperity of the people, as stated in Article 33 paragraph 3 of the Law of the Republic of Indonesia in 1945. Land ownership is a human right of every citizen of Indonesia as regulated in the 1945 Constitution of the Republic of Indonesia, in particular Article 28H which states that every person has the right to have private property rights and these rights cannot be taken arbitrarily by anyone.

To protect land ownership rights by the government, a land registration system is implemented. One of the objectives of land registration as stipulated in Article 3 of Government Regulation No. 24 of 1997, is to provide legal certainty and protection to holders of registered land rights in order to easily prove themselves to be holders of the rights in question. The certificate is a strong proof of ownership of land rights, but nevertheless, everyone can be disputed about the truth of the certificate and the right to land. Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency Number 11 of 2016 serves as a guideline for the Ministry of Agraria in resolving land cases. If it can be proven the untruth of a person's land rights, Cancellation of land rights as Decree of the Head of the Land Office and Head of the Regional Office of the National Land Agency is done in the first two things, namely due to administrative defects in the issuance of the certificate, either based on a request from an interested party or party that is harmed or found

personally by the Head of the Land Office concerned. Second, due to the existence of a Court Decision which must be implemented, for example, namely the cancellation of land rights by a state administrative court on the grounds of a legal defect due to substantial errors that contradict the applicable law [1]

In the Regional Office of the National Land Agency of Central Java Province, there has been a cancellation of land rights due to administrative defects based on the existence of a criminal decision, namely on the cancellation of Property Rights Number 1362 / Jabung on behalf of Jadianan Simbolon. On June 15, 2017, Nuning Lestari made a request for revocation of the Certificate to the Head of the Semarang City Land Office for Ownership of Property No. 1362 / Jabung located in Jabung Sub-District, Banyumanik District, Semarang City in Central Java with an area of 6849 M2 which was registered in the name Jadianan Simbolon. Nuning makes a request for revocation of land rights by bringing evidence in the form of Criminal decision No.222 / Pid.B / 2016 / PN.Smg. Jo 209 / Pid / 2016 / PT.Smg Jo 1412 K / PID / 2016 who have permanent legal force.

Criminal case Number 222 / Pid.B / 2016 / PN.Smg Jo. No. 209 / Pid / 2016 / PT.Smg Jo. No. 1412 K / PID / 2016. with the defendant Jadianan Simbolon, SH bin Milior Simbolon on the charge of the crime of "ordering to insert false information into an authentic deed" as provided for in article 266 paragraph (1) of the Criminal Code. The verdict on the case stated that Soaman Simbolon was proven legally and convincingly guilty of committing a crime of "ordering to insert false information into an authentic deed", for his mistake, Jadianan Simbolon was sentenced to two years in prison.

Through the criminal verdict, it can be seen that Jadianan Simbolon has been guilty of the indictment of article 266 paragraph (1) of the Criminal Code, so that in the Certificate of Ownership Number 1362 / the Combination on behalf of Jadianan Simbolon there is false information contained therein.

From the explanation above, this study aims to determine the meaning of criminal decision No. 222 / Pid.B / 2016 / PN.Smg Jo. No. 209 / Pid / 2016 / PT.Smg Jo. No. 1412 K / PID / 2016 in the cancellation of Property Rights Number 1362 / Joint and the mechanism for cancellation.

Based on the background stated above, then the problem can be formulated as follows: (1) How to interpret criminal verdict No. 222 / Pid.B / 2016 / PN.Smg Jo. No. 209 / Pid / 2016 / PT.Smg Jo. No. 1412 K / PID / 2016 in the cancellation of Ownership Right Number 1362 / Combination on behalf of Jadianan Simbolon; and (2) How is the mechanism for implementing the revocation of ownership rights number 1362 / merger on behalf of Jadianan Simbolon.

2. Method

The research approach used by researchers is a qualitative approach to the type of empirical juridical research or non-doctrinal research, which is an approach by looking at something of legal reality in society. [2]

Sources of research data obtained by two types of data, namely primary data that is data collected from the first hand and processed by an organization or individual [3] and secondary data, namely among others including official documents, books, results from research in the form of reports and so on.[4]

The researcher conducts data validity using source triangulation because the triangulation is closely related to data collection techniques taken by researchers in interviewing and document data collection. Analysis of the data used in writing includes data collection, data education, data presentation, and drawing conclusions.

3. Result and Discussion

3.1 The meaning of criminal verdict No. 222 / Pid.B / 2016 / PN.Smg Jo. No. 209 / Pid / 2016 / PT.Smg Jo. No. 1412 K / PID / 2016 in the cancellation of Property Rights Number 1362 / Combination on behalf of Jadianan Simbolon

Certificate of land rights is a State Administration Decree (KTUN) issued by the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency which is the Office of State Administration.

In Act Number 51 of 2009 concerning the Second Amendment to Act Number 5 of 1986 concerning State Administrative Court in article 1 number 9 states that:

"State Administration Decree is a written stipulation issued by a state administration body or official containing legal action on state administration based on applicable legislation, which is concrete, individual, and final that results in legal consequences for a person or legal entity. civil"

According to Article 32 of Government Regulation No. 24 of 1997 of 1997, it is explained that certificates are proof of rights that act as strong evidentiary tools regarding physical data and juridical data contained therein, as long as the physical and juridical data are in accordance with the data in measuring certificate and land book concerned.

Guaranteed legal certainty, protection, and justice for those who feel disadvantaged as a result of the KTUN against land claims are settled through the State Administrative Court (PTUN). PTUN's decision aims to provide an opportunity to take legal action against disputes arising in the field of State Administration. [5]

In-State Administrative Court, the time limit for filing a lawsuit is as stated in Article 55 of Law Number 5 of 1986 concerning State Administrative Court, which is 90 days from the issuance of KTUN, so if 90 days have passed, PTUN can no longer accept the claim. However, disputes regarding land rights certificates can in fact still be heard in the District Court.

According to Dr. Syofyan Iskandar, SH, MH, Judge of the Semarang State Administrative Court Regarding the time period of the lawsuit, the District Court adheres to the principle of *axio perpetua* which does not recognize the time period, but if the PTUN recognizes the time period in filing a lawsuit that is 90 days since the issuance of KTUN. Therefore, if more than 90 days have been issued, KTUN can be sued in the District Court.

The difference in the object of the case in the district court and the Administrative Court is that in the District Court the object of the case (*objektum litis*) in a dispute is the rights or interests of the community that are violated as a result of the issuance of a State Administration Decree whereas in a State Administrative Court the being the object of the case is the State Administrative Decree itself.

In filing a civil claim, there is a grace period for filing a lawsuit that is 5 (five) years since the issuance of the certificate, as stipulated in Article 32 paragraph (2) PP Number 24 of 19997 regarding Land Registration which reads:

"In the case of a piece of land that has been legally issued a certificate in the name of the person or legal entity who obtained the land in good faith and has actually mastered it, then the other party feels that it has no right to land that can no longer demand the implementation of that right if in time 5 (five) years since the issuance of the certificate did not file an objection in writing to the certificate holder and the Head of the Land Office concerned or did not file a lawsuit to the Court regarding land acquisition or issuance of the certificate. "

This means that if it has been more than 5 (five) years since the issuance of the certificate, it can no longer file a lawsuit. However, the existence of the grace period is not absolute as long as it can be proven that the acquisition of the land was done not in good faith.

In the case of a dispute between Nuning Lestari and Jadianan Simbolon, the party from Nuning Lestari chose to take the criminal route to prove that Jadianan Simbolon in obtaining his rights to

his land committed acts that were prohibited by law. In 2016 Jadianan Simbolon was reported to Semarang Police District by Sahid Nugroho (Nuning Lestari's biological son) on charges of falsifying an authentic deed.

In the trial, it was revealed that the sale and purchase letter dated June 23, 1993, between Jamian's heirs as the seller and Jadianan Simbolon as the buyer used by Jadianan Simbolon for the certification process was an illegal sale and purchase letter because Jamian's heirs had never sold the land to Jadianan Simbolon.

The Semarang District Court issued Decision Number 222 / Pid.B / 2016 / PN.Smg. The symbol of the Jadianan Simbolon fulfills the charge of violating article 266 paragraph (1) of the Indonesian Criminal Code which consists of:

1) Whoever

"Whosoever" is meant as a legal subject supporting rights and obligations, and from the results of the examination of the identity of the defendant at the trial, the legal subject is the defendant, thus the element of whoever has been fulfilled;

2) Asking to insert false information into an authentic deed regarding something whose truth must be stated by the deed

what is meant by "authentic deed" is a letter made by a public office according to the forms and conditions specified in the law and or a letter that must be signed, must be made intentionally and must be used by people for the purposes for whom the letter was made.

Authentic deed referred to in a quo case includes:

- SHM Number 01362 on behalf of the Defendant
- Decree Number: 4-XC-2005 dated July 14, 2005, canceling SHM No. 444 and SHM No. 445

Thus the element "Telling to insert false information into an authentic deed concerning something whose truth must be stated by the deed" has been fulfilled.

3) With the intention to use or order others to use the deed as if the statement is in accordance with the truth;

Upon request of the Defendant's Certificate Then the Semarang City Land Office on October 29, 2007 issued SHM 01362 / Jabung on behalf of the Defendant

Thus the element "With the intention to use or order others to use the deed as if the statement is in accordance with the truth" has been fulfilled.

4) If its use can cause harm;

- As a result of the defendant's actions, the witness Nuning Lestari suffered a loss, namely the loss of the right to control and use the land of approximately 3418 m2 owned by the witness Nuning Lestari in accordance with SHM 445 in Ex. Jabung Kec. Banyumanik, Semarang City

Thus the element "If its use can cause harm" has been fulfilled.

Criminal Decision No.222 / Pid.B / 2016 / PN.Smg dated June 21, 2016, the verdicts include:

1.Stating the Defendant: JADIAMAN SIMBOLON, SH Bin (alm) BILLION OF SYMBOLON has been legally proven and convicted of committing a criminal act of "ordering the insertion of false information into an authentic deed"

2.Convicting the Defendant is therefore imprisoned for 1 (one) year and 6 (six) months;

3.Order evidence:

1 (one) bundle of land book along with the mark of SHM No. 1362 / Ex. The merger on behalf of JADIAMAN SIMBOLON was returned to BPN Semarang through witness ENI SETYOSUSILOWATI, SH. MH.

Then on the decision, the legal counsel from Jadianan Simbolon filed an appeal, which resulted in decision number No. 209 / Pid / 2016 / PT.SMG dated September 1, 2016, whose decisions include:

1. Stating the Defendant: JADIAMAN SIMBOLON, SH Bin (alm) BILLION OF SYMBOLON has been legally proven and convicted of committing a criminal act of "ordering the insertion of false information into an authentic deed"

2. Convict the Defendant, therefore, by imprisonment for 2 (two) years;

3. Order evidence:

1 (one) bundle of land book along with the mark of SHM No. 1362 / Ex. The merger on behalf of JADIAMAN SIMBOLON was returned to BPN Semarang through witness ENI SETYOSUSILOWATI, SH. MH

Jadianan Simbolon as the defendant in the case, submitted an appeal which resulted in No. 1412 K / PID / 2016 dated January 6, 2017 whose decisions include:

Judge:

Refuse the cassation request from the Cassation / Defendant.

So, in the case of the crime, Jadianan Simbolon was proven guilty of article 266 of the Criminal Code and received a sentence of two years in prison. According to Abdul Wahib, SH, MH, a Judge at the Semarang District Court in his interview on February 20, 2020, stated that the sentence of the criminal decision had no effect on whether a certificate was canceled or not, because the criminal entered into the realm of public law governing relations between people and the state, not regulate the rights of individuals. Therefore, in a criminal decision, even if it is proven that there is an interest or right of someone else who has been violated by the issuance of a certificate, the Criminal Court cannot decide to declare the certificate null and void. According to Dr. Syofyan Iskandar, SH, MH, Judge of the Semarang State Administrative Court, in canceling land rights there are two things, namely, there is a cancellation based on the *contrarious actus* principle that can be done by the official who issues the KTUN or officials at the level above it and the certificate revocation in the implementation of the court decision legally binding.

According to Philipus M. Hadjon and Tatiek Sri Djatmiati, the principle of *contrarious actus* in state administrative law is the principle that states that a TUN Agency or Officer who issues a TUN Decree by itself is also authorized to cancel it. This principle applies even though in the TUN decision there is no common safety clause. If in the future there turns out to be a mistake or error, then this decision will be reviewed (Hadjon and Djatmiati, 2009: 78).[6] So, even though through criminal ruling No. 222 / Pid.B / 2016 / PN.Smg Jo. No. 209 / Pid / 2016 / PT.SMG Jo. No. 1412 K / PID / 2016 it is known that Jadianan Simbolon has been legally and convincingly guilty of committing a crime as contained in article 266 paragraph (1) of the Criminal Code, to cancel the right to his land, it is necessary to request a revocation of land rights to the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency as the body that issues certificates of land rights. Therefore, in the cancellation of Property Rights Number 1362 / Joint Office of the Regional Office of BPN Central Java Province does not implement the decision, but makes the Criminal Decision No. 222 / Pid.B / 2016 / PN.Smg. Jo 209 / Pid / 2016 / PT.SMG Jo 1412K / Pid / 2016 as study material for cancellation to prove mistakes in the issuance of property rights Number 1362 in the name of Jadianan Simbolon.

3.2 The mechanism for implementing the revocation of ownership rights number 1362 / merger on behalf of Jadianan Simbolon

Article 19 of the BAL stipulates that in order to guarantee legal certainty by the government land registration is carried out throughout the territory of the Republic of Indonesia according to the provisions regulated by government regulations. The purpose of land registration as contained in Government Regulation No. 24 of 1997 in addition to providing legal certainty, it can also provide protection to holders of rights over a parcel of land. To provide legal certainty and legal protection, the relevant rights holders are given certificates of land rights.

Cancellation of land rights as Decree of the Head of the Land Office and Head of the Regional Office of the National Land Agency is done in the first two things, namely due to administrative defects in the issuance of the certificate, either based on a request from an interested party or party

that is harmed or found personally by the Head of the Land Office concerned. Secondly, due to the existence of a Court Decision which must be implemented, for example, namely the cancellation of land rights by a state administrative court on the grounds of a judicial defect due to substantial errors that contradict the applicable law.

Cancellation of land rights without a court decision is regulated in Regulation of the Head of Land Affairs Agency of the Republic of Indonesia Number 3 of 2011 concerning Management of Study and Handling of Land Cases in conjunction with Regulation of the Minister of Agrarian Affairs and Spatial Planning / National Land Agency Number 11 of 2016 concerning Settlement of Land Cases Referring to article 4 jo article 24 Regulation of the Minister of Agrarian Affairs and Spatial Planning / National Land Agency Number 11 of 2016, the authority of the Ministry of ATR / BPN takes decisions such as the decision to revoke land rights, the decision to revoke a certificate, without prior court ruling is only on land disputes and land conflicts, i.e. land cases whose settlement does not go through a judicial institution.

In Cancellation of Ownership Number 1362 / Merger on behalf of Jadianan Simbolon, the Office of the Agrarian Region and Spatial Planning / National Defense Agency of Central Java Province guided by the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency (Permen ATR / Perkaban) Number 11 of 2016 concerning settlement of land cases. The settlement flow is as follows:

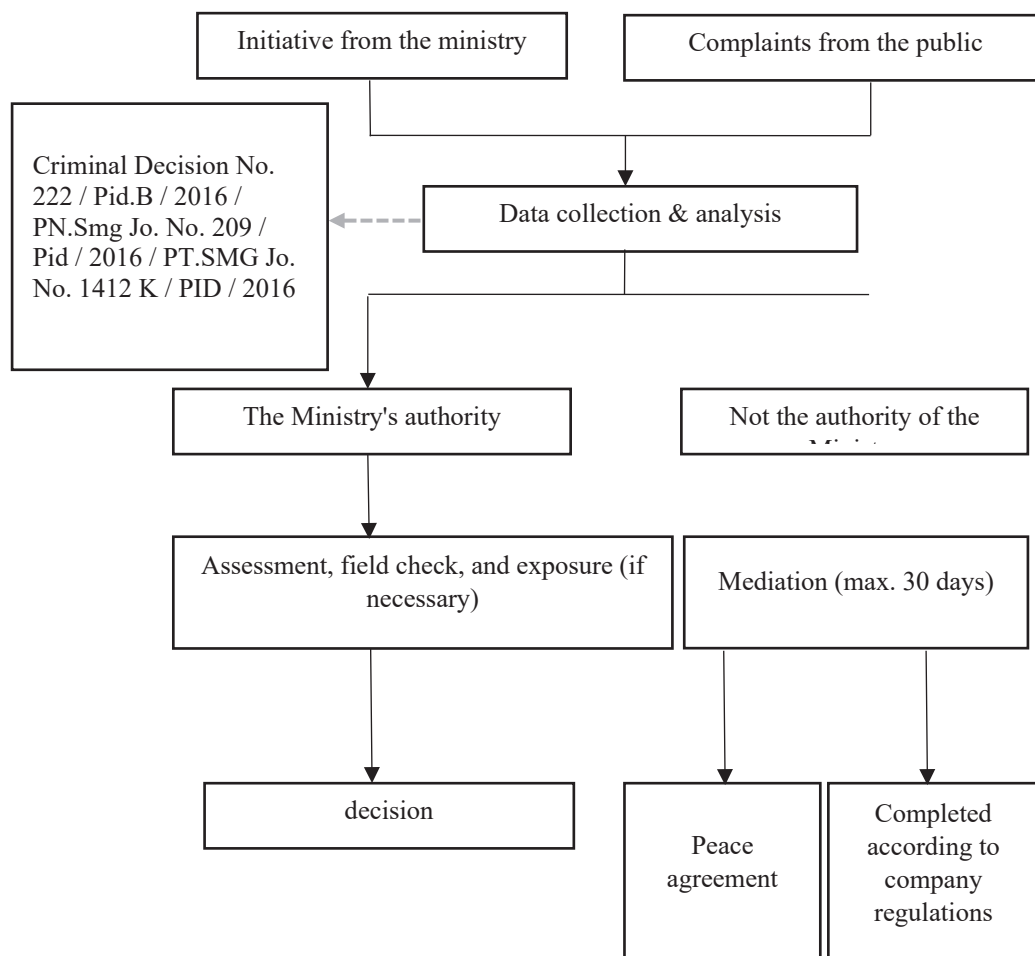


fig 4.2 Settlement of land cases

The authority to cancel ownership rights number 1362 / merger belongs to the Regional Office of the National Land Agency of Central Java Province because ownership rights number 1362 / merger on behalf of Jadianan Simbolon is issued by the Semarang City Land Office. This is in accordance with article 26 paragraph (2) of the Agrarian Regulation and Spatial Planning / Head of the National Land Agency Number 11 of 2016, namely:

"(2) the authority to cancel as referred to in paragraph (1) consists of:

- a. M
Minister, for the granting of rights whose decisions are debited by the Minister or Head of Regional Office of BPN, and Disputes or Conflicts with certain characteristics as referred to in article 13 paragraph (3);
- b. Head of Regional Office of BPN, for the granting of rights whose interests are issued by the Head of the Land Office. "

Based on the results of an analysis conducted by the Regional Office of the Central Java National Land Agency towards Criminal Decision No. 222 / Pid.B / 2016 / PN.Smg Jo. No. 209 / Pid / 2016 / PT.SMG Jo. No. 1412 K / PID / 2016, in the issuance of Hak Milik No. 1362 / Jabung on behalf of Jadianan Simbolon, it contains procedural errors / administrative defects.

The category of administrative disability as stated in article 11 paragraph (3) of Agrarian Regulation Number 11 Year 2016 namely:

- a. Errors in procedures in measuring, mapping and / or broad calculations;
- b. Errors in procedures in the process of registering affirmations and / or recognition of rights to ex-adat land;
- c. Errors in procedures in the process of determining and / or registering land rights;
- d. Incorrect procedure in the process of determining abandoned land;
- e. Overlapping of rights or certificates of land rights where one of the basis of rights is clearly an error;
- f. Errors in procedures in the process of maintaining land registration data;
- g. Incorrect procedure in the process of issuing a replacement certificate;
- h. Error in providing information on land data;
- i. Incorrect procedures in the process of granting permits;
- j. Misuse of space use; or
- k. Other errors in the application of legislation.

The administrative defect in question is a procedural error contained in Article 11 paragraph (3) point H, namely an error in providing land data information.

After the dispute resolution has been carried out as referred to in Article 24 of ATR Regulation Number 11 of 2016, the Head of Regional Office of ATR / BPN of Central Java Province or the Minister shall resolve it by:

- a. Decision of Cancellation of Land Rights;
- b. Certificate Cancellation Decision;
- c. Decision of Changes to Data on Certificates, Measurement Letters, Land Books and / or other Public Lists; or
- d. Notification that there are administrative errors

In resolving the dispute between Nuning and Jadianan Simbolon, the Head of Regional Office of ATR / BPN of Central Java Province issued a Decree on Cancellation of Certificate Number 07 / Pbt / BPN.33 / IX / 2019. After the proof of ownership is canceled, the status of the land returns to its original state of being Yasan land with C No. 173 P. 35 K1. D.II.

Cancellation of certificate does not mean to eliminate/give rise to land rights or other civil rights to the parties in accordance with Article 26 of ATR Regulation Number 11 of 2016, namely:

Therefore, in order to regain land rights, Nuning Lestari must register the land in accordance with applicable regulations.

4. Conclusion

From the results of the study, it can be concluded that the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency can cancel the right to land without a court ruling which explicitly states that it is canceled if the product issued contains an error in accordance with the principle of *contrarius actus*. In canceling the Right of Ownership Number 1362 / the Joint Office of the Regional Office of BPN in Central Java Province did not implement the decision, but made the Criminal Decision No. 222 / Pid.B / 2016 / PN.Smg. Jo 209 / Pid / 2016 / PT.SMG Jo 1412K / Pid / 2016 as supporting data in the cancellation study to prove the existence of administrative defects in the issuance of the Certificate. Cancellation of ownership right of 1362 / Jabung without being preceded by a court decision is appropriate to be carried out to guarantee legal certainty. Implementation of Cancellation of Ownership Number 1362 / Combination on behalf of Jadianan Simbolon is conducted by referring to Permen ATR / BPN Number 11 Year 2016 concerning the Settlement of Land cases. The Semarang City Land Office responds to the cancellation request letter from Nuning Lestari number 141 / LKBH-SF / VIII / 2018 on 1 August 2018 by conducting data collection and analysis. The authority to revoke the Property Right Number 1362 / Jabung belongs to the Regional Office of the Central Java BPN Province so that the Head of the Semarang City Land Office submits the results of his analysis to the Regional Office of the Central Java Province BPN for review, field inspection and exposure. From the results of the field assessment and inspection, it is known that in the issuance of SHM Number 01362 / Jabung on behalf of Jadianan Simbolon there are administrative defects. For this matter, The Head of the BPN Regional Office of Central Java Province issued a decree number 07 / Pbt / BPN.33 / IX / 2019 concerning the cancellation of Property Rights Number 01362 / Jabung on behalf of Jadianan Simbolon. The decision to revoke land rights does not cause other civil rights, so to get his rights back, Nuning Lestari must register his land again in accordance with applicable regulations.

Based on the conclusions above in accordance with the problem under study, the advice that can be given by the author is the Regional Office of the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency of Central Java and Semarang City Land Office is expected to always pay attention to the General Principles of Good Governance (AAUPB) in issuing a decision to revoke land rights so as to minimize future disputes. The Semarang City Land Office is expected to be more careful in issuing land rights certificates regarding the truth of the rights and information provided by the applicant for land rights certificates by gathering facts of the situation that occurred at the time of the certificate issuance by first checking and verifying their validity and eligibility.

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Regulation of the Minister of Agrarian Affairs / Head of National Land Agency Number 3 of 1997 concerning Provisions for Implementing Regulation Number 24 of 1997 concerning Land Registration.

The Authority of The Ministry of Defense in Exporting and Importing the Defense and Security Tools

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Abstract. This research aims to describe and analyze the Authority of the Ministry of Defense in exporting and importing Defense and Security Tools based on the Law Number 16 of 2012 about Defense Industry. It needs to be observed since in the Law of Defense Industry it is mentioned that the users of defense industry are Indonesian Armed Force, Indonesian Police, ministries and/or non-ministry government institutions, and parties with the license based on the legal regulations. Regarding the export and import of the Defense and Security Tools, it is perceived that there is a discrepancy between the Law no. 16/2012 on Import Security Tools. The method used in this research is normative juridical using secondary sources of data as the theoretical foundation, then the data is analyzed descriptive qualitative. Based on the research results, it can be concluded that the Ministry of Defense has an attributive authority in exporting and importing Defense and Security Tools based on positive law stated within the constitution, yet its implementation has not been optimal.

Keywords: Defense and Security Tools; Authority; Ministry of Defense

1. Introduction

Defense and security aspects are very important factors in ensuring the survival of the country. The ability to defend against the foreign and domestic threats is needed for a country to maintain its existence. The defense and security of the Indonesian state is carried out through the universal defense and security system, in accordance with Article 30 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, namely: "The national defense and security effort is carried out through the defense and security system of the people of the universe by the Indonesian National Army and the National Police The Republic of Indonesia, as the main force, and the people, as a supporting force" [1].

After the 1999 reforms, through a political decision, there was a separation between the Army and Police which was then stipulated in the MPR Decree No. VI/2000 on the Separation of the Indonesian National Armed Forces (TNI) and National Police jo. the MPR Decree No. VII/2000 on the Role of the TNI and National Police, which was later strengthened by enacting and passing Law No. 2/2002 on the National Police [2]. It was also promulgated and passed in the Law No. 3/2002 on the National Defense jo. the Law No. 34/2004 on the Indonesian National Armed Forces (TNI), thereby emphasizing the separation of duties and responsibilities between defense and security. Domestic security is defined as a condition marked by the guarantee of security and public order, orderly and upholding the law, as well as the implementation of protection, patronage and service to the community [3]. Whereas, national defense is defined as all efforts to maintain national sovereignty, the territorial integrity of the Unitary State of the Republic of Indonesia, and the safety of all nations from

threats and disturbances to the integrity of the nation and state [4]. The explanation further emphasizes the separation of handling of defense and security issues by whom and doing what, in which the defense issues by the TNI while security issues by the National Police as the main force.

National defense and security efforts carried out through the defense and security system of the universe require the availability of defense and security equipment supported by the ability of domestic industries, ownership of sophisticated technology and appropriate technology, control of economic resources, and accelerating the achievement of national goals. So far, the availability of defense and security equipment has not been supported by the ability of the defense industry in an optimal and independent manner which causes dependence on Security Defense Equipment Tools from abroad. The Republic of Indonesia has a strategic defense and security industry, such as PT. Perindustrian Angkatan Darat (Pindad), PT. Dirgantara Indonesia, PT. Penataran Angaktan Laut Indonesia (PAL Indonesia), which can answer global demands and challenges. However, it should be recognized that the capability of the defense industry is still limited so that integrated implementation and management is needed through the empowerment of the defense industry. Efforts to realize the implementation of the defense industry have been enacted and passed in the Law No. 16/2012 on the Defense Industry, as the legal basis for the implementation of the national defense industry.

Based on this description, the problem to be discussed in this study is how is the authority of the Minister of Defense in the export and import of defense and security equipment, is the application of such authority effective in the import of firearms for the benefit of the National Police, and what are the obstacles and supporters of the application of the authority of the defense minister in the import of Security Defense Equipment Tools, especially firearms.

2. Methods

The method used in this study is a normative juridical approach, meaning that the law is conceptualized as norms, rules, principles, or dogmas. Data were obtained from library observations, namely secondary data, which were then compiled, explained, and analyzed by providing conclusions [5].

3. Result and Discussion

a. Analysis based on statutory regulations

Indonesia as a state of law, legislation must be a source of authority for each action and decision of a government official or other legal body and/or legal entity delegated to carry out government functions [6]. In the rule of law, there is executive power to carry out a government. Executive power is the power regarding the implementation of laws as well as carrying out the will of the state [7]. The Indonesian government system adheres to a presidential government system which is a government system that is centered on the position of president as head of government as well as head of state, the executive power is in the hands of the president. As head of government, the president is assisted by the vice president and ministers in the cabinet. The Minister has the authority to carry out daily government tasks. Authority is the right to exercise power in the field of government in the administration of the state based on law. The authority of a state institution is an authority strengthened by

positive law to regulate and maintain it. Without authority, a right juridical decision cannot be issued [8].

Analyzing the authority of the Minister of Defense in the export and import of Security Defense Equipment Tools begins with a discussion of the authority itself. Based on Article 11 of the Law No. 30/2014 on Government Administration, Authority is obtained through Attribution, Delegation and/or Mandate [9]. The authority of attribution is defined as the granting of Authority to Government Agencies and/or Officials by the 1945 Constitution or Law. Authority is the right to exercise power in the field of government in the administration of the state based on law. According to Hadjon, the term "authority" is often interchangeable with the term "power". The terms "authority" or "power" are often equated with the term *bevoegdheid* in Dutch law [10]. As a concept of public law, authority (*bevoegdheid*) is described as a legal power (*rechtsmacht*), where the concept is also related to the formation of government decisions. It can be said that the authority must be clearly regulated and stipulated in the legislation in force.

The authority of the Minister of Defense in the export and import of Security Defense Equipment Tools is the authority of attribution because it is clear and stipulated in the legislation in force or found in positive administrative law, i.e. the Law No. 16/2012 on the Defense Industry. The establishment of attribution authority for the Minister of Defense in regard to the exports of Security Defense Equipment Tools is stipulated in Article 55 of the Law No. 16/2012 on the Defense Industry, i.e. everyone who exports and/or transfers equipment used for defense and security of other countries must obtain the minister's permission to carry out government affairs in the defense sector [11]. With these provisions, a person who will export Security Defense Equipment Tools to the Defense Industry production from home to abroad must have an export permit from the Minister of Defense. The issuance Security Defense Equipment Tools export permit documents is under the authority of the Minister of Defense obtained by attribution. The Minister of Defense also has the authority to ban the export of Security Defense Equipment Tools, in accordance with Article 68 of the Law No. 16/2012 on the Defense Industry, i.e. every person is prohibited from selling, exporting and/or transferring Defense Equipment Tools and Strategic security without the permission of the minister who carries out government affairs in defense field.

Article 69 of the Law No. 16/2012 states that "Everyone is prohibited from buying and/or importing strategic Defense and Security Equipment Tools without obtaining permission from the minister who carries out government affairs in the field of defense." The word "prohibited" in Article 69 indicates that there is a statutory prohibition on the activity of importing goods in this case Security Defense Equipment Tools into customs areas without obtaining permission from the Minister of Defense. The formulation of the prohibition also stipulates the authority of attribution to the Minister of Defense to issue Security Defense Equipment Tools import licenses to everyone who will carry out Security Defense Equipment Tools import activities. At the level of "prohibition" both regarding exports and imports of Security Defense Equipment Tools, the Minister of Defense's permission is regulated in the same pattern and degree. Likewise, it should also be at the "mandatory" level regarding the Minister of Defense's permission for exports and imports of Security Defense Equipment Tools.

In that case, Security Defense Equipment Tools at home cannot yet be fulfilled by the defense industry, users and the defense industry "can" propose to the Defense Industry Policy Committee (KKIP), to use foreign products through procurement through direct processes between governments or to manufacturers, in accordance with Article 43 of the Law No. 16/2012, stating that one of the requirements for procuring Security Defense Equipment Tools

from abroad is the existence of trade returns, local content and/or offset of at least 85% of the contract value. The trade-offs for procuring Security Defense Equipment Tools from abroad are approved by the Defense Industry Policy Committee (KKIP). Since the proposal is submitted to KKIP, even for national strategic interests needs to be considered by the House of Representatives, it is not obligatory to obtain the minister's permission to conduct government affairs in the defense sector. This shows that there is no attributive authority given to the Minister of Defense in procuring Security Defense Equipment Tools from abroad through trade-off mechanisms including offset, in contrast to exports that are expressly stated "obligatory" to obtain the Minister of Defense's permission.

The results of the investigation of the implementing laws and regulations, at the level of the Minister of Defense's regulations regarding the Defense Minister's authority on export and import of Security Defense Equipment Tools are stipulated in the Minister of Defense Regulation No. 6/2017 on the Defense Industry Determination, Licensing for Production, Export and Import of Security Defense Equipment Tools. In the Minister of Defense Regulation No. 6/2017 on the Establishment of the Defense Industry, Licensing for Production, Export and Import of Security Defense Equipment Tools, the authority of the Minister of Defense in the export and import of Security Defense Equipment Tools is clearer and more straight forward. There are provisions that are not in line between the Act and the Minister of Defense Regulation as an implementation regulation. Therefore, it can be interpreted differently by the stakeholders, particularly in the implementation of Security Defense Equipment Tools imports.

b. Effectiveness of the Application of The Minister of Defense's Authority in Importing Firearms for The Benefit of The National Police.

In accordance with Article 8 paragraph (1) of the Law no. 16/2012, it is stated that defense industry users consist of TNI, Police, ministries and/or non-ministerial government agencies, and the parties given licenses in accordance with statutory provisions. Users must use Security Defense Equipment Tools which can already be produced by the domestic defense industry, thus encouraging the independence of the defense industry. Thus, the National Police as one of the users of the defense industry must share responsibility for the development of the defense industry, and must use Security Defense Equipment Tools which can already be produced by the domestic defense industry.

In Article 69 of the Law No. 16/2012 on Defense Industry, it is stated that everyone is prohibited from buying and/or importing strategic Defense and Security Equipment Tools without the permission of the minister who runs government affairs in the field of defense. However, Minister of Defense Regulation No. 6/2017 on the Establishment of the Defense Industry, Licensing for Production, Export and Import of Defense and Security Equipment Tools, as an implementation regulation, does not specify in more detail what procedures must be taken for users when importing Defense and Security Equipment Tools. The National Police as one of the defense industry users who need firearms, whose specifications cannot be produced by the defense industry, are permitted to import with the issuance of the Defense and Security Equipment Tools import license (in this case firearms Stand Alone Grenade Launcher (SAGL)) by the Minister of Defense. Therefore, the procedure for submitting Defense and Security Equipment Tools import licensing for users is not described in the Minister of Defense Regulation No. 6/2017. The National Police in the procurement of firearms (SAGL) from abroad (through imports) found it difficult to obtain an import permit from the Minister of Defense. In the end, the import of firearms (SAGL) continues without the import permit

document from the Minister of Defense, so it is not in accordance with Article 69 of the Law No. 16/2012 on the Defense Industry. Based on positive law in force, the import of firearms (SAGL) for the interests of the National Police can be qualified in violation of the laws and regulations, in this case the Law No. 16/2012 on the Defense Industry, although there are shortcomings to the implementation rules.

The implementation of the Minister of Defense's authority in importing firearms for the benefit of the National Police is not running as required by law, both in laws relating to the defense industry and firearms. The National Police ignored the Minister of Defense Regulation No. 7/2010 on Guidelines for Licensing, Supervision, and Control of Firearms for Military Standards Outside the Ministry of Defense and the TNI, even though SAGL weapons imported by the National Police, according to caliber, can be classified as military standards. The National Police did not heed because the Regulation of the Minister of Defense was a follow-up to Presidential Instruction No. 9/1976 on Enhancing the Supervision and Control of Firearms which are considered by the National Police to be incompatible with the Law No. 12/2011 on the Establishment of Laws and Regulations [12]. In addition, the National Police considers that Minister of Defense Regulation No. 7/2010 only applies to the TNI and defense, but not for the interests of the National Police institution. The National Police ignored the Law No. 16/2012 on the Defense Industry. Even though the National Police is referred to as one of the defense industry users, the National Police must use Security Defense Equipment Tools which can already be produced by the domestic defense industry in order to encourage the realization of the independence of the defense industry. However, if the defense industry cannot meet the needs of the National Police, import can be carried out with the permission of the Minister of Defense in advance and the import can be carried out through a trade return mechanism. Since it was not done by the National Police in the import of SAGL weapons, the application of the authority of the Minister of Defense in importing firearms for the benefit of the National Police can be concluded ineffective.

c. Constraints and Supporting Factors for the Implementation of the Defense Minister's Authority in Importing Security Defense Equipment Tools, Especially Firearms.

In accordance with the mandate of the Defense Industry Law, the Minister of Defense has the authority related to the control of firearms as part of Security Defense Equipment Tools, especially in the case of imports. In this case, everyone is prohibited from buying and/or importing strategic Security Defense Equipment Tools without obtaining the minister's permission to administer government affairs in defense field. However, the extent to which the application of this authority can be implemented is influenced by factors that are both obstacles and their supporters.

1) Constraint Factor

a) Usability of Legislation related to firearms is not optimal.

At present, the regulation of firearms at the level of the law is no longer in accordance with the changes that occur due to the changing times. The latest statutory regulation regarding firearms is Government Regulation in Lieu of the Law No. 20/1960 on Licensing Authorization Given According to Laws on Firearms. Previously, the provisions regarding firearms had also been regulated by the Firearms Act of 1936; the Law No. 8/1948 on Registration and Granting of Firearms Use Permits; Emergency Law No. 12/1951. The law

does not contain substance regarding the control and supervision of imported firearms, but firearms classified as Security Defense Equipment Tools are part of the substance of the Law No. 16/2012 on the Defense Industry, but it still has to be spelled out in the implementing regulations regarding firearms.

b) Coordination between institutions or agencies is not optimal.

The coordination between institutions or agencies related to the regulation and supervision of firearms is not optimal. Coordination between these institutions or agencies is important, because the issue of firearms is not only the authority of one agency, but including many institutions. This is proven by the emergence of issues of firearms and ammunition of military standards imported by the National Police from abroad for the benefit of the Mobile Brigade Corps and the State Intelligence Agency which are withheld by customs, because they did not have permission to issue goods from the TNI Strategic Intelligence Agency at the command of the TNI Commander.

c) Definition of Strategic Security Defense Equipment Tools needs explanation.

Article 69 of Law No. 16/2012 on the Defense Industry stating that everyone is prohibited from buying and/or importing strategic Security Defense Equipment Tools without obtaining the minister's permission to carry out government affairs in the defense sector, it is necessary to explain the phrase "strategic." However, strategic definitions or explanations of Security Defense Equipment Tools are not found in the Defense Industry Law, or its implementing regulations, thus confusing stakeholders including the National Police.

d) Law enforcement is not working

The law on firearms does not contain substance that discusses the permit to import firearms. However, for firearms with military standards, there is a Minister of Defense Regulation No. 7/2010 on Guidelines for Licensing, Supervision, and Control of Firearms for Military Standards Outside the Ministry of Defense and the TNI. Meanwhile, the National Police is not subject to the regulation, even though firearms imported for the interests of the National Police including the classification of military standard firearms. In this case, the National Police is one of the institutions outside of Ministry of Defense and the TNI, as stated in Article 8 letter j of the Minister of Defense Regulation No. 7/2010.

Law enforcement related to the import of firearms for the benefit of the National Police can be reviewed based on the Law No. 16/2012 on the Defense Industry. In accordance with Article 69 of Law No. 16/2012 on the Defense Industry stating that everyone is prohibited from buying and/or importing strategic Security Defense Equipment Tools without obtaining the minister's permission to carry out government affairs in the defense sector. Furthermore, in Article 75 of Law No. 16/2012, it was stated that every person who buys and/or imports strategic Defense and Security Equipment Tools without obtaining permission from the minister conducting government affairs in the field of defense, as referred to in Article 69 shall be liable to a maximum imprisonment of 7 (seven) years and/or a maximum fine of Rp 100,000,000,000.00 (one hundred billion rupiah). The problem arises is how to enforce the law related to the import of military standard firearms if in this case what is considered to violate the law is a government agency, i.e. the Police and firearms importers who obtain permits from the National Police. Therefore, the law enforcement in the form of the

application of fines as stipulated in Article 75 of the Law No. 16/2012 has also not yet implemented.

e) Long bureaucratic chains

Noting Article 53 of the Minister of Defense Regulation No. 6/2017 on Determination of the Defense Industry, Production, Export and Import Licensing of Defense and Security Equipment Tools, as well as the Defense and Security Equipment Tools import licensing mechanism chart, there is a long bureaucratic chain in order to implement the Defense Minister's authority to grant Defense and Security Equipment Tools import licenses. It was started with the application for import permit Security Defense Equipment Tools by the defense industry or users accompanied by the requirements as specified with a copy to the Minister of Trade in this case the Director General of Foreign Trade. Afterwards, a request for security clearance was submitted by the Director General of the Ministry of Defense to the TNI Commander, in this case the TNI Commander's Assistant Intelligence. The processing of security clearance is carried out according to input from the TNI Strategic Intelligence Agency after receiving confirmation from the Defense Attache of the Republic of Indonesia in the country of origin of the goods regarding the validity of import document for Security Defense Equipment Tools. The issuance of security clearance greatly affects the granting of import permit for Security Defense Equipment Tools from the Minister of Defense, which is mandated to the Director General of the Ministry of Defense. In the event that the TNI Commander's Intelligence Assistant on behalf of the TNI Commander does not approve the application for security clearance, on the recommendation of the TNI Strategic Intelligence Agency, a security clearance denial is issued for the defense industry or users who will import Security Defense Equipment Tools. Vice versa, if the TNI Strategic Intelligence Agency recommends the issuance of security clearance, then the TNI Commander's Intelligence Assistant on behalf of the TNI Commander will approve the application for security clearance and issue it. In addition to the request for security clearance, the Director General of Defense Potential of the Ministry of Defense also asked KKIP for recommendations or considerations regarding the issue of offset regulation, trade returns and local content, and ascertain whether the defense industry is capable of domestic production. In certain conditions, strategic Security Defense Equipment Tools need to gain the consideration from the house of representatives.

2) Supporting factors

a) The authority of the Minister of Defense is obtained by attribution.

One of the main supporting factors to the application of the authority of the Minister of Defense in the import of Security Defense Equipment Tools, especially firearms, namely the existence of attribution authority to the Minister of Defense as mandated by Law No. 16/2012 on the Defense Industry. In accordance with Article 12 paragraph (1) of the Law No. 30/2014 on Government Administration, stating that Governmental Agency and/or Officer obtains Authority through Attribution if it is regulated in the 1945 Constitution of the Republic of Indonesia and/or the law.

- b) The union of the words "defense" and "security".

Based on MPR Decree No. VI/MPR/2000 on the Separation of the TNI and the National Police and MPR Decree No. VIII/MPR/2000 on the Role of the TNI and the Role of the Police, as well as Article 30 of the 1945 Constitution of the Republic of Indonesia which has separated the authority of security from national defense, the National Police has responsibility in the security sector while the TNI carries out duties in the field of defense. As a consequence of the separation of the TNI and the National Police as one of the results of the reformation, the National Police considers that domestic security affairs are the duties and responsibilities of the National Police including the supervision and control of firearms and ammunition that have the potential to disrupt public security and order because they can be misused.

In line with the times and political dynamics after the reforms lasted for more than 14 years, the Law No. 16/2012 on the Defense Industry, which again consolidates the words "defense" and "security" into one phrase, like two sides of a coin, namely "defense and security" as stated in the Defense and Security Equipment Tool. In the law, the discussion of defense and security related to the issue of equipment is not separated. However, the title of the Act only mentions "defense", and the National Police is one of the users required to use domestic defense industry production as needed. Thus, if the National Police intends to import firearms that cannot be provided by the defense industry, it is necessary to obtain prior permission from the Minister of Defense, even though the firearms are for security matters and their caliber is not a military standard. As the principle of interpreting the law of *lex posteriori derogat lex priori* (the new law put aside the old law), the Police must comply with the Law No. 16/2012 on the Defense Industry when importing firearms.

4. Conclusion

The research results show that the authority of the Minister of Defense in the export and import of Security Defense Equipment Tools is an attribution authority because it is determined in the applicable laws and regulations i.e. the Law No. 16/2012 on the Defense Industry. The authority of the Minister of Defense regarding the export of Security Defense Equipment Tools is stipulated in Article 55 and Article 68 of the Law No. 16/2012 on the Defense Industry. The authority of the Minister of Defense in terms of imports is that regulations are not as strict as exports, which has the effect of creating uncertainty for those who will import Security Defense Equipment Tools. For this reason, there is consistency in the export and import arrangements for Security Defense Equipment Tools related to the authority of the Minister of Defense. Thus, in Article 43 of Law No. 16/2012 on the Defense Industry, it is necessary to add a clause that "the import of Security Defense Equipment Tools through trade returns or offset must obtain the minister's permission to carry out government affairs in the field of defense".

Regarding to the authority of the Minister of Defense on firearms import for the benefit of the National Police is not effective, because the implementation of import is not in accordance with positive law in force. The National Police ignored the Minister of Defense Regulation No. 7/2010 on Guidelines for Licensing, Supervision, and Control of Firearms for Military Standards Outside the Ministry of Defense and the TNI, even though SAGL weapons imported by the National Police, according to caliber, can be classified as military standards. In addition, the National Police ignored the Law No. 16/2012 on the Defense Industry, even though the National Police is referred to as one of the defense industry users so it is obligatory

to use Security Defense Equipment Tools which can be produced by the domestic defense industry.

The constraining factors to the authority of the Minister of Defense in the import of Defense Security Equipment Tools, especially firearms, include the effectiveness of legislation related to firearms is not optimal, coordination between agencies or agencies is not optimal, the definition of Defense Security Equipment Tools is not clear, strategic law enforcement does not work, and long bureaucratic chains. Meanwhile, supporting factors include the authority of the Minister of Defense obtained by attribution and the union of the words "defense" and "security" in defense and security equipment.

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Implementation of Intellectual Property Management Centre in Order to Legal Protection of Creative Industrial Products in Yogyakarta

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Abstract. The aim of this research is to find out the importance of IPR for MSMEs and to analyze the institutional implementation of the Intellectual Property Management Center in order to provide protection for MSME creative products in Yogyakarta. This research method uses qualitative research methods using primary data from the field and secondary data from references and documents. The results of this study obtained an analysis that the importance of IPR protection on MSME creative products especially to provide legal protection if there is a violation of the MSME intellectual work. In addition, the role of BPKI is felt to be very helpful, especially in increasing MSME awareness of IPR registration due to the various work programs of Intellectual Property Management Centre namely advocacy, assistance and facilitation of IPR

Keywords: Intellectual Property Right's , Micro Small Medium Enterprises, Intellectual Property Management Center

1 Introduction

Nowadays community innovation is developing so rapidly. Many innovative products are produced by creative industry groups in Indonesia, where the creative industries in Indonesia have a major role in the country's economy and are one of the contributors to the country's foreign exchange. In Indonesia, the creative industry is often referred to as Micro Small Medium Enterprises (MSME's), which from year to year its existence has increased in number. This is because businesses in the MSME's sector are very promising even though the country is in the midst of a hurricane / economic crisis that has a gap, but it is believed that the creative industries (MSME's) are able to withstand such conditions.

MSME's can also be a buffer, especially for employment and socio-economic communities, so far the number of MSMEs in Yogyakarta up to the end of 2015 is 137,267, which continues to experience economic growth of 10% annually.[1] According to the explanation in Act Number 20 Year 2008 concerning Micro, Small and Medium Enterprises, MSME's is a business activity that is able to expand employment and provide broad economic services to the community, and can play a role in the process of equity and increase in community income, encourage economic growth and play a role realizing national stability.

Creative industries have considerable potential to be developed and can become a mainstay of the national economy. Creative industry is an industry that produces a variety of products that are related to the process of manifesting an idea or ideas into intellectual property that has high economic value for the welfare and employment of the people and can increase the economic growth of a country. Creative industries are formulated as economic activities that include industries with creative human resources (HR) as the main assets to create economic added value. [2].

The rapid growth of MSME's in Yogyakarta must be balanced with the support of government agencies. The number of MSME's in Yogyakarta is unaware of the importance of protecting Intellectual Property Rights for their creative products. Protection of Intellectual Property Rights is the spearhead of the protection of MSME creative products where the main objective is to provide legal protection and guarantee the welfare of its people. Legal protection of MSME's creative products through a first to file system that is legal protection of creative products will be protected by the state for the party who is first applied for registration. The Intellectual Property Rights System is an individual right. Because of its nature which is the individual's rights, a person is free to submit an application or register his intellectual work or not register. [3] With legal protection efforts for MSME's creative products, in reality the community is still faced with bureaucratic challenges that are too complicated and also take a lot of time starting from licensing and fulfillment of registration requirements, lack of public education about IPR registration so that IPR protection is not considered important by the community, also the role of government does not accommodate the legal protection of the ability of MSME's practitioners in the Yogyakarta community, which can be later almost the target for IPR protection. The fact that the market potential of creative works at home and abroad is very large and has a tendency to continue to grow, further reinforcing the reason for the importance of protecting intellectual property rights (IPR) on creative economic products with the aim that the originator of creative ideas and innovations get economic benefits for his intellectual work.

In Indonesia, the institution tasked with providing services for filing applications for IPR registration is the Directorate General of Intellectual Property (DJKI) under the Ministry of Law and Human Rights of the Republic of Indonesia. So, it can be ascertained that the submission of IPR applications requires a relatively long time. In Yogyakarta, there is an institution that deals with IPR registration for MSME's, the Intellectual Property Service Center (BPKI), which is an institution under the Yogyakarta Provincial Industry and Trade Office. BPKI was formed with the Governor Regulation DIY Number 98 of 2018 concerning the Establishment, Organizational Structure, Duties, Functions and Work Procedures of the Technical Implementing Units at the Yogyakarta Special Industry and Trade Office.

In an effort to achieve the goal of IPR registration for MSME's it is needed cooperation of all parties both the business world, government and society. For this reason, government intervention is needed in encouraging the advancement of the creative industry through coaching related to IPR protection for MSME's creative products. In this context the problem examined in this paper is how the role of institutions in the framework of IPR registration for MSMEs in synergy to support innovative products in order to provide legal protection in Indonesia. Therefore this paper aims to review and explain the role of government institutions and their efforts to increase the number of IPR registrations for MSME's. This paper is the result of Applied Grant Research funded by the Ministry of Research, Technology and Higher Education Budget for 2019-2020.

2 Method

This research is a qualitative research using Empirical Juridical approach. Yogyakarta City is the location of this research. The method of data collection is through library research studies, documents, and field studies with resource persons at the Intellectual Property Management Center. The analytical method starts from data collection, data reduction, data presentation and drawing conclusions.

3. Results and Discussion

3.1. The Importance of Legal Protection for Intellectual Property Rights for MSME Creative Products

Intellectual Property Rights (IPR) registration is important because it does not rule out the possibility that this IPR can be a trigger to bring up new innovations for companies that can ultimately benefit the public as well as the company itself. IPR is also a source of material wealth for its owner because it has economic value. In industrial and trade activities, economic benefits can not only be enjoyed by the owner, but also by other parties.

Property Rights attached to the term IPR cannot be separated from the economic value of a property as part of material rights. The economic right is in the form of profits from the amount of money obtained due to the use of IPR itself, or because the use of IPR by other parties based on a license. The fact that there is economic value shows that IPR is one of the objects of trade [4]. In accordance with the times, the protection of the rights possessed by every human being requires an arrangement, including the case with IPR. [5]. In general, IPR is divided into two categories, namely Copyright and Industrial Property Rights. Industrial Property Rights are divided into 6 (six) types of IPR, namely: Patents, Trademarks and Geographical Indications, Industrial Designs, Layout Designs of Integrated Circuits, Trade Secrets, and Plant Variety Breeding.

IPR registration provides legal protection consequences. Intellectual works are born with sacrifices that make works that are economically valuable, especially with economic benefits that can be enjoyed, the inherent economic value grows the concept of wealth (intellectual property) of intellectual works for the business world, or those works can be said as an asset. Exclusive rights granted by law are an appropriate reward for investors and creators of IPR [6]. These lawful rights give an elite right to the designer or maker or their appointment to completely use their development / creation for a given time frame. It is very much settled that IP is assumed to be an essential job in the advanced economy [7]. Through these rewards, creative people are encouraged to continue to hone their intellectual abilities so they can be used to help improve human life. The main purpose of the IPR legal system is to ensure that the creative process continues by providing adequate legal protection and providing sanctions against those who use the creative process without permission.

The main objective of legal protection is the legal certainty of the people of Indonesia in order to guarantee the rights obtained as citizens and secure protection and welfare in accordance with the provisions in the legal regulations. According to Setiono, legal protection is an act or an effort to protect the community from arbitrary acts by the authorities that are not in accordance with the rule of law, to realize order and peace so as to enable humans to enjoy their dignity as human beings. [8]. Legal protection is an illustration of the operation of the legal function to realize legal objectives, namely justice, usefulness and legal certainty. Legal

protection is a protection given to legal subjects in accordance with the rule of law, both those that are preventive (preventive) and in the form of repressive (coercive), both written and unwritten in the context of enforcing the rule of law. The law itself in its form as a rule clearly can not do all that. Thus it becomes relevant to discuss the factors that influence law enforcement.

These factors according to Soerjono Soekanto are as follows: factors of the rule of law/ regulation itself, factors of law enforcement officers / facilities, factors of facilities or facilities, factors of society and cultural factors. [9]. This opinion is in line with that expressed by Lawrent Friedman who states that law enforcement is influenced by three things, namely legal substance, legal structure, legal culture. The factors mentioned above are interrelated, because it is the essence of law enforcement and is a benchmark of the effectiveness of law enforcement. Likewise, the protection of IPR can be qualified as a repressive and preventive legal effort. Preventive legal measures are seen in the regulation of IPR in a number of laws and regulations, while repressive legal measures are seen in the regulation of criminal acts in the provisions mentioned above.

In the Indonesian economy, Micro, Small and Medium Enterprises (MSME's) are the business groups that have the largest number and are proven to be resistant to various kinds of economic crisis shocks. The important role for MSME's in economic development in Indonesia needs to be taken into account, especially related to the creative and innovative products produced, besides that MSME's are able to create a wide range of employment opportunities and provide economic services to the wider community. Currently there is a shift in the world economic order that leads to free economic competition so that with this condition it needs special attention from the government related to the threat of counterfeiting products produced by MSME's as well as a decrease in creativity and innovation due to the imitation threat and counterfeiting of creative industry products . In addition, threats also come from the external side, namely in the face of intense competition with similar businesses. Products produced by MSME's are products that are born from intellectual abilities so they are products related to IPR. This is the reason why MSME's are very closely related to IPR, and in terms of legal protection is important in order to protect the products of creative industries.

Awareness of IPR by MSME's is still very low, which causes the potential for violations of IPR from products produced by MSME's so that the economic rights that MSME's should have over intellectual work are lost. So that it will undoubtedly cause a loss of the economic value of an SME product. [10]

3.2. The Role of the Intellectual Property Management Center in the Intellectual Property Rights Registration Service for Micro, Small and Medium Enterprises

The Intellectual Property Service Center is an institution that provides IPR services for SME's, where the Intellectual Property Service Center is an institution under the Yogyakarta Special Industry and Trade Office. The Intellectual Property Service Center was formed with the regulation of the Governor of DIY Number 98 of 2018 concerning the formation, organizational structure, tasks, functions and work procedures of the technical implementing units in the Department of Industry and Trade of the Special Region of Yogyakarta [11]. Intellectual Property Service Center has a vision "As a competent and professional public service unit in improving the competitiveness of MSME's" and Mission "The realization of an integrated service that is able to lift the image of business people with coaching, training, consultation, advocacy, facilitation of IPR"

The Intellectual Property Service Centre has a role in providing services to MSME's such as: Consultation on intellectual property rights; Facilitation of registration of intellectual property rights; Issuance of MSME's recommendations; Issuance of co-branding licenses; and advocacy and education. For now consultation by the Intellectual Property Service Center can be done directly by visiting the Intellectual Property Service Center office or through <https://disperindag.jogjaprovo.go.id/haki/> Online connected to whatsapp application, this is done to facilitate the community for the information needs of IPR registration.

Data on the number of IPR registrants in the Special Region of Yogyakarta are as follows:

Table 1. Submission of UKM IPR in DIY

No.	Regency/City	Amount
1.	Yogyakarta City	354
2.	Bantul Regency	205
3.	Sleman Regency	260
4.	Kulonprogo Regency	67
5.	Gunung Kidul Regency	44

In addition to general IPR registration services for MSMEs, the BPKI also facilitates registration of intellectual property which is one of the programs aimed at helping the public from IPR registration fees with a financing burden of Rp. 0 (free). All costs of facilitating intellectual property are charged to the Regional Expenditure Planning Budget and the Privileged Budget. The intellectual property that can be registered are trademarks, collective marks, geographical indications, patents, copyrights, industrial designs. In accordance with the mandate of Yogyakarta Special Region Regulation Number 9 Year 2017 Concerning Empowerment and Protection of Creative Industries, Cooperatives and Small Businesses the fifth part of article 28 which states "Local Government provides facilitation of intellectual property rights, halal certification, home industry food permits as referred to in Article 19 paragraph (2) letter d to individuals or the community in accordance with the provisions of the legislation. "

The following is the facilitation recap data carried out by the 2019 Intellectual Property Service Center:

Table 2. Facilitation Recap of 2019

No.	Types of Goods Facilitation Types	Types of Goods Facilitation Types
1.	Handycraft Clay Pottery Statue	Brand
2.	Juice drinks	Brand
3.	Processed rendang packaging	Brand
4.	Restaurant	Brand
5.	Processed chicken meat packaging	Brand
6.	Wet cakes and pastries	Brand
7.	puzzle	Brand
8.	Processed fish	Brand

9.	Pickled fruits and vegetables, meatball tofu	Brand
10.	Chocolate drink	Brand

In addition to general IPR registration services for MSME', the BPKI also facilitates registration of intellectual property which is one of the programs aimed at helping the public from IPR registration fees with a financing burden of Rp. 0 (free). All costs of facilitating intellectual property are charged to the Regional Expenditure Planning Budget and the Privileged Budget. The intellectual property that can be registered are trademarks, collective marks, geographical indications, patents, copyrights, industrial designs. In accordance with the mandate of Yogyakarta Special Region Regulation Number 9 Year 2017 Concerning Empowerment and Protection of Creative Industries, Cooperatives and Small Businesses the fifth part of article 28 which states "Local Government provides facilitation of intellectual property rights, halal certification, home industry food permits as referred to in Article 19 paragraph (2) letter d to individuals or the community in accordance with the provisions of the legislation. "

The following is the facilitation recap data carried out by the 2019 Intellectual Property Service Center:

Table 3. Facilitation Recap of 2019

No.	Type of <i>co branding</i>	Amount
1.	<i>Jogjamark</i>	171
2.	100%Jogja	8
3.	<i>Jogjatradition</i>	1

Advocacy and education on Intellectual Property Rights is carried out to provide an understanding of the protection of Intellectual Property to the people of the Special Region of Yogyakarta, advocacy and education is carried out by the Intellectual Property Service Center on a regular basis to MSME actors. In addition to the programs implemented above, the Intellectual Property Service Center also carries out public service publications, advertisements on radio, talk shows, and organizes IPR communication forums as an effort to inform the public of the importance of intellectual property protection.

To carry out its role and function, the Intellectual Property Service Center also conducts and fosters relations with various agencies and working partners, namely: Directorate General of Intellectual Property, Ministry of Law and Human Rights; Ministry of Industry; Ministry of Trade; DIY Regional Office of the Ministry of Law and Human Rights; Ministry of Research Technology and Higher Education; Creative Economy Agency; KPD Related (DIY & Regency / City); Indonesian Intellectual Property Center Association (SKII); and various Higher Education IPR Centers such as Gajahmada University, Indonesian Islamic University, Yogyakarta Veterans University, Sunan Kalijaga State Islamic University, Yogyakarta Muhammadiyah University, Yogyakarta Janabadra University, Yogyakarta "Amikom" STMIK, Yogyakarta Academy of Industry, Yogyakarta State University, and Ahmad Dahlan University.

4. Conclusion

MSME's is a promising creative industry in Indonesia. Many creative industries produce creative products that come from intellectual property that has a high economic value. Therefore

we need the protection of these creative products to prevent violations of ownership or utilization of the creative products.

BPKI is an institution that deals with intellectual property services for MSME's. The services are in the form of socialization, advocacy, and IPR education, IPR management assistance, facilitation of filing IPR applications and Jogja Co Branding facilitation for MSMEs. In addition to carrying out its functions and duties, BPKI also collaborates with various Ministries and Intellectual Property Centers in various universities. With the role of BPKI in the management and service of IPR at MSME's, it is expected that an increase in the number of IPR registrations for MSME's, due to increased awareness of IPR for MSME's.

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Construction of Policy on Women Workers Who are Breastfeeding in Relation with The Fulfillment of The Children's Rights

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Abstract. The Government of the Republic of Indonesia has issued policies to provide legal protection for women workers who are breastfeeding. The policies issued in the context of fulfilling the rights of women workers and the rights of children based on the philosophy that the fulfillment of the necessities of life is a human right and constitutional right for every Indonesian citizen. Based on this conception, the results of this study examine government policies in providing legal protection for women workers to breastfeed their children. This is a normative legal research with the three approaches, namely statute, concepts, and analysis. The data used are secondary data collected through a literature study, then analyzed qualitatively. The results of this study indicate that the policies of women workers who are breastfeeding in relation to the fulfillment of children's rights have not provided strong and firm legal protection for women workers who are breastfeeding and also for breastfed children.

Keywords: breastfeeding, children, policy, women, workers.

1. Introduction

The government has issued several policies related to the protection of women workers, including the patronage of women workers who are still breastfeeding their children. The 1945 Constitution of the RI (UUD NRI 1945) stipulates that children have the right to the continuance of life, growth, and development. Children also have the right to get protection from hardness and discrimination.[1] Based on these provisions, it has implied that the fulfillment of the necessities of life is the human right and constitutional right for every Indonesian citizen. Refer to the provision of the constitution, women workers/workers whose children still need to breast milk (ASI) should get the appropriate opportunity to breastfeed their children. As we know, ASI is the mayor intake for a newborn child (baby), and this ASI in the first six months is very urgent to intake for the baby. Babies are entitled to exclusive breastfeeding for six months from birth.[2] This policy is certainly not only the responsibility of certain parties but also the responsibility of all related elements.

It is suspected that at this time the policies set by the Government have not yet run optimally. It is also suspected that there are several factors that influence the working of the policy, either from the aspect of substance, structure, or culture. When the three aspects do not work or there is an imbalance in one aspect, then the objective of the policy is not fully achieved.

Based on the conditions, this article focuses on one aspect that influences the operation of the law, namely from the aspect of a substance by examining the construction of policy to fulfill the rights of women workers to breastfeed their children as a form of legal protection for women and also to realize the child's rights to obtain breast milk. We can examine *political will* in providing the fulfillment of rights for citizens, especially women workers and children. As for on research examining the formulation of problems focused on: How the construction of government policy on women workers to breastfeed her child in relationship with the fulfillment of child rights?

2. Research Method

Research on the construction of government policies on female workers to breastfeed their children in relation to the fulfillment of children's rights is a type of normative legal research. In essence, this type of research examines and analyzes the legal norms set by the authorized official for that.[4] The legal norm referred to here is the legislation relating to government policies towards breastfeeding female workers. There are three approaches used. The first approach used is the legislative approach. In addition to the statutory approach, a conceptual approach and analysis approach are also used.

This *statutory approach* is used to study, explore, and examine the regulations that govern women workers. The application of the *statutory approach* by considering the structure of the norm in the form of a hierarchy of laws and the existence of the norm. The point here is whether the norm is in a general, old or new law.[5] *Conceptual approach* is used to analyze research problems that arise from the existence of empty norms in a legal system. This empty norm may or may not be the norm of a regulation that can be applied to a legal event.[5] The *analytical approach* is used to analyze legal material, find out the meaning contained in the terms used in the regulations conceptually, as well as find out their application in practice.[6] This approach is used to analyze policies on breastfeeding women workers that are currently applied.

The specification of this research is analytical descriptive research, where the results obtained on a particular population are systematically, factually, and accurately described.[7] This research will describe the results of the construction of policies on women workers who are breastfeeding in relation to the fulfillment of children's rights.

The research data used are secondary data. These secondary data include primary legal material and secondary legal material. Primary legal material includes eight laws and regulations. The first is UUD NRI 1945. Furthermore, there are four laws namely the Human Rights Act (Law Number 49 of 1999), the Children Protection Act (Law Number 23 of 2002), the Manpower Act (Law Number 13 of 2003), and the Health Act (Law Number 39 of 2009). Besides the Act, there is also Government Regulation concerning the Provision of ASI Exclusive (Regulation Number 33 of 2012, Joint Regulation of the State Minister for Women's Empowerment, Minister of Manpower and Transmigration, and Minister of Health concerning Increased Provision of ASI During Working Time at Work Place (Number 48/MEN.PP/XII/2008, PER.27/MEN/XII/2008, and 1177/MENKES/PB/XII/2008), and Regulation of the Minister of Health of the Republic of Indonesia concerning Procedures for Providing Specific Facilities for Breastfeeding and/or Milking ASI (Regulation Number 15 of 2013).

The secondary legal material is taken from literature books related to the substance of this research. The collection of both legal materials was carried out through a literature study. The

collection of both legal materials was carried out through a literature study. The secondary data is then analyzed using qualitative analysis methods. This qualitative analysis is intended to present research results in the form of sentence descriptions. Or in other words, the results of this study are the finding which is not descriptions through statistical procedures or other shapes of calculation.

3. Research Results and Discussion

The Republic of Indonesia Law on Manpower provides a different understanding between workers and workers/laborers. Labor has a wider scope than workers/laborers. Someone said as labor when he can do work that produces goods and/or services. The goods and/or services are used to meet their own needs and for the needs of the community. The definition of labor is not the same as the understanding of workers/laborers. What is meant by workers/laborers is every person who works (to another person/party) by receiving wages/rewards in other forms. It was implied here that both labor and workers/laborers in it include men and women. Therefore, in providing legal protection for male and female workers according to the law there is no distinction.

With regard to the nature of women who experience menstruation, childbirth, miscarriage, and breastfeeding, women workers are given special protections. If she feels pain on the first and second days of menstruation, she is not required to work. Women workers who give birth are entitled to a break of one and a half months before and after childbirth. What if he has a miscarriage she has the right to rest one and a half months after she gave birth to his child. Women workers who experience miscarriage (biological birth) are entitled to a break of one and a half months after miscarriage or following the statement of the obstetrician or midwife. The Manpower Act also stipulates that women workers who are still breastfeeding their children should be given the appropriate opportunity to breastfeed their children if this is done during work time. The purpose of the opportunity ought here to be related to the length of time given to women workers to breastfeed their children by paying attention to the availability of a place, following the conditions, and capabilities of the company, which is regulated in legislation or a collective labor agreement (CLA).

Based on the focus of this study, then in fact this is very closely related to the protection of children. They have inherent human rights that must be upheld. The regulation of children's rights is contained in the UUD NRI 1945 and the UN Convention on the Rights of the Child. Child protection efforts need to be implemented as early as possible or in other words since they were born. Starting from the conception of child protection that is whole, complete, and comprehensive, in conducting coaching, developing, and protecting children, community participation is needed. Related to this, parents (father and mother) as part of the community have a very urgent role in protecting children, and of the initial formation of the attitude and behavior of children starting from their parents.

Examining the policy construction on women workers who are breastfeeding in relation with the fulfillment of children's rights, of course we cannot remove our eyes to see the current legal conditions (*ius constitutum*) and the conditions to be achieved in the future (*ius constituendum*) which regulates women workers who are breastfeeding in relation with the fulfillment of children's rights. Or in other words, review *das sein* and *das sollen*. Tracing the government policies in the past up to now, these policies can be grouped in terms of time. The policy period for women workers who are breastfeeding in relation to the fulfillment of

children's rights can be sorted out in the period after Indonesian Independence until 1965 (the Old Order era), from 1966 until 1998 (the New Order era), and from 1998 until now (the Reformation period).

During the old order period, policies on breastfeeding women workers in relation to the fulfillment of children's rights had not been explicitly stated in the specific legislation. Juridical footing that can be affirmed here is the basis of the state which is at the same time the state philosophy of Pancasila and UUD NRI 1945. The foundation of our country, *Pancasila*, has firmly provided basic foundation in protecting all citizens. The second precept and the fifth precept become the main foundation in the granting of this legal protection without ignoring the power of the other precepts, the first precept, the third precept, and the fourth precept. UUD NRI 1945 provides a basic arrangements for women workers. Women workers as part of Indonesian citizens receive constitutional protection as do the citizens in general.[1]

During the New Order era, legal protection for women workers who breastfeed their children was contained in the Human Rights Act, although it was not specific. This law provides that women get specific protection rights in the implementation of their job/profession. Protection is being direct at things that can endanger their safety and health about women's reproductive functions. Stressed also that female reproductive function, guaranteed, and protected by law.[8]

As for the reform period, the desire to fulfill the rights of breastfeeding women workers in relation with the fulfillment of children's rights is contained in the Child Protection Act[9], the Manpower Act[10], the Health Act, the Regulations of Government RI concerning The Provision of Exclusive ASI[11], the Joint Regulation of the Women's Empowerment Minister, the Manpower and Transmigration Minister, and the Health Minister regarding the Improvement in the Provision of ASI during Working Time at the Workplace[12], as well as the Regulation of the Health Minister concerning Procedures for Providing Specific Facilities for Breastfeeding and/or Expressing ASI.[13]

Of the three periods, the Government's *political will* in the reformation period seems to be stronger than in the previous two periods, although it cannot yet be said that there is a complete bias towards women workers who are breastfeeding. Broadly speaking, the policies related to women workers who are breastfeeding in relation with children protection can be seen in Tabel 1 below.

Table 1. Policies Against Women Workers Who Breastfeed Their Children in Relation with the Fulfillment of Children's Rights

No	Law Regulation	Article	Paragrap	Note
1	UUD NRI 1945	28D	(1)	This policy is a desire of the Indonesian people to build a democratic state that carries out justice and humanity.
		28G	(1)	
		28H	(1)	

2	The Human Rights Act	49	(2)	Provision of special protection for women's reproductive functions including health services related to menstruation, pregnancy, childbirth and providing opportunities for breastfeeding children.
		49	(3)	
3	The Manpower Act	6		Non-discriminative treatment without ignoring gender aspects
		83		Time opportunities for breastfeeding their babies and availability of places to breastfeed directly or indirectly (by milking)
4	The Health Act	128	(2)	Regulating is an appeal for support to breastfeeding mothers
		129	(1)	
		142	(1)	
5	Government Regulation concerning Provision of Exclusive ASI	30	(1)	Regulating is an appeal for support for the implementation of the Exclusive ASI Program
6	Regulation of the Health Minister concerning Procedures of the Provision of Specific Facilities for Breastfeeding and/or Blushing ASI	6	(1)	Regulating is an appeal for support for the provision of space for exclusive breastfeeding
		6	(2)	

7	Joint Regulation of the Women Empowerment Minister, Manpower and Transmigration Minister, and Health Minister concerning the Provision Improvement of ASI During Working Time at Work Place concerning the Provision Improvement of ASI During Working Time at Work Place	Article 2		Regulation is coordination, covering guidance, training, socialization, and monitoring.

Source: Secondary data after being processed, 2020

In relation with the efforts to provide protection for breastfeeding mothers, the *International Labor Organization (ILO)* has issued Convention No. 180 of 2000 concerning Maternity. Article 10 of ILO Convention No. 183 of 2000 regulates breastfeeding mothers with 2 (two) paragraphs of regulation. The clause in 2 (two) paragraphs stipulates that every woman worker is given the right to time to breastfeed her child. The time is taken by women workers to breastfeed their children must be calculated as work time and should be paid. The Government of the Republic of Indonesia has adopted this regulation but has not yet ratified the convention. The regulation is stated in the Manpower Act Article 83.

One aspect that cannot be ignored in policies on breastfeeding women workers in relation with the fulfillment of children's rights is the aspect of law enforcement. This aspect of law enforcement certainly cannot be released from the regulation of sanctions for not fulfilling the substance of the policies that have been determined.

Table 2. Provisions for Sanctions on Policies Against Breastfeeding Women in Relation with the Fulfillment of Children's Rights

No	Legal Regulation	Article	Paragraph	Penalty
1	UUD NRI 1945	28D	(1)	There is no penalty regulation
		28G	(1)	
		28H	(1)	
2	The Human Rights Act	49	(2)	There is no firm penalty regulation
3	The Manpower Act	6		Article 190 paragraph (2) which determines the existence of administrative sanctions

		83		There is no penalty regulation
4	The Health Act	128	(1)	There is no penalty regulation, but Article 200 stipulates that violation of Article 128 paragraph (2) is a form of imprisonment and fines.
		129	(1)	There is no penalty regulation
		142	(1)	
5	Government Regulation concerning Provision of Exclusive ASI	30	(1)	Does not regulate penalty
6	Regulation of the Health Minister concerning Procedures of the Provision of Specific Facilities for Breastfeeding and/or Blushing ASI	6	(1)	Does not regulate penalty
		6	(2)	
7	Joint Regulation of the Women Empowerment Minister, Manpower and Transmigration Minister, and Health Minister concerning the Provision Improvement of ASI During Working Time at Work Place	2		Does not regulate penalty

Source: Secondary data after being processed, 2020

From Table 2, we can observe the absence of strict and strong penalties on policies against breastfeeding women in relation to the fulfillment of children's rights set by the Government. Strict penalties are only stipulated in the Manpower Act Article 190 paragraph (2) which provides administrative penalties for violations of the provisions of Article 6 of the Manpower Act. Then the provisions of Article 200 of the Health Act stipulate that violation of Article 128 paragraph (2) is a form of imprisonment and fines. In addition to the two articles, there is no penalty related to the regulation of women workers who are breastfeeding.

Based on the policies that have been set by the government, the construction of policies for women workers who are breastfeeding in relation with the fulfillment of children's rights has not provided strong and strict legal protection for women workers who are breastfeeding and also breastfed children. The government still has not given much attention to women who

are breastfeeding, in the long run, this is tight related to the quality of children. From the philosophical aspect, the fulfillment of the principles of humanity and the principle of justice for breastfeeding women and breastfed children has not been well realized. From the juridical aspect, there are still weaknesses in the regulation of penalties, including horizontal and vertical harmonization among regulations. If we look at the sociological aspect, the concern of the elements in society towards women who are breastfeeding cannot be said to be in the high care category.

4. Conclusion

As explained in the discussion section and the results of the research, it can be concluded that policies on breastfeeding women workers in relation to the fulfillment of children's rights in Indonesia are outlined in several regulations. Since the independence of the Republic of Indonesia until now, the policy products that were rolled out during the reform period were more than in the previous periods. The political will of the government for women who are breastfeeding is also stronger even though it has not yet fully provided legal protection for women who are breastfeeding their children (especially women workers) and also breastfed children. The construction of policies for women workers who are breastfeeding in relation to the fulfillment of children's rights has not provided strong and strict legal protection for women workers who are breastfeeding and also breastfed children. Regulations in policies are for the most part appeals which are not followed by imposing penalties on those who do not implement the substance of the policies.

Based on these conditions, to realize an *ius constituendum* that provides benefits for all parties, concrete actions from all elements of the nation are needed so that breastfeeding women workers get the proper protection and at the same time provide protection against the fulfillment of children's rights to get breast milk which will be very beneficial in its growth. Therefore, the government should re-conceptualize policies related to the fulfillment of the rights of breastfeeding women workers that lead to and strengthen the realization of constructive, humanitarian, and implementative policies. Community support is also needed in the respective capacities of women, entrepreneurs, workers, non-governmental organizations, academics, and others.

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General Elections in Indonesia : Between Human Rights and Constitutional Rights

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Abstract. General elections are part of human rights. Also element of realizing the democratic ideals of the Indonesian people as mandated in the Opening of the 1945 Constitution of the Republic of Indonesia. This study aims to analyze the fundamental rights of citizens who have been guaranteed by the constitution or ordinary referred to as constitutional rights, especially in general elections. This study uses a doctrinal legal approach (normative). The primary legal material includes Law Number 12 of 2011 concerning the Establishment of Legislation, Law Number 39 of 1999 concerning Human Rights, Law Number 7 of 2017 concerning General Elections. Based on the analysis and discussion of the problem can be stated the results of this study, namely: First, the conception of state fulfillment of the constitutional rights of its citizens is the responsibility of the state, so that the neglect means denial of the constitution. Second, the relationship of political parties as a means of politics is the embodiment of fundamental rights based on the constitution, which are a part of human rights in general.

Keywords: Human right, constitutional rights, citizen, general election

1 Introduction

The constitution guarantees and secures people's constitutional rights protection. Article 28A to 28J of the 1945 Consitution provides protection, recognition, and respect towards the concept of human rights [1]. General election as political aspiration channel also functions to fulfil the constitutional rights [2].

The fundamental and repeating issue is that in several aspects the percentage of people's participation in the democratic general election is still low. The implementation of state protection towards the fulfilment of human rights and citizen's right (or the constitutional rights) is in the form of the general election [3]. Indonesia has just held a democratic general election at April 17, 2019 to chose five hundred seventy-seven members of the House of Representatives, one hundred and thirty-six members of the Regional Representative Council, and the members of Regional House of People's Representatives (both on provincial and regency/ municipality level) simultaneously throughout Indonesia for the period of 2019-2024. This general election is different from the previous because this time it co-occurred with the Indonesian Presidential election of 2019.

However, not all constitutional rights are identical to human rights [4]. Interest teams, non governmental organizations, major international organizations, and states all settle for that the "global human rights regime is a global law construct". whereas cultural, economic, structural,

political, and social aspects of rights are often acknowledged by the human rights community, the legal approach continues to be favored. If the human rights regime seems to fail in its purpose, the standard response is to clarify legal rules by drafting a lot of law of nations, instead of to question the efficaciousness of the dominant legal approach [5]. It can also be said that the UDHR made a significant contribution to international rights documents [6].

Unfortunately, the human rights definition does not cover some of the citizen's constitutional rights. For example, every citizen has the rights to become government employee or to hold a position in the governance; this right belongs to the citizen constitutional right but does not apply to those who are not the citizen of the state. Therefore, not all citizen's human rights are human rights; on the other hands, all human rights cover every citizen's rights.

Having been experiencing colonization by other countries has caused the Indonesian founding fathers realized the importance of anti-colonialism and anti-imperialism. Colonialism, imperialism and anti-imperialism are decisive in shaping some nation history for hundreds of years. Imperialism is outlined as the structural domination of peripheral countries and regions by core powers through completely different means that. Hence, anti-imperialism encompasses projects, actions and policies minded to revert domination and to create a 'balanced' relationship between countries and regions supported the promotion of sovereignty [7]. Indonesia has the Constitution Preamble as the fundamental norms (*Grundnorm*) that become the basis of a nation of laws (*rechtsstaat*) based on the recognition of human independence. Further, the constitution is an essential principle of human rights, let alone the state pledge for citizen protection which includes economic, social, and cultural rights as contained in the fourth paragraph.

Along with the statement that the country is participating in carrying out the world order based on independence, eternal peace, and social justice, the country also emphasizes its commitment towards universal humanity in its relation among nations. According to human rights theory, the rights are attached to and inseparable from men. Even though its presence is a reaction from threats towards humans, nevertheless, rights have emerged along with human existence.

A review of human rights has a universal area with a broader scope compared to constitutional rights. Constitutional rights have a domestic scope that prevails in positive laws within a country. The development of human rights on the international level has urged the encouragement on the recognition on the national level as constitutional rights.

Nevertheless, there is a dichotomy line in between these rights. There is a fundamental similarity between human rights and constitutional rights in terms of function, substance, and structure. The function is to limit the government authority and to protect the fundamental rights of every citizen [8]. Substantially, both rights accommodate the fundamental rights such as civil, political, economic, and social and cultural rights beside the protection towards the minority's rights and environment [9]. Besides that, both types of right has similar structure where there is a difference between derogable (limited fulfillment rights) and non-derogable rights (unlimited fulfillment rights). The embodiment of people's sovereignty in state life includes the people's representative or parliaments, and in the form of the constitution as the highest level of social agreement. Countries that embrace the parliament in the people's sovereignty resulted in the total adoption of parliament supremacy. The constitution in parliamentary countries is based on parliamentary law products (legislative act). While in the countries that embrace the constitution as the embodiment of people's sovereignty places the constitution as the highest law. As a consequence, the law that derives from the parliament cannot violate the constitution [10].

In the Indonesian system of representative democracy, the people's participation is reflected mainly through the general election to form the representative institution. This

representative mechanism is sufficient in guaranteeing the aspiration representation for the goodness of people. Therefore, in the representative system, the position and role of political parties are considered dominant.

Representative democracy is the paradigm we tend to go along with the shape of democracy that emerged within the eighteenth century at the time of the French and American revolutions. It is often outlined as a regime focused on the elections of elites who act as trustees of and create choices on behalf of the larger population. In theory, representation needn't involve election. In follow, however, elections became a part of the terribly definition of representative democracy, partially as a result of the theories developed to justify it crucially associate common sovereignty with democratic authorization, and democratic authorization, in turn, with consent expressed through the box [11].

Unfortunately, election as democracy representation is not always going well, some of them have constitutional issues. Australia as an example, the outcome of the 2016 double dissolution election was that the Coalition came to government with a reduced majority within the House of Representatives. Within the new House, 76 of the 150 elected members can begin their terms as members of the Coalition, that is adequate to present the re-elected Coalition government a slender working majority, whereas the Australian Labor Party (with 69 members) another time forms the opposition. As for the 76 freshly electoral senators, the Coalition government is confronted, like most federal governments since war II, with a Senate during which it doesn't have a transparent majority. Within the immediate aftermath of the double dissolution election, it's not entirely clear whether or not the changes to the Senate legal system achieved the specified hindrance of 'preference harvesting' by micro-parties. This uncertainty can stay till an in depth rigorous analysis of preference distribution is undertaken. However, a preliminary assessment is that these reforms were sure-fire in terms of dominant preference distributions therefore on guarantee votes were counted and distributed in a very manner that a lot of accurately mirrored 'the can of the people'. There are variety of constitutional problems that surround the new Parliament as elected at the 2016 election [12].

In *das sollen*, the government has a juridical warranty for carrying out the government system aiming at the people's prosperity. The state's warranty is in the form of seeking the fulfillment of constitutional rights for its citizens. The constitutional rights here include the principle rights and citizens' principle freedom concerning education, occupation, equality before the law, social economy, of speech, and living; these rights are all guaranteed by the constitution. In the constitution, these rights refer to human rights. The review attempt must be significant and simultaneously to consider the development of human lives that is getting more diverse. The Universal Declaration of Human Rights (UDHR) is the manifestation of the individual human's thought as a citizen and a part of the world inhabitant.

Further review of the constitutional rights warranty from the states indicates that this issue is significant in its norms implementation. In realizing the significant concept of constitutional rights in the general election and considering that Indonesia is a constitutional country, therefore, it is significant to have a study on 1) how Indonesia conduct law protection towards its citizens in relations with the general election, 2) what are Indonesia's preventive steps in providing law protection, 3) how sufficient is the law protection from the perspective of the Universal Declaration of Human Rights?

There are several previous studies on constitutional rights have been conducted. First, the Legal Protection of Disability in Fulfilling the Right to Education and Employment written by Jazim Hamidi. The study is about protection for people with disability in getting their right for education and occupation. This study discusses Indonesia's attempt as a country of law to

protect people with disabilities as a part of their constitutional rights which is regulated in Article 28 verse (2) of the Indonesia Constitution of 1945. This study also discusses the law protection in the attempt to fulfill the rights of education and occupation for people with disability. Further, this study also focusing on the policy formulation of affirmative action for people with disability to access jobs throughout Indonesia in specific.

The second, it is an article entitled the constitution's perspection on the empowerment and warranty of women's rights by Dedy Sumanto et.all. This article is about the citizens' constitutional rights, both men and women, which are assured by the state. Therefore, the empowerment and assurance must be in accordance with the commitment of getting equal opportunity to make choices by rejecting assumption and thoughts about women's inferiority and eliminating inequality based on gender that prevail in law.

The third study written by R. Herlambang Perdana Wiratraman entitled Constitutional Rights of Citizens after the amandement of 1945 Constitution: a concept, management and dynamic of implementation. This study discusses that the human rights context has a higher level in ordinary law norms; therefore, the normative framework and its constitutional rights' concept also focusing on human rights themselves.

Based on the previous studies, currently, there is not any study that is focusing on how Indonesia conceptualize the constitutional rights in their relationship with the general election, also what are the steps taken by the government to implement it.

2 Method

This study is conducted based on law products by using the normative law approach. The analysis of this study uses the normative analysis by reviewing the change in the 1945 Constitution as the result of the main amendment in relationship with the wider-spread recognition and assurance of human rights in the government system. This study aims at finding out how Indonesia provides law protection as the implementation of constitutional rights as assured by the Republic Indonesia's 1945 Constitution as a part of human rights quality enforcement. This study is descriptive. Which requires a statute approach in answering the statement of the problems [13]. According to the source, the data is in the form of secondary which includes legislation, books, articles, scientific journals, and dictionary. Nevertheless, to achieve a more comprehensive result, this study also uses primary, secondary, and tertiary law products. The primary law products in this study are Law number 12, 2011 on formation of Law Regulation, Law number 39, 1999 on Human Rights, and Law number 7, 2017 on General Election.

3 Result and Discussion

3.1 State and Citizens' Constitutional Rights

Indonesia has been struggling with human rights since the formulation of the 1945 Constitution by the Investigating Committee for Preparatory Work for Independence. The initial thoughts and debate on the formulation of the 1945 Constitution in the Investigating Committee for Preparatory Work for Independence, which refused to include a more dominant idea of human rights in the constitution. Nevertheless, due to the persistent of Mohammad Hatta and

Yamin, the constitution finally included several articles on human rights; the articles of which included the right to religious freedom, the right of assembly and association, the right of expression of opinion in the form of written and spoken, and several others. Further, the human rights are closely related and become the principle of the entire movement for the struggle for Indonesia's independence. The *primus inter pares* of human rights is the dignity of man has appeared dominantly during the formulation of the Universal Declaration of Human Rights in 1948 [14].

The English word dignity has the closest meaning to the Indonesian word, *martabat*. Dignity is attached to one's self. Therefore, all convention and/ or international covenant along with the protocols include all human rights which to protect, respect or level up human dignity. Humans' status dignity and inherent dignity are brought along in debates concerning human rights. Human rights are usually outlined as standards of treatment that human beings command by virtue of their inherent dignity [15].

As human rights are attached to one's self, it is different from the meaning of the citizen's rights. Nevertheless, since the 1945 Constitution includes the human rights; therefore, it has legally become the citizen's constitutional rights as well. However, not all constitutional rights are identical to human rights. Constitutional rights are rights defined and presented by constitutional law. A right could be an advanced of elements: legal liberties, claims, powers and immunities. a true right, if respected, provides dominion, freedom and management, over some core legal position upon the right-holder in any confrontation with one or additional second parties. The foremost basic constitutional rights are the power rights of the governing public officials and institutions, however they need constitutional liberty-rights, claim-rights and immunity-rights furthermore. Alternative constitutional rights are those of personal people and associations of private individual [16]. Some constitutional rights do not belong to the definition of human rights. For example, every citizen deserve the right to become a functionary in the governance. This right belongs to all citizens but does not apply to those of non-citizens. Therefore, not all citizen's rights belong to the human right; on the contrary, every human right is undoubtedly a part of citizen's rights" [17].

The concept of nation of law has developed in the initial part of 20th century. The development is marked by the emergence of modern welfare state. The idea of "The Welfare State", that appeared within the 1940's, is mostly accepted as a wider definition of the role of the State within the field of social and policy. Most scholars of the topic, whether on the right or left politically, take it to mean an additional positive and purposeful commitment by the government [18]. At first, it was the country that acted as the night guard and security enforcement, but gradually the function shifted to the fact that the state also took roles in the citizen's activity to ensure their prosperity. Almost all nations have their constitution which regulates not only the structure, function, and the country's division of functionary, but also the relationship among all the elements. The modern constitution does not limit its scope to the mentioned scope only. The modern constitution contains principle rights and freedom of people from the state and its functionary. The idea of nation of law is the thoughts extension on authority limitation as one of the principles of democratic-constitutionalism. The core of thought on the nation of law is the limitation of authority through juridical rule, namely regulation [19].

Human rights makes the state becomes its main subject. The definition of the state remains still and identical with various international law products, and have particular characteristics such as permanent population, and territory, governance and the ability to engage with other countries.

The country as the main subject of law is because it is the primary entity responsible for protecting, prevailing, and improving the human rights, especially for its citizen. Beforeit, citizen has become attention-grabbing topic and divided into some categories. Cosmopolitan

global citizenship is split into four categories: political global citizenship, that focuses on the dynamic relations between states and people or different polities; moral global citizenship, that focuses on ideas similar to human rights and empathy; economic global citizenship, that focuses on power relations, types of capital, the workforce, and international development; and cultural world citizenship, that emphasizes symbols and cultural structures that divide or unite members of various societies and considers the globalization of different cultural forms [20]. We compare it to the Korean constitution. the structure of the Constitution in terms of the two pillars of constitutionalism namely democracy and the protection of human rights. has also become a prominent issue in Korea [21].

The emerging issue is that the state violates the human rights, both direct violation of the citizens and other country's citizens, and indirect violation through economic and political policies national-wide and international-wide. Further impact results in the inability to fulfill, even to apply human rights for its citizens and non-citizens.

In the international law system, the common practice where a country is considered as a violation of human rights (also known as a gross violation of human rights) is under the following conditions. First, the state does not protect the human rights; instead, it attempts to eliminate its citizens' human rights, namely derogable rights. Second, if the state allows or even commits an international crime or a serious ones such as genocide, war crimes, and crimes against humanity, and what is worse, the state does not make any efforts to hold them accountable for it.

In Indonesia, after the amendment, the 1945 Constitution regulates more clearly about the state's obligations towards human rights and freedom of religious belief. Article 28I (4) of the 1945 Constitution and its amendment regulate that the state holds responsibility on the protection, promotion, enforcement, and fulfillment of human rights. This article becomes the commitment for Indonesia towards human rights and the origin of the government's responsibility.

Furthermore, article 28I (5) of the 1945 Constitution and its amendment declare its commitment to uphold and protect the human rights under the democratic principle of the state of the law; therefore, the implementation is guaranteed, regulated, and outlined in laws and regulation. Indonesia is a state of law which means the country runs based on law.

A further outline is in Law number 39, 1999. Article 71 of this Law confirms that the government is obliged and responsible for respecting, protecting, upholding, and improving the human rights stated in this law, other regulation, and international law on human rights affirmed by the Republic of Indonesia. Article 72 of Law number 39, 1999 then details the government's obligation and responsibility as regulated in Article 71 which includes the effective implementation steps in law, politic, social, culture, defense and security, and other field.

3.2 Political Parties in Fulfilling the Principle Rights of Constitution

The functions of political parties in Indonesia are firmly attached to a theory by Miriam Budiarjo, which states that political parties are a mean of political communication, socialization, recruitment, and conflict management [22]. According to *Yves Meny dan Andrew Knapp*, the functions of political parties include (i) mobilization and integration, (ii) as a mean of influence formation towards voting patterns, (iii) political recruitment facility, and (iv) as a means of elaborating policy choices.

Another opinion states that political parties are one of the embodiments of the freedom of association and requirement for the functioning of democracy. The freedom of association derives from the divine tendency of humans as social creature and to engage in an organization,

both formal and informal, which is necessary for humans. The societal tendency is an organizational life to fulfill the need and similar interests from people to achieve common goals based on similarity in thoughts and conscience [23].

The embodying of people's sovereignty in a democratic system must ensure full involvement of the people to plan, organize, implement, and supervise and make an evaluation in implementing the authority functions of a state. In Indonesia, the representative system as the form of modern democracy has three types, namely parliamentary democracy, power separation democracy, and democracy that is controlled directly by people through referendum and initiatives [24].

The impact of parliamentary democracy is the distance between people and government related to the implementation of the functions. If this practice is without any assurance of people's participation in the state as the warrant of people sovereignty, there will be pseudo-pragmatism of people sovereignty. The most proper step to counter this situation is by forming instruments to channel people and their representatives in parliament and public functionary. These instruments are essential, considering that democratic governance requires a mechanism and representative institution of the will of people. Else, the representative system may change into manipulation and coercion by the authority.

Following the people's sovereignty in the 1945 Constitution, people have the authority to determine the pattern and ways of governance. The sovereignty is under the Constitution regulation, which is by state institutions and by the people, several of which are through general election mechanism as in Article 22E of the 1945 Constitution. The general election also is a mechanism to channel the political infrastructure and suprastructure. The general election also is a transformation mechanism of the party's political aspiration in becoming the state's policy. In practice, in a country with a small number of inhabitants and small regions, the people's sovereignty is difficult to run effectively and thoroughly. Further, in a county with a large number of inhabitants and a vast region, it is almost impossible to accommodate people's opinion one by one to determine the governance. Moreover, in the modern society today, the development level is complex and dynamic, along with the unequal level of people's intelligence and a wide variety of specialization among work sectors.

The expansion of human rights warrant through articles in the 1945 Constitution is progress in building the foundation of the state of law to strengthen the contract between the people and the ruling government in the spirit of Indonesian constitutionalism. The spirit of Indonesian constitutionalism must put forward two directions of political building of constitutional law, namely, first, the limitation of power to avoid arbitrariness of authority, and secondly, the warrant of respect, protection, and fulfillment of human rights. The advance of articles on human rights in the constitution is a global tendency in various countries on the recognition of the universalities of human rights. Gradually the recognition will strengthen the state's capacity in encouraging civilization on human dignity [25].

For a significant meaning to the country, the constitution must have functions; therefore, there is gap between the written regulation in the 1945 Constitution and the practice in reality [26]. The first practice that put the sovereignty in the hand of people by the People's Consultative Assembly has now changed under the 1945 Constitution [27].

A more principle change through the amendment of the 1945 Constitution occurred by changing the state's of law conception become more open and exclude foreign term (*rechtsstaat*) or the rule of law. The division of judicial power into two, namely the Supreme Court (MA) and the Constitutional Court (MK), is now completed with the Judicial Commission (KY), whose duty is related to judicial power [28].

There are two versions of a dynamic developing state of law, namely formal and substantive. According to Tamaha in Hamdan Zoelva (2012), formal version of state of law refers to the method where the authority issues the laws, the clarity of the norms and temporal dimension of the enactment of the norms. Formal conception does not relate to good laws or bad law; instead, it emphasizes the formal dimension of laws. The formal version derives from rule by law conception, where laws become the acting instrument of the government. Further, it develops into formal legality, which means the law is the clear, prospective, and absolute norm, which eventually becomes democracy and legality in which the agreement that determines the highest legal content or law [29].

Every state of law confirms the above as norms and constitution. The highest law is the constitution itself; the constitution in Indonesia is in the form of philosophical values based on Pancasila and the 1945 Constitution [30]. The state of the law is a reflection of government action, which shows that the country is subject to the norms in the constitution [31].

The constitution is a set of systematic rules to regulate and arrange the structure and function of governmental institutions. The rules discuss the authority and its limitation of the institutions within the constitution. In the practice of state administration and rules of constitutional law, the focus of the study is only on the matter of the constitution, both in terms of the substantive meaning as legal provision and formal meaning as statutory formulation, as mentioned in articles of constitutional documentation.

The constitution is a juridical implementation that does not represent its cultural meaning [32]. Constitutionalism first emerged in the 18-19 centuries to affirm the American doctrine of the Supremacy of Constitution (written constitution) of the legislation product. Nevertheless, the idea and practice in the modern life have existed in poleis of Western Europe in the 11th and 12th centuries.

During the mentioned era, the law prevailed in local urban areas (state life was developing in the national space), a various constitution was partly in the written form which was known as chartulary, charta, or charter, and some other parts were in another form of written documents. The constitutional idea admitted the government authority such as in the form of tax collection, money-making, armies forming, peace agreement making, and war declaring to the other polis. On the other hand, the authority also limits the citizens' constitutional rights such as the people's freedom and also in terms of fair and just judicial process. The basic of constitutionalism as the one that emerged in Western Europe consists of two, first is the law concept is affected by the Anglo Saxon legal system, known as rule of the law, that states that the legal authority controls the state power; therefore, the law is controlling the politic, not vice versa. Second, the citizens' civil rights state that the constitution guarantees the citizens' freedom and limits the state power and its legitimation.

Furthermore, in the second half of the 20th century, the German Federal Constitutional Court provided guidance regarding constitutional rights. That the granting of constitutional rights does not mean that these rights override legislative rights [33]. The human rights will become the constitutional rights due to its higher status in general law norm hierarchy, especially in the constitution [34]. In general, the normative framework and constitutional rights conception are similar to human rights. In the context of the simultaneous general election last July 2019, there were opportunities and challenges because the legislative election started first before the presidential election [35]. The situation is contradictory, because on one side, we initiated the strengthening of the presidential system, yet the system requires only political parties and joint parties that met the quorum deserved to propose their candidate of the president and the vice president. Different from the previous presidential election in 2009 and 2014, only political parties that achieved at least 20% of votes that could propose their candidates. The

requirement indicates that the legislative and presidential election are not yet strengthening the presidential system. The aim is to fill in the seats at the existing legislative institutions. While the presidential election seems to stand alone apart from the legislative election edespite its purpose is to fulfill the performance requirement of the mentioned system. Therefore, the choice is to make a mix coalition that eventually threatens the electability of the parties themselves [36].

Nowdays, Turkey began to think about a presidential system. This is unique because they have to considered many systems and choose presidential as consideration. The presidential system is expected to provide an additional democratic government. Three main arguments are typically shown to prove the claim that the presidential system is more democratic. The direct, and widespread characteristics of the electoral system are believed to form democratic governance. It's wide accepted that direct elections are much better than the appointment of an executive branch by parliament. Second, from a responsibility perspective, a presidential system is believed to be better than parliamentary system. It is aforementioned that because the president includes a single power, it is easier for residents to spot who is responsible if something goes wrong. Third, the presidential system is better than parliamentary system. this implies that voters recognize who they are selection for, and who are going to be the executive when winning the election. Conversely, in a parliamentary system, changing into prime minister and therefore the method of forming a coalition is not continually predictable [37].

The presidential system in Indonesia, ideally, provides broad authority to the president to conduct his executive duties. Other authority can give a particular limitation to the president's power by the constitutional reasons [38]. Based on the last simultaneous general election, it requires solutive policies by optimizing the formulation of the general election without ignoring the presidential system strengthening. From the technical point of view, it needs to avoid more victims of KPPS officials who guarded the C1 ballots, which took a significant of time, which made the public become bored and initiated friction among society [39].

The turning point for the simultaneous general election in 2019 was the Constitutional Court Decision Number 14 / PUU-XI / 2013 concerning the Judicial Review of Law Number 42 Year 2008 concerning the Election of the President and Vice President [40]. Under certain conditions a consensus is needed which aims to create stability and justice between citizens and the state. so that it is not divided by religious or moral issues [41].

The legislative election system in general elections consists of three principle (1) a majoritarian system. The majoritarian system is a system that provides a single seat or single constituency in the electoral district, and depends on the acquisition of the most votes; (2) the proportional system, which is the opposite of the majoritarian system. Each electoral district is available with many seats with proportional party seat acquisition with the highest number of votes; and (3) the semi-proportional system is a combination of the two systems above. While on the presidential and vice-presidential election, there are two methods applied, namely popularly elected where the candidate with the highest votes wins, and electoral college, where the elected candidates are from the portion of the vote at provincial or regency/municipal of Regional House of People's Representative; the votes of which must exceed the 50% of minimum vote..In the popularly elected, the candidate with the highest vote wins the election, while on the electoral, only the candidate with minimum a 50% vote wins the election.

4 Conclusion

Review and study on constitution give fundamental principles of state life and administration, as well as the organizational structure of a particular country. Further, the constitutional values can represent a country's civilization level. Constitution has a significant role in the state life. The definition and content of the constitution have developed following the human civilization and the state's organization. According to the state's law principle, it is the law that regulates the state instead of humankind. Law is a hierarchical unit of a set of law norms with the constitution as its highest foundation, which means that a state of law wishes to have constitutional supremacy. As the highest implementation of the social agreement, the constitutional supremacy is the consequence of a state of law and the implementation of democracy itself. Therefore, the principles of constitutional regulation must become the foundation of laws that regulate the state administration's life and its citizens. Consequently, the fundamental change of the 1945 Constitution has a significant effect on the existing law system and regulation. The change on the 1945 Constitution has a particular implication in the type of regulation and its content. The change in the 1945 Constitution aims at the changing of law regulation system and adjustment of the existing regulations' content.

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Transactions of Human Organs According to Islamic Law, Positive Law and Health Law

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Abstract. Organ transplantation as an alternative in medicine has contributed to the increasing number of human organ transaction cases. This situation is a picture of a mismatch between law and reality in society. Therefore, the authors conducted research on this matter by observing Islamic law, positive law and health law. The method used is empirical legal research methods. The formulation of the problem namely; 1) What are the transactions of human organs in Islamic law, positive law, and health law? 2) What is the reality of the Indonesian people? With the results of the study; 1) All regulations in Indonesia forbid the existence of human organ transactions, whoever does it will be punished. 2) The high need for human organ transplants in health and the lack of donors, is one of the causes of high organ transactions. Meanwhile, other causes are economic pressure, lack of health facilities and special supervision provided to those who need donors. The conclusion of the research (suggestion and criticism) of the author is that in Indonesia in particular there must be institutions and special supervision for people who need and or want to donate their organs, socialization about health and the dangers of organ transactions, also real efforts to clarify the existing rules and economic improvement the community is very important to be considered and improved.

Keywords: Organ transactions, rules and reality.

1. Introduction

Every day society and technology in the world continues to develop rapidly, including the health sector. Various ways of treatment in the health sector also changed a lot. For example, in terms of saving lives from chronic or emergency conditions, transplantation is one of the most widely used treatment methods, this is happening in all countries including Indonesia [1]. Transplantation is one of the medical treatments that arises as a result of community unhealthy lifestyle, which then causes damage to the human organs. Transplantation defined as treatment by replacing old or damaged organs with new or healthier organs. Generally, patient who needs a transplant will wait for a donor, such as their relatives. Others also buy these organs from the black market because their lives are threatened and needs immediate donor.

The high demand for organs transplantation and tiny number of people who willing to donate their organs causes frequent cases of human organ transactions. The recipient continues to carry out the transplant despite the slight potential for success and recovery as well as requires a huge amount of money. For example, those who have diseases such as heart failure, kidney failure, eyes and so forth [2]. Including some ligament or nerve muscle tissue can be transplanted as well [3].

Patients who need urgent organ transplantation are usually ready to spent huge amount of money. When unfortunate people experience economic pressure, they prefer easy way to get money by donating their organs. In this case, the donor should be done voluntarily, whereas organ transactions carried out of compulsion. This should be banned because it does not meet the donor criteria set by the Indonesian Ulama Council (MUI).

The MUI helps countries by making rules, sanctions and criteria for prospective organ donors. In health ethics, doctors are also prohibited from serving organ transactions and there is a strict

selection for prospective donors. However, organ transactions can still occur due to donor's financial difficulties factor, causing concern for the government and health practitioners. In some cases, recipients and donors can meet in person and make transactions. There are also transactions under the guise of transplants, openly offered to hospitals and at the most extreme, announced in social media forums. This phenomenon reflects the country's poor economic situation, lack of attention to health services, unclear rules and a lack of community sensitivity to the law. If this situation continues, not only the donor will be harmed, but also the country. Because when the citizen receives no prosperity, then the country's development is also hampered. Previous research illustrate that there are factors that causing mismatches between current rules and situation in the society. This research is expected to provide a solution.

2. Methods

This study uses an empirical legal research method, which functions to study the law in real terms, as well as knowing how law works in society. Empirical legal research examines people in social life, so it can be categorized as sociological legal research. The research material was taken from applicable legal norms and community data from various groups, levels of education and regions in Indonesia. It is hoped that the research results will depict legal and reality discrepancies in society in clearly, detail, systematically and easily understood by various groups.

3. Research and Discussions

3.1. Transactions of Human Organs in Islamic Law, Positive Law, and Health Law.

Islam is a religion that pays special attention to health. Every believer is obliged to look after and care for their bodies. Islamic law also discusses various diseases and ways of healing (the cure) in verses of the Qur'an, Hadits and the Islamic book of Jurisprudence or *Fiqih*. Islam also prohibits actions that are *mudhorot* (dangerous) physically. Some verses of the Qur'an that explain it are:

وَأَنْفِقُوا فِي سَبِيلِ اللَّهِ وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ وَأَحْسِنُوا إِنَّ اللَّهَ يُحِبُّ الْمُحْسِنِينَ

QS. al Baqarah verse 195: Spend in the Way of Allah and do not cast yourselves into destruction with your own hands; do good, for Allah loves those who do good.

وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

QS. an Nisa verse 29: You shall not kill yourselves. Surely Allah is ever compassionate to you.

لَا ضَرَرَ وَلَا ضِرَارَ

Hadits Rasulullah Shallallahu 'alaihi wa sallam said:
Do not do anything that harms yourself or others.

Therefore, each individual must maintain their healthy body. In addition to the prohibition to do *mudhorot* (endanger) on himself, the faithful are also required to always cure his illness. A hadits says that all diseases have a cure. Narrated in a hadits shahih by Imam Bukhari.

مَا أُنْزِلَ اللَّهُ دَاءً إِلَّا أُنْزِلَ لَهُ شِفَاءٌ

Rasulullah Shallallahu 'alaihi wa sallam said: God does not send down a disease unless He also brings down the medicine. (HR. Bukhari)

Some of the verses and hadiths above explain the command to protect the body and health. This is contrary to the phenomenon of human organ transactions. It is not halal for a Muslim to endanger himself or others in words or deeds without the right reasons.

Although the MUI has issued a fatwa on organ transplants, there is a dispute among the *ulamas*. Some of them believe that human organs are not allowed to change or taken. It is considered to change God's creation and to persecute humans. While we are not allowed to persecute ourselves and others. While the rest assume that for the sake of greater interests and problems, it is okay to do, as long as it is done in a good and right manner without the intention of the transaction (buying and selling) [4]. Despite the law that has been established by the ulemas, many cases of organ theft result in murder and or illegal organ transactions. This crime is organized and difficult to trace by law.

To reduce transactions for organ transplants, Islamic law stipulates that donors can only be obtained from someone who is still alive or corpse. For alive donors, *syara* law allowing to donate one or more organs from his body sincerely, without pressure from anyone (*ikhlas*).

وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ

QS al Baqarah verse 179: People of understanding, there is life for you in retribution that you may guard yourselves against violating the Law.

Meanwhile, islamic theologian agreement is in accordance with Qs. Al-Maidah.

مَنْ أَجَلَ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَءِيلَ أَنَّهُ مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ
أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا
أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءَهُمْ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُمْ
بَعْدَ ذَلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ

Qs. Al-Maidah. verse 32: Therefore We ordained for the Children of Israel that he who slays a soul unless it be (in punishment) for murder or for spreading mischief on earth shall be as if he had slain all mankind; and he who saves a life shall be as if he had given life to all mankind. And indeed again and again did Our Messengers come to them with clear directives; yet many of them continued to commit excesses on earth.

Several *ijtihad* results of MUI concerning human body namely Fatwa Result of National Conference MUI number 6/Munas VI/MUI/2000 concerning Human Rights, Fatwa MUI year 2019 concerning Transplantation of Organs and/or Body Tissues from Donors to Death to Others, as well as Fatwa MUI year 2009 concerning Eye Banks and Other Organs. Transplantation is not allowed, except to help because the *mudhorot* is smaller and intention *tabarru'* is not for transaction (buying and selling). The human body is considered only as entrusted by Allah Subhanahu wa-ta'ala. Human are only given the mandate to keep the entrusted body. A person has no right to give his organs because they are not private property. If there are other people who need another person's organs, it may be given if it is not life-threatening.

The importance of helping in virtue and piety and the prohibition of helping in making sin and transgression are explained in Al-Qur'an and hadiths. Namely Al-Maidah verse 30 and 32 that state Allah forbid killing and whoever does it, he is among the losers. Ulema who refuse transplantation are due to the reason that changing or damaging without benefit is prohibited, but may done with the aim of greater benefit. People who are still alive are more entitled to use their limbs, so they are obliged to maintain their health. However, they have the right (*ikhtisas*) to give his organs voluntarily to others as long as it does not damage himself or cause a large *mudharat*.

Aside from corpse or someone who has died which their organs are no longer used. With good and correct provisions, donating the organs for others in need is permitted, as long as not for trading.

The donor recipient must have strong reasons to conduct transplantation, such as live threaten. Donor process must be done with a will witnessed by the heirs.

Indonesia is an independent country and based on law. Based on Pancasila and the 1945 Constitution, with the aim of creating a nation that is just, prosperous, safe and orderly [5]. Strive to provide the same legal guarantees, not distinguishing anyone when enforcing the law [6]. In order to achieve this goal, various types of businesses are carried out, one of which is health development [7]. Indonesia is called state law when it uses the rule of law when carrying out its affairs in order to create law order in society [8]. These statements have been illustrated in the opening of the 1945 Constitution.

Transactions of organs in Indonesia are considered illegal acts that are contrary to the ideals of the nation. Generally, those who carry out organ transactions are people who have conditions that are less able. Whether it's like a physical, psychological or economic problem. Organ transactions are a criminal offense. But it turns out that in the Criminal Code the regulation on organ transactions does not exist, so it is categorized in a special criminal group.

The Criminal Code does not regulate human organs transactions, but regulates life-threatening goods transaction. Article 204 of the Criminal Code contains criminal sanctions for anyone who trades goods that are known to endanger the life and/or health of others. Article 206 of the Criminal Code is supplemented by additional penalties and announcements of judge decisions [9]. While Article 64 paragraphs 1 and 2 of Law No. 36 of 2009 regulates the healing and recovery of diseases caused by organ transplants. This article also explains humanity in paragraph 3 as transaction of human organs is prohibited and its criminal sanctions described in article 192 [10].

Unlike the case with organ transplants. Organ transplantation defined as moving (graft) a tool or tissue of functioning and healthy human body to replace the recipient's organ that no longer functioning in terms of treatment or as an effort to rescue the recipient. Until now, transplantation is the best way to help patients who have organ damage [11]. Unfortunately, organ transplantation opens the opportunity to crime of selling illegal organs due to its high demand and urgency. This needs to be taken seriously considering human organs are not goods that can be traded freely because they can threaten the lives of others. When it happens on a large scale, it may impact on the unity of the Republic of Indonesia.

Unfortunately, in Criminal Code and Law No.36/2009 concerning Health has not yet explained the action described as the practice of human organ transactions. However, Law No.23/1992 concerning Health regulates the prohibition of human organs commercialization. Article 33 Paragraph (2) states that organ transplants and blood transfusions are done only for humanitarian purposes and are prohibited for commercial purposes. Violations of these articles are subject to prison sentence for 15 years maximum and a maximum fine of Rp. 300 million [12]. According to Law No. 36 of 2009 concerning Health Article 64 is explained as follows: (a) Healing of diseases can be done through body transplants and drug implants. (b) Organ transplants as referred to in paragraph (1) are carried out only for humanitarian purposes and are prohibited from being commercialized. (c) Organs trading are prohibited under any circumstances [13]. Article 69 regulate that every person who intentionally trades organs or body tissues under any circumstances, as referred to in Article 64 paragraph (3), is sentenced to a maximum of 10 years in prison and a maximum fine of Rp1,000,000,000.00 (one billion rupiah) [14]. Therefore, positive laws only permit human organ transplantation for humanitarian purposes and prohibited from being commercialized.

The practice of kidney organ trafficking for medical transplants is still common. It is difficult to get kidney organs from living donors without reward, so kidney organs are on high demand. There are no laws and regulations that protect recipients and providers of transplanted organs, in terms of receiving or giving rewards as appreciation. Fundamental problem occurs in its regulation of organ transplantation terms and mechanisms. On the one hand, it is permissible as long as for the treatment and recovery of Health and only for humanitarian purposes, but is prohibited for commercial purposes. Unfortunately, humanitarian and commercial goals are not clearly regulated. The method of obtaining organs and or tissues of the body is also not regulated. Ironically, the provisions for the sale and purchase of organs and tissues of the human body have the threat of criminal sanctions that are relatively heavy for perpetrators. But if traced, it happens because of compulsion.

Organ transplants should not be linked to organ transactions because they would violate the MUI fatwa and positive law. There are four legal terms of the agreement according to Article 1320 of the Civil Code namely; their agreement is binding, the ability to make an agreement, a certain thing, and a halal cause. If referring those terms, organs transaction is invalid or illegal, with greater *mudhorot* if the seller is still alive.

Frequently, donor recipients give money to the donors because of reciprocation. Lack of organ donors causing patients who need adequate health services to protect themselves find their own ways to solve their problems. Some experts say organs transactions occur because the lawsuits are rare and through untraced black-market channels. Patients should obtain legal protection. According to the 1945 Constitution, the state has duties to protect and maintain health, justice and welfare of the citizens.

Human organs transplantation was first done successfully on December 23rd 1954, this method has become increasingly popular. However, when organ transplantation needs increased, then problem has arisen like lack of donors. It opens up opportunities for people who want to make a profit by providing or even selling their own organs. Moreover, patients are willing to give extra cash to get the organs regardless of its origin. WHO data states that organs trafficking often involve black markets. The hospital has conducted rigorous donor screening, but there is no guarantee that donor recipients will not look for people who want to sell their organs under the guise of donors on the black market. Human organs, especially kidneys, become the main commodity of black-market sales [15].

Kartono, an initiator of the MKEKI and a former chairman of IDI, revealed that doctors have the opportunity to conduct organ transactions in the form of information on patient needs to the brokers. Doctor's involvement occurs indirectly so that it is difficult to trace. Penal sanctions do not threaten them as well, only ensnare the person making the transaction. In this case, doctor will be subject to ethical sanctions. Health Law No. 36 of 2009 rule it in limited to articles relating to criminal acts. Namely Article 64 paragraph 1-3, Article 65 paragraph 1-3, Article 66, 67 paragraph 1 and 2, and Article 192. Despite those regulations, when patient urgently needs the organs but hospital cannot help to obtain it as soon as possible, donor recipients or their family will look for people who willing to sell their organs. Thus, the opportunity for organs transaction once again is opened. The Regulations often hamper law enforcement officers in eradicating cases, because they only regulate normative matters. So that witnesses and evidence are difficult to obtain because the authorities experience obstacles outside the legal system, such as crime mode, subjects and object [16].

3.2. Reality of The Indonesian People.

Despite the religious law, positive law and several articles of health law already prohibited organs trafficking, health community cannot avoid its chance occurrence during organs transplantation. To gather public opinion about this phenomenon, 133 respondents gave their statements on the questionnaire. In order to representing the whole society equally, respondents gathered are varies from age 16 to 60 years old, have various fields of profession, level of education and social status. Therefore, this research able to accommodate all thoughts and foresee knowledge development regarding this issue in the society.

The majority of Indonesian as much as 96.2% have understood the importance of health. 3% of them still confused and 0.8% answered not knowing. 79.7% of the public know and have seen a news about human organs transaction, quarter of them (20.3%) answered they did not know. Only 79.9% people understood regulation relating human organ transactions in Indonesia. The remaining 21.1% did not know the rules. Regarding the ban, 57.9% said that they thought it might still be true, and 39.1% of respondents answered yes. Considering the highly needs of donors, only a few people who voluntarily willing to donate, the rest 3% assume there isn't.

Regarding trigger on illegal transactions of human organs, the reasons that are written based on most opinions respectively are;

1) Inadequate economy to survive makes people often choose ways to gain money. This factor caused by difficulty to get a job, the high number of layoffs and high debt.

2) Numerous and urgent needs from patients as well as difficulty to get donors that comply with existing regulations. The state also does not fully guarantee organ stock availability. So that people are willing to pay dearly to get it, either by buying on the black market or paying someone who wants to sell their organs. Unfortunately, people with lower income often take this shortcut.

3) Health factors. It is triggered community awareness who know their body condition or disabilities. So that they choose to donate their organs to those in needs and have longer life expectancy.

Around 30% of respondents thought that the government also had not yet made a specific regulation toward human organ transaction. All this time, the regulation on organ transactions are scattered in several articles of the existing law. This inefficiency put people to examine several laws to know one prohibition. In the existing articles, it has not yet been explained regarding special regulatory body for transactions of human organs. There is also no specific institution that focuses on providing donors, other than the Eye Bank which provides legal donor eyes. That phenomenon creates public perception that it is okay to get illegal organs as long as the live is saved. The mislead public opinion become the main cause of human organ transactions.

General public as respondent assume that majority illegal organs seller are from the unfortunate and the buyers are the rich who needs donor. The black market and doctors are also suspected as the perpetrators in illegal organ transactions. In handling or preventing this case from happening, 63.9% of respondents thought the government had ran the regulations and carried out their duties properly. However, the remaining 36.1% believe that law enforcement officials had not yet applied the existing rules properly and correctly. Organ trafficking is a special organized crime so that it is difficult to completely eradicate unless the government creates specific rules. When experiencing organs trafficking, people tend to be afraid to report or are confused about where to report due to some reasons. Namely, lack of government socialization, lack of religious education and health, psychological health and the community and family environment.

Some countries create Organ Banks to overcome the problem of organ trafficking in their countries. Organ Bank is a special organization accompanied by a special supervisory team that accommodates and provides organ supplies. The organ bank functions as a legal dealer and supplier of organs. In the questionnaire, majority of respondents agreed with its holding in Indonesia to reduce organ trafficking. Both respondents who refused and agreed with Organ Bank are requesting good and honest regulation and supervision in management, so that it could benefit not only individuals but also the state.

4. Conclusion

Judging from all sides both Islamic law, positive law and health law concluded that, transactions of human organs are prohibited. Anyone who carries out or is related to human organ transactions, for whatever reason will be subject to severe sanctions. But there are no regulations that specifically regulate the actions of organ transactions, some existing rules are still in the form of articles scattered in several laws that are considered to be related and until now the regulation and supervision of human organ transactions has not been fully as expected. Because, both in the Criminal Code and Law No. 36 of 2009 concerning Health, there is no article that shows the characteristics of what and how are the characteristics of an action that is categorized in the transactions of human organs. In general, transactions of human organs in Indonesia are prohibited, unless done voluntarily. But in fact many patients have difficulty finding donors, and the country does not have enough stock. This causes many people to carry out organ transactions, either through the black market or meet directly with donors by promising some amount of money. This crime is the same as human trafficking, both are organized crime so it is difficult to catch the suspect or the person who committed the Act.

Meanwhile, when viewed in the reality and public opinion regarding this matter, there are still gaps in the rules made by the government. The suggestion and criticism from the author is that in Indonesia in particular there must be institutions and special supervision for people who need and or want to donate their organs, socialization about health and the dangers of organ transactions, also

real efforts to clarify the existing rules and economic improvement the community is very important to be considered and improved. so that even the poor will not easily sell their organs just for money.

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Strengthening the Highest Authority of People's Consultative Assembly Determined In The 1945 Constitution of The Republic of Indonesia In Order to Strengthen The Constitutional Check and Balances System

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Abstract. The People's Consultative Assembly is one of the representative institutions that functions to determine and revise the 1945 constitution as well as to the structure and to lay off the president (post amendment) of the 1945 constitution. Regarding with the authority of the People's Consultative Assembly, then the Check and Balances System is the requirement of the presence of balance within the government system. The research used is Normative Juridical Law. Normative law research is a literary research towards secondary data with the analysis used in this research is qualitative analysis. The research result shows the reason causing the needs of adjustment towards the arrangement, position and the authority of the People's Consultative Assembly into an institution representing the people with two chambers (bicameral). One of them is the need for Indonesia today to start applying a check and balance system in order to improve the constitutional lives and to encourage democratization. With the existence of two chambered people's representative institutions, it is expected that this institution would be able to run its legislative and control functions better.

Keywords: Authority of People's Consultative Assembly, 1945 constitution, Check and Balances System

1. Introduction

The position of People's Consultative Assembly (MPR)[1] on the transition to democracy must not be restored into the People's Legislative Assembly which has the highest authority.[2] However, what must be strengthened is the authority of the People's Consultative Assembly as the state institution with the highest authority. Related to the authority of the MPR as a representative institution, the check and balances system is a condition for a balance in the government system.

The main idea in checks and balances is an effort to divide the existing power into branches of power aiming to prevent the dominance of a group.[3] If all three branches of power have their own checks to each other, the checks are used to balance the power. A branch of power that takes too much power is limited through the actions of another branch of power. Checks and balances are created to limit government power.

People's Consultative Assembly is one of the representative institutions that performs the function of establishing and amending the 1945 Constitution and inaugurating and dismissing the President (Post amendment) of the 1945 Constitution. Prior to the amendment, the function of the MPR was to establish and amend the Constitution and Guidelines for State Policy, appoint and dismiss the President, and hold the President accountable. Soetoprawiro states that MPR, based on the 1945 Constitution, was almost similar to the authority of the *Gouverneur Generaal* during the Dutch East Indies regulated through the *Indische Staatsregeling*. [4] Soekarno in a BPUPKI meeting on May 28, 1945 stated before the Head of State and Deputy Head of State that a Consultative Assembly was for all Indonesian people which is the highest power in the republic. The power held by the deliberations of all Indonesian people is occupied, not only by representatives of Indonesian regions, but also by representatives of all Indonesian groups or people, who are freely elected and independent by the people with the most votes. [5]

From the judicial point of view of state administration, there has been a change in the chamber system for the MPR to the Bicameral system, which has positioned the MPR as no longer the Supreme State Institution implementing the full sovereignty of the people. Referring to the aforementioned background, the Indonesian constitutional system is based on the new constitution and the upcoming practice of the state administration is limited to only three constitutional duties/powers of the MPR, namely: a) Amend and enact the Constitution; b) Inaugurate the President and/or Vice President; and c) Dismiss the President and Vice President in their tenure. (Vide Article 3 paragraph (1), (2) and (3) of the 1945 Constitution after Amendment). [6]

The current basic problem related to upholding the three powers mentioned above is whether the position of the MPR must be restored as the highest representative body of the people? Regarding this issue, Megawati Soekarnoputri stated that the People's Consultative Assembly must be restored to be the highest institution of the State because it is the only institution that holds the people's sovereignty; thus, it must indeed be the highest. The MPR has thus become the embodiment of all the people, especially when the MPR upholds and carries out the three authorities that do have the highest function compared to other institutions. Why does the MPR have to be the highest state institution? It is because the MPR can appoint the president and dismiss the president through impeachment. Besides, there are authorities in which the results are higher than other State institutions, namely: a) Stipulate MPR Decree as the implementation of the 1945 Constitution; and b) Stipulate and amend the 1945 Constitution.

2. Method

This study used a normative juridical law. Normative legal research is a library research using secondary data. [7] By conducting library research, initial data will be obtained to be analyzed and used as material in this paper. The sources of legal material consist of secondary data and primary data. The analysis used in this study is qualitative analysis.

3. Result and Discussion

3.1 The Authority of the MPR Stipulated in the 1945 Constitution After Amendment

According to Mahfud after the 1945 Constitution was changed, it was clear that democratic life was growing better. The change itself has been a huge progress for our democracy. In the past, if there was an idea to change the 1945 Constitution, it had been very taboo.[8]

The journey of the MPR experienced significant changes after the amendment of the 1945 Constitution began in the period 1999-2002. After the fourth amendment to the 1945 Constitution, fundamental change related to the structure and function of parliamentary legislation is that the MPR is no longer the highest state institution but a state institution,[9] while duties and authority of the MPR referring to amendment of the 1945 Constitution are as follows:[10]

- 1) Hold a meeting at least once in five years
- 2) Amend and enact the Constitution. A written change proposal was submitted by at least 1/3 of the total number of MPR Members and the decision was made with the approval of at least fifty percent plus one of all MPR members.
- 3) Inaugurating the President and Vice President based on the results of the Election in the plenary session of the MPR.
- 4) Decide the proposal of the DPR based on the decision of the Constitutional Court to dismiss the President and/or Vice President during their tenure after the President and/or Vice President are given the opportunity to submit an explanation in the plenary session of the MPR.[11]
- 5) Hold a hearing to decide upon the DPR's proposal no later than thirty days after receiving the proposal.
- 6) Inaugurate the Vice President to be President if the President dies, quits, is dismissed, or is unable to carry out his/her obligations within his/her tenure.
- 7) To elect a Vice President from two candidates nominated by the President, in the event of a Vice President's absence within the tenure no later than sixty days.
- 8) Elect the President and Vice President if both of them terminate their tenure simultaneously no later than thirty days. With such fundamental changes, there must have been a State institutional reconstruction, in this case the MPR. For this reason, the author would like to examine whether the change in the structure of the State institutions based on the amendment of the 1945 Constitution was in accordance with the Presidential system considering the position of state institutions being equal. Amendments to the Law or State Constitution[12] will have a great influence on a country's construction because the constitution[13] is something that is very important for every nation and state, both those who have long been independent and who have just gained their independence. Corpus Juris Scundum, volume 16, defines constitution as something that is very important for every nation and state, both long-term independence and who have just gained independence.

After the amendment of the 1945 Constitution, Article 1 paragraph (2) underwent a change, that is, the sovereignty is in the hands of the people and is carried out according to the Constitution. With this change, the MPR is no longer the highest state institution but equal to other state institutions. Its authority is only limited to changing and stipulating the Constitution, inaugurating the President and Vice President, and dismissing the President and/or Vice President during the tenure based on the Constitution. The composition of the MPR has also been amended. Article 2 paragraph (1) of the 1945 Constitution after the Amendment confirms that the MPR members consist of members of the DPR and DPD who are elected from the elections. This representative system is known as a bicameral system.

3.2. Strengthening the Highest Authority of the MPR Stipulated in the 1945 Constitution of the Republic of Indonesia in the Context of Strengthening the State Administration Check and Balances System

The Indonesian MPR Assessment Institute concludes the following opinions:[14]

- 1) Maintaining the principles and implementation of people's sovereignty and the position and authority of the People's Consultative Assembly after the amendment of the 1945 Constitution of the Republic of Indonesia.
 - a) The Indonesian state was formed on the basis of the will of the people to realize the ideals of the noble people as affirmed in the Vision and Mission of an independent Indonesia contained in the Preamble of the 1945 Constitution of the Republic of Indonesia. Therefore, all efforts to realize the Vision and Mission must not reduce or even continue to strengthen the people's sovereignty as referred to in Pancasila.
 - b) The principle of popular sovereignty is contained in Precepts IV of Pancasila which must be understood in a holistic wholeness with other precepts. Sila IV reads: Democracy guided by the inner wisdom in the unanimity arising out of deliberations among representatives. It means that the demands of the people as individuals and the community as a group are deliberated in the institutions of people's representatives which include aspects of the executive, legislative, judicial, and auditive. Therefore, it is not only fully implemented by a state institution in a hegemonic manner.
 - c) As understood, the realization of the Vision and Mission of an independent Indonesia as stipulated in the Preamble of the 1945 Constitution of the Republic of Indonesia is very dependent on the determination, enthusiasm, discipline and obedience of the state administrators and all Indonesian people in the Pancasila and the 1945 Constitution of the Republic of Indonesia. Therefore, all forms of irregularities that have occurred to this day need to be assessed whether it is true that there has been a irregularities in the formulation of the articles of the 1945 Constitution of the Republic of Indonesia or in manifestation through laws or also in the policies and procedures in all implementation practices of the nation.
 - d) Article 1 paragraph (2) emphasizes that people's sovereignty must always be kept in the hands of the people, only the implementation is regulated in the 1945 Constitution of the Republic of Indonesia. The provisions in Article 1 paragraph (2) also emphasize the supremacy of the constitution and not the supremacy of the MPR because the Indonesian state adheres to constitutional understanding. Constitutionalism places the 1945 Constitution of the Republic of Indonesia as the highest basic law. All state institutions, government agencies and social institutions as well as political institutions and all citizens must comply with the provisions stipulated in the 1945 Constitution of the Republic of Indonesia. The MPR has the authority to amend and enact the Constitution but must also submit to the provisions stipulated in the Constitution.
- 2) It maintains the principles and implementation of people's sovereignty and the position and authority of the MPR after the amendment to the 1945 Constitution of the Republic of Indonesia by adding the MPR's authority to determine the GBHN, with two kinds of formulations of authority.
 - a) Variety 1
Adding the MPR's authority to determine the GBHN through Amendments to the 1945 Constitution of the Republic of Indonesia.

- i. The current national condition shows that the structure and process of formulating national interests is fragmented according to the platforms and programs of the President, Governor, Regent, and Mayor, so that various conflicts and disharmony of national and regional development emerge. There have been many processes of omission of natural resource exploration, and various national security problems have arisen in the context of globalization which greatly threatens the survival of the nation and state of the Republic of Indonesia.
 - ii. Ideally, the National Development Planning System as per the GBHN model is a legal document for the organizers of national development based on popular sovereignty. This means that it is the people through their representatives in the MPR institution who make, establish, and monitor it. The state direction document or national development planning that has been prepared and established by the MPR is then mandated to the President to be implemented.
 - iii. It requires an amendment to the 1945 Constitution of the Republic of Indonesia to add MPR authority to determine the GBHN as the direction and strategy of national development.
 - b) Variety 2
Adding other provisions as a consequence of the MPR's authority to determine the GBHN.
 - i. MPR supervision function is needed for the implementation of the GBHN.
 - ii. In the framework of supervision, the MPR holds an Annual Session as a means for state institutions to submit performance reports.
 - iii. These provisions are part of the proposed Amendment to the 1945 Constitution of the Republic of Indonesia.
- 3) Restore the position and authority of the MPR as the full perpetrators of the people's sovereignty (the highest state institution).
- a) The founding fathers were aware that the Republic of Indonesia that was built must be a stable State. Therefore, it is necessary to design a Political and Government System that can guarantee the stability of the administration of the State that will advance Indonesia. The experience of the Indonesian people in developing themselves since the early 1970s by using a system of popular sovereignty carried out entirely by the People's Consultative Assembly has brought progress in the lives of the Indonesian people supported by strong political stability and security, so that the Indonesian nation has been taken into account in association the nations.
 - b) The entire construction of the implementation of people's sovereignty in the articles of the 1945 Constitution of the Republic of Indonesia prior to the changes rests on the formulation of Article 1 paragraph (2), i.e. sovereignty is in the hands of the people, and is carried out entirely by the People's Consultative Assembly. This provision is the embodiment of the principle of kinship in the life of the nation and state, in accordance with the mandate of the Preamble of the 1945 Constitution of the Republic of Indonesia.
 - c) Rearrangement of the position and authority of the MPR, including the institutional format of the DPD as a regional representation, and also the institutional format of the group delegates representing the groups.

- d) Restructuring the authority of other State Institutions, especially the Constitutional Court, which is related to the authority to conduct judicial review of the Law on the Constitution.
- e) The MPR supervision function is needed for the implementation of the GBHN through the MPR trial mechanism.
- f) Specifically, the MPR is authorized to:
 - i. Amend and enact the 1945 Constitution of the Republic of Indonesia.
 - ii. Set outlines rather than the direction of the state.
 - iii. Select and appoint the President and Vice President.
 - iv. Dismiss the President and/or Vice President of the 1945 Constitution of the Republic of Indonesia.

According to the theory of state administration law in Indonesia, the MPR is the only institution that has supremacy,[15] which contains two principles:

- 1) As a sovereign body that holds power under the law to determine everything that has been affirmed by the 1945 Constitution, it is called "legal power".
- 2) No rival authority, meaning that there is no rival authority both individuals and bodies that have the power to violate or override what has been decided by the MPR.

There are three reasons why adjustment is needed namely composition, position and power of the MPR to become a bicameral representative body of the people. One of them is the need for Indonesia today to start implementing a system of checks and balances in order to improve the life of the state and encourage democratization. With the existence of a representative body with two chambers, it is hoped that this institution will be able to perform its legislative and control functions better

4. Conclusion

The current number of job seekers (prospective workers) in Indonesia is not comparable with the number of companies seeking for employees. A lot of fresh graduates who explore the world of work and look for a job finally find a job which does not match their educational background. Thus, they have to accept the job with work experience from the very bottom level. On the other hand, a lot of companies make strict requirement for the position offered. It is related to the income of companies that are used to pay workers. It is considered that the government is not serious to overcome the problem of outsourcing. This leads the workers do not have legal certainty. In this case, the Government cannot implement the 3 (three) labor principles as stipulated by the ILO. Thus, when the work contract ends, it will be extended for years, even decades. It can be said that the Government does not reduce contract labor which is basically not in accordance with the 1945 Constitution. As a result, the outsourcing workers follow the "market flexibility" system meaning that they have no other choice to work in a particular company with an outsourcing system.

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The Authority of the Court Against the Decision of the Indonesian National Arbitration Board (BANI) in the Settlement of Business Disputes in the Perspective of Legal Certainty

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Abstract: Article 70 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (AAPS Law), opens the possibility for parties to submit requests to cancel an arbitration award. But the explanation of article 70 of the AAPS Law explains that the request for cancellation must be proven by a court ruling, this makes the existence of legal uncertainty so that it creates as if there is a new norm. This study wants to find out the legal position of the decision of the Indonesian National Arbitration Board (BANI) in resolving business disputes and examine the court's authority over the BANI's decision related to canceling the decision in the perspective of legal certainty. The method used in this study is normative (*doctrinal*) legal research sourced from secondary data. The results showed the Constitutional Court Decision No. No. 15 / PUU-XII / 2014 concerning the explanation of Article 70 of the AAPS Law has juridical implications for the cancellation of the arbitration award stipulated in Article 70 of the AAPS Law. Then the judge in examining an application for an annulment of arbitration does not require another court decision so that he can directly examine and assess the evidence presented in the court in the request to cancel the decision of BANI, thus providing more legal certainty.

Keywords: Business Dispute, Arbitration.

1. Introduction

Basically the parties involved in the business world want everything to go according to what has been planned. However, in practice sometimes what has been agreed between the two parties cannot be carried out because one of the parties has a different interpretation from what has been agreed as stated in the contract so that it can cause disputes [1]. Disputes that occur will lead to disputes between the parties in the implementation of the agreement because in addition to differences in perception of the agreement, but also because one of the parties default or commit an act against the law (*onrechtmatigedaad*).

As Cut Memi's opinion that in general there are several things that cause business disputes, first, because of different interpretations of the contents of the articles in the agreement that determine the rights and obligations of both parties; secondly, differences of opinion regarding how to implement contractual rights and obligations, so that this can also lead to a default [2]. If that happens, then disputes between the parties can be reached in two ways, namely through the court (*litigation*) or through the mechanism of dispute resolution outside the court (*non litigation*).

In the business world, dispute resolution in court (*litigation*) and dispute resolution outside the court (*non litigation*) is the last choice because in business activities disputes between business people are unprofitable, so this must be avoided. However, if a dispute occurs, settlement outside the court (non-litigation) is an alternative. The choice of resolving disputes outside the court (*non litigation*) becomes an alternative because settlement in court (*litigation*) goes through a long process because it takes time and effort. This is possible because a civil lawsuit through the court one of the parties can make an appeal, appeal and review (PK). It is different if the settlement is done outside the court through Arbitration because the settlement is final and binding.

Settlement of disputes outside the court is accommodated by the enactment of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, hereinafter referred to as the AAPS Law and also the formation of the Indonesian National Arbitration Board (BANI). The choice of dispute resolution through Arbitration is based on the wishes of the parties both agreed before the implementation of the agreement and the agreement after the dispute [3].

Definition of arbitration according to Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, (AAPS Law): "Arbitration is a way to settle a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute."

Bryan A. Garner in the Black's Law Dictionary defines arbitration "A method of dispute resolution involving one or more neutral third parties who are using. Agreed to the disputing parties and whose decision is binding [4].

In Indonesia, interest in resolving disputes through arbitration began to increase since the enactment of Law Number 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution (AAPS Law). This development is in line with globalization in the business sector which also requires quick dispute resolution, so that business people choose dispute resolution through Arbitration, because besides having advantages because it is fast, it also adheres to the win-win solution principle. Another advantage of the settlement through arbitration is confidential, because the trial process is closed and only the parties to the dispute may be present.

This was also stated by Joni Emirzon, that the method of settlement through arbitration is one of the alternative dispute resolution that provides many advantages, such as cheap and faster, maintained confidentiality, decisions that are final and binding. This is because the settlement through litigation (court) requires a long time so it is not profitable for business people if the dispute resolution must be resolved through litigation or in court [5].

Other definitions of arbitration as stated in the rules of procedure BANI (Indonesian National Arbitration Board): "Arbitration is to provide a fair and fast resolution in civil disputes arising concerning trade, industry, finance, both national and international in nature."

Riskin and Westbrook in his book, *Dispute Resolution and Lawyer*, American Casebook Series: "Arbitration is a form of adjudication in which neutral decision makers are not judges or officials of administrative institutions. There is no single, comprehensive definition of arbitration that accurately explains all arbitration systems [6].

However, the AAPS Law states that not all disputes can be resolved by arbitration. According to the AAPS Law Article 5 paragraph (1) which can be resolved through an arbitration institution is only a dispute in the field of trade and concerning rights which according to the laws and regulations are fully controlled by the party in dispute. Furthermore, in paragraph (2) it is determined that a dispute that cannot be resolved through an arbitration institution is a dispute which according to the laws and regulations cannot be held peacefully.

Therefore, the arbitration clause is an agreement or agreement as outlined by the parties in the agreement. The principles contained in the principle of *pacta sunt servanda* and Article 1338 of the Civil Code fully apply to the arbitration agreement as stipulated in the provisions of Article 3 of the AAPS Act which says that the District Court is not authorized to adjudicate disputes of parties who have been bound in an arbitration agreement.

Although Article 60 of the AAPS Act states that the arbitration award is final and has permanent legal force and is binding on the parties, nevertheless, Article 70 of the AAPS Law opens the possibility for the parties to submit a request for cancellation. So that in practice Arbitration decisions through BANI many cancellations are submitted to the court by one of the parties to the dispute. Based on the background of the problems that have been described, the authors would like to examine in depth in this study, namely: 1. What is the legal position of the decision of the Indonesian National Arbitration Board (BANI) in business disputes in Indonesia 2. How is the Court's authority over the BANI's decision related to the cancellation of the decision in perspective legal certainty.

2. Method

The method used in this research is normative legal research. Normative legal research is often referred to as doctrinal legal research. Terry Hutchinson, as quoted by Jhonny Ibrahim, in his description of normative legal research explains: "Doctrinal research is library based, focusing on reading and analysis of primary and secondary materials. The primary materials are the actual sources of law legislations and case law. The secondary materials include the commentary on the law found in the textbooks and legal journals. Often, reference sources such as legal encyclopedia, case digest and case citators are needed to index and access the primary sources [7]. Normative legal research is not familiar with field research because the material studied is legal material, so it can be said to be library based, focusing on reading and analysis of primary and secondary materials. In this study using research source collection techniques in the form of library research techniques or secondary data. Peter Mahmud Marzuki called it the statute approach, [8]. In this study called the normative juridical approach (doctrinal), an approach by examining all the laws and regulations related to legal issues. Analysis of research materials is an activity to solve and describe the

problems studied based on the materials that have been collected. The analysis technique in writing this law with the analysis of legal substance (approach of legal content analysis). If you use this type of research, then there are three gradations of normative analytical approaches that can be used, namely: 1. Legal exploration. 2. Legal review 3. Legal analysis [9]. The approach used in this research is the application of analytical normative legal substance (approach of legal content analysis). Based on this, the steps that can be taken are by legal review and legal analysis.

3. Results and Discussion

3.1. Legal Status of the Decision of the Indonesian National Arbitration Board (BANI) in Resolving Business Disputes

BANI has an Arbitrator consisting of experts in the field of business law. Decision makers in arbitration are called Arbitrators who have expertise in their fields. At present BANI has more than 100 arbitrators with backgrounds from various professions and experts in the business field, meaning different from the settlement in court because the judge does not always understand the business dispute cases disputed by parties who work in court.

BANI examines a case based on the provisions of Article 2 of the AAP Law which is based on a specific legal relationship that has entered into an arbitration agreement that expressly states that all disputes or dissent arising or that may arise from the legal relationship will be resolved by arbitration. The arbitration clause is the basis for a dispute decided by the Arbitration Institute, (BANI). The existence of an arbitration agreement clause nullifies the right of the parties to the agreement to submit the dispute to the District Court as referred to in article 3 of the AAPS Law.

Concerning the arbitration agreement or clause is the basis for dispute resolution through arbitration, so the principle that develops in the field of contract law, namely *pacta sunt servanda*, has an important meaning in arbitration related to the nature of the agreement or arbitration clause [10]. The principle of *pacta sunt servanda* contained in Article 1338 of the Civil Code explains "All agreements made in accordance with the law apply as the law for those who make it."

Thus the arbitration clause is absolutely binding for the parties who have agreed either before the dispute or after the dispute. The arbitration clause cannot be withdrawn secretly, or carried out unilaterally canceled / not recognized by one of the parties. However, it is possible to be withdrawn by agreement of the parties to the dispute, meaning that the arbitration clause does not apply if the parties expressly cancel.

The District Court must refuse and not interfere in resolving disputes that have been determined through arbitration, except in certain cases stipulated in this law as stipulated in article 11 of the AAPS Law "the parties to submit a dispute resolution or dissent included in the agreement to the District Court. " Court interference is only possible in certain matters such as in the case of execution or cancellation of the arbitral award must also be expressly regulated in state law [11].

The legal status of the BANI decision is absolute and the Court may not examine the arbitral award as affirmed in Article 62 paragraph (4) of the AAPS Law "The Head of the District Court does not examine the reasons or considerations of the Arbitration award." Accordingly, the

Chairperson of the District Court does not have the authority to review an arbitration award materially. However, judges in Indonesia are not always guided by the provisions of the AAPS Law, as research conducted by Cut Memi on BANI Decision Number 399 / V / ARB-BANI / 2011 dated November 1, 2011, was later canceled by the Central Jakarta District Court with Decision Number 528 / Pdt .G / ARB / 2011, on March 28, 2012.

The judge accepted the plaintiff's cancellation request, saying the plaintiff had never agreed to the provisions of the arbitration clause contained in both the Lump Sum Contract Conditions and the Lump Sum Contract Agreement. [12]. Then the judge decided to cancel the BANI ruling based on legal considerations that the arbitration award handed down based on an arbitration clause that was not agreed upon and not signed by one of the parties in this case BANI Decision Number 399 / V / ARB-BANI / 2011 dated November 1, 2011, was contradictory with the provisions of Article 4 paragraph (2) of the AAPS Law, which requires an arbitration agreement or clause to be contained in a document signed by the parties. Therefore it is legal to cancel an a quo arbitration award, even though the cancellation is not based on the reasons stated in Article 70 of the AAPS Law, but because according to the Assembly, Article 70 of the AAPS Law is only applied when all parties agree arbitration clause. According to judges Article 70 of the AAPS Act, it is only applicable when all parties agree with the arbitration clause.

Even though the parties to the dispute have been bound by the agreement in both the Lump Sum Contract Conditions and the Lump Sum Contract Agreement which contains the arbitration clause. However, by one of the parties denied and used as a reason to cancel the decision of BANI. Though it is clear that the contract made contains an arbitration clause so that the District Court should reject the request for a cancellation of the BANI decision because it is clear that the arbitration clause has entered the contract which means that the parties have agreed that if a dispute occurs then the settlement is settled through the arbitration institution.

So the reason for not having agreed an arbitration clause is an unacceptable reason. The arbitration clause included in the principal agreement of the parties is referred to as *the pactum de compromittendo* clause. Form *pactum de compromittendo* clause of the parties binding the agreement will settle disputes through an arbitration forum before a real dispute occurs, this is as regulated in article 7 of the AAPS Law.

There are two ways to make a *pactum de compromittendo* clause:

- a. By including the arbitration clause concerned in the main agreement. This method is the most common method.
- b. Pactum compromettindo clause is made separately in a separate deed.

With the provision of article 7 of the AAPS Law, the legal position of the BANI ruling should be final and binding, cancellation cannot be submitted to the District Court by one of the parties to the dispute and it should be rejected even though on the grounds that the arbitration clause included in the contract agreement has not been agreed to be resolved through the Institution Arbitration (BANI).

3.2. The Court's Authority Against Cancellation of BANI's Decision in Settling Business Disputes in Indonesia

As stated above, basically the arbitration award (BANI) is final and binding means that it is the final decision binding on the parties to the dispute so that no legal remedy can be made. However Article 70 of the AAPS Law opens the possibility that states that: against an arbitration award the parties may submit a request for cancellation if the decision is alleged to contain the following elements: a. Letters of documents submitted during an examination, after the verdict is handed down are acknowledged to be false or declared to be false; b. After the verdict is taken, found decisive documents, which are hidden by the opposing party; or c. The decision was taken from the results of a ruse carried out by one of the parties in the examination of the dispute.

But the explanation of article 70 of the AAPS Law also explains that the request for cancellation can only be submitted against an arbitration award that has been registered in court. The reasons for the cancellation request referred to in this article must be proven by a court decision. If the court states that the reasons are proven or not proven, then the court's decision can be used as a basis for consideration for the judge to grant or reject the petition. Therefore, if an arbitration award by one of the parties allegedly contains one of the elements specified in Article 70 of the AAPS Law, a request for cancellation can be submitted to the District Court. The request for cancellation of the arbitration award must be submitted in writing no later than 30 (thirty) days from the day of submission and registration of the arbitration award to the Registrar of the local District Court.

Explanation of Article 70 of the AAPS Act is considered to be contrary to the intent contained in Article 70 of the AAPS Act itself because it is as if the explanation of Article 70 of the AAPS Law arises a new norm, not explaining the body of Article 70 of the AAPS Law. The explanation of Article 70 of the Arbitration Law is burdensome and detrimental to the applicant, because the 30-day time limit stipulated in Article 71 of the Arbitration Law will be exceeded, because it is unlikely that a criminal case can be examined and decided within 30 days. Explanation of article 70 of the AAPS Law was then submitted by the Judicial Review to the Constitutional Court. (MK). The Petitioners of the Judicial Review reasoned that the explanation in Article 70 caused confusion and legal conflict [13].

This is considered not to provide legal certainty because it raises new legal rules that conflict with the provisions contained in Article 70 of the Arbitration Law itself. With the expiry of the allotted time, it is clear that the request for cancellation of the arbitration award cannot be submitted and if it is still submitted then the opportunity will be rejected by the Panel of Judges who examined the request. In its decision, the Constitutional Court stated that the Elucidation of Article 70 of the Arbitration Law is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force. The Constitutional Court's consideration that the explanation of article 70 of the AAPS Law is not legal and just. As a result of the legal ruling on the issuance of the Constitutional Court, in the submission of the cancellation of the BANI ruling in accordance with the article 70 of the AAPS Law, it does not have to be proven first through a court ruling. Considering the revocation of article 70 of the AAPS Law which previously created new norms and multiple interpretations, article 70 of the AAPS Law is considered quite clear. Thus the Constitutional Court's decision can be used as a basis by the court in exercising its authority over the BANI Decision which is proposed for cancellation by one of the parties so as to provide legal certainty implications for BANI's decision.

4. Conclusions

The Legal Position of the Indonesian National Arbitration Board (BANI) in resolving business disputes is final and binding, as regulated in Article 60 of the AAPS Law. However, in practice, judges sometimes ignore the provisions of article 7 of the AAPS Law, so that if the parties have entered into an arbitration agreement, then the disputing parties have no reason to deny the arbitration clause in the contract that has been made and is used as a reason to submit the cancellation of BANI's decision, then the court should refuse if the submission of cancellation is not in accordance with the provisions stipulated in Article 70 of the AAPS Law.

However, in practice, the Court Judge accepted the reason for one of the parties to the dispute on the grounds that the arbitration clause included in the contract had not been agreed upon. Decision of the Constitutional Court No. No. 15 / PUU-XII / 2014 has juridical implications for the annulment of arbitration award stipulated in Article 70 of the AAPS Law. Then the judge in examining the application for cancellation of the arbitration does not require another court decision so that it can directly examine and assess the evidence presented in the court in deciding the case for the cancellation of the award.

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The Authority of Customary Village In Managing Tourism Objects

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Abstract. The development of tourism in Bali provides a great magnet for increasing sources of economic income, including customary village in Bali. The research type of normative research. Customary village have natural resources and customary, religious and cultural resources participate as active players in the tourism industry in Bali, especially in managing tourism objects. Customary law should also be interpreted to strengthen state law in regulating customary villages, so that the relationship between the two is a parallel relationship, or co-existence not a hierarchical relationship. The research result, arrangements for the management of tourism objects that originate from State law and customary law are forms of legal pluralism. Customary villages have authority in managing tourism objects based on legal pluralism. State law and customary law have given this authority. However, the negative effects of tourism must still get attention, must be able to distinguish between the sacred and profane.

Keywords: Authority, Customary Village, Managing, Tourism Objects

1. Introduction

Customary village in Bali as a customary law community grows and develops for centuries and has original rights, traditional rights and original autonomy rights governing its own households based on the '*tri hita karana*' philosophy which is elaborated in the local wisdom of *sad kerthi*, imbued with the teachings of Hindu religion and cultural values and local wisdom living in Bali. The customary village in Bali has a very big role in the development of society, nation, and country so it needs to be protected, fostered, developed and empowered to realize the life of *krama* Bali that is sovereign politically, economically independent, and has a personality in culture in accordance with the *tri sakti* teachings Bung Karno the proclinator of independence of the Republic of Indonesia.

Customary village has a life order with a distinctive / unique high culture which is a world attraction, especially as a tourism destination, in the form of: customs, religion, traditions, arts and culture, and local wisdom. All of that is spirit, inner strength that provides endurance, adaptability and innovation in facing the dynamics of changing times.

The development of tourism in Bali provides a great magnet for increasing sources of economic income, including customary village in Bali. Customary village have natural resources and customary, religious and cultural resources participate as active players in the tourism industry in Bali, especially in managing tourism objects.

Based on the background description above, questions can be submitted including: 1) does the customary village in Bali have the authority to manage tourism objects in their area? And 2)

How is the model of the authority of customary villages in the management of tourism objects in Bali.

2. Method

This is a type of normative research. The data examined are secondary data using primary and secondary legal materials. The approach used is a conceptual approach, a statutory approach and a case approach. Data analyzed with description analysis.

3. Discussion

3.1 Authority of Customary Villages in Managing Tourism Objects

Argues that there is a difference between the understanding of authority and power. Authority is a formal power granted by legislation and power is defined as a certain part of authority [1]. Stated that authority is a mastery over a certain field of government, or certain groups of people in which there are authorities, and whereas authority is defined as the power granted to certain people or groups to carry out a public action [2].

Authority is closely related to power, legitimate power breeds an authority. Authority is a legitimate power because the rules set it. Authority can be exercised if it is regulated and in accordance with applicable regulations. This is in accordance with the principle of legality which aims to ensure legal certainty. The authority that is owned so that it is not carried out arbitrarily. Also related to the principle of accountability, who carries out their authority is responsible.

At least in theory there are 3 (three) ways to obtain authority [3], namely attribution, delegation and mandate. Attribution is the granting of governmental authority by lawmakers to these government organs. This means that the authority is inherent to the designated official for the position he is assigned to. This attribution refers to the original authority on the basis of the constitution or legislation. Delegation is the delegation of governmental authority from one government organ to another government organ. Or in other words there is a delegation of authority. So the responsibility / accountability lies with the recipient of the delegation / delegate [4]. A mandate occurs if an organ of the government allows its authority to be carried out by another organ on its behalf. In the mandate there is no transfer of responsibility, but the responsibility remains inherent in the mandator.

Based on the description above about the authority related to the authority of the customary village in managing tourism objects in Bali included in the authority that is attributed. The argument is that there are several legal rules starting from the level of the 1945 Constitution of the Republic of Indonesia to the level of regional regulations that give authority to customary villages in Bali to be able to manage tourism objects in their territory, in addition to that there is also original authority derived from the autonomy of their customary villages. The legal basis for the authority of traditional villages to manage tourism objects includes:

A. Constitutional Basis

The constitutional basis of customary village authority in managing tourism objects is contained in "Article 18 B paragraph (2) of the 1945 Constitution that the state recognizes and respects the customary law community units along with their traditional rights as long as they

are alive and in accordance with the development of the community and the principles of the unitary state of the Republic of Indonesia, which is regulated in law". The stipulation states that the unity of customary law communities (customary villages) along with their traditional rights as long as they are still alive get recognition and respect from the State in accordance with the principles of the unitary state of the Republic of Indonesia.

"Article 18B paragraph (2) of the 1945 Constitution stipulates that the state recognizes and respects the units of society customary law and traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State Republic of Indonesia, which is regulated in the Law". "This means that the existence of customary law community unit must still be recognized and given a guarantee of its survival in the Unitary State Republic of Indonesia". "Article 28I paragraph (3) of the Law Basic 1945 emphasizes, that: Cultural identity and community rights traditionally respected in harmony with the times and developments civilization".

Recognition and guarantee of the survival of the unit customary law communities and their traditional rights as wisdom Bali locality must be strengthened. This is in accordance with the provisions of Article 236 paragraph (4) of Law Number 23 Year 2014 concerning Government Regions, that local regulations can load local content according to the provisions of the legislation. This means that the region as a legal society unit that has autonomy has the authority to regulate and manage the Region in accordance with the aspirations and the interests of the people as long as they do not conflict with the order national law and public interest. In order to give wider space for the Region to organize and manage the lives of its citizens, the central government in forming policies must pay attention to local wisdom, and vice versa, when form regional policies both in the form of regional regulations as well as other policies should also pay attention to interests national. Thus a balance will be created between synergistic national interests and continue to pay attention to conditions, peculiarities, and local wisdom in the administration of the government whole. This shows clearly that even though it was realized in a way a unitary state needs homogeneity, but a unitary state The Republic of Indonesia continues to provide recognition and guarantees the existence of customary law community unit and rights the traditional.

In the Constitutional Court Decision, case decision 31/ PUU-V/ 2007 dated June 18, 2008 stated that a unit of customary law community could be said to be *de facto* still alive (actual existence) whether territorial, genealogical, or functional in nature. Contains elements of "(i) the existence of a community where the community has group feelings (in group feeling); (ii) customary government institutions; (iii) the presence of assets and/ or customary objects; and (iv) the presence of customary law norms. Particularly in territorial customary community unity there is also an element (v) of certain territories". It is also of the opinion that the unity of customary law communities and their traditional rights is seen in accordance with the development of the community if the customary law community unit:

1. "Its existence has been recognized based on laws that apply as a reflection of the development of values that are considered ideal in today's society, both laws that are general and sectoral in nature, such as agriculture, forestry, fisheries, etc. as well as in local regulation";
2. "The substance of these traditional rights is recognized and respected by members of the community concerned and the wider community, and does not conflict with human rights".

The customary law community unit that is determined to be a customary village carries out the function of government (local self-government), so there is an absolute requirement, namely the existence of a territory with clear boundaries, the existence of governance, and other

instruments, plus one of the other institutions in the life of the customary law community such as shared feelings, assets, and customary government institutions. So, based on the constitutional basis, customary villages in Bali have the authority to manage tourism objects as part of running their traditional rights based on applicable customary law.

B. Act of the Republic of Indonesia Number 10 of 2009 concerning Tourism

The provisions of Article 19 of the Tourism Act states in paragraph (1) that everyone has the right to have the opportunity to meet tourism needs, conduct tourism businesses, become tourism workers / laborers; and / or play a role in the process of tourism development. Whereas paragraph (2) states that every person and / or community in and around a tourism destination has priority rights: to be a worker / laborer; consignment; and / or management. The word everyone also includes traditional villages in Bali has the authority to manage tourism objects as part of running their traditional rights based on applicable customary law. Indigenous villages are also domiciled as legal subjects.

C. Act of the Republic of Indonesia Number 6 of 2014 concerning Villages

In Article 97 (1) The determination of a customary village must meet the following requirements: “a). the traditional law community unit and its traditional rights are actually still alive, both territorial, genealogical and functional in nature; b). customary law community unit and their traditional rights are seen in accordance with community development; and c). customary law community unit and their traditional rights in accordance with the principles of the Unitary State of the Republic of Indonesia”.

Next in Article 103 the authority of customary villages based on original rights includes: “a). governance arrangements and implementation based on original arrangement; b). regulation and management of customary or customary territories; c). preservation of the cultural and social values of the customary village; d). settlement of customary disputes based on customary law in force in the customary village in an area that is in harmony with the principles of human rights by prioritizing settlement by deliberation; e). the holding of a tribal peace court hearing in accordance with the provisions of the legislation; f). maintenance of peace and order of the customary village community based on customary law in force in the customary village; and g). the development of customary law life in accordance with the socio-cultural conditions of the customary village community”.

D. Government Regulation of the Republic of Indonesia Number 43 of 2014 concerning regulations for the Implementation of the Act of the Republic of Indonesia Number 6 of 2014 concerning Villages

Article 34 (1) states that village authority based on original rights consists of at least: “a). indigenous peoples' organization system; b). fostering community institutions; c). fostering institutions and customary law; d). Village cash land management; and e). development of the role of the village community”. Furthermore, Article 35 states that the exercise of authority based on original rights by customary villages includes at least: “a). structuring the organizational and institutional systems of indigenous peoples; b). customary law institutions; c). ownership of traditional rights; d). traditional village treasury land management; e). customary land management; f). agreement in the life of indigenous village communities; g). filling the position of the head of the customary village and the customary village apparatus; and h). term of office of customary village head”.

E. Government Regulation of the Republic of Indonesia Number 47 Year 2015 concerning Amendment to Government Regulation of the Republic of Indonesia Number 43 of 2014 concerning Regulations of Act Number 6 of 2014 concerning Villages

Article 34 paragraph (1) Village Authority based on the right of origin consists of at least: “a). indigenous peoples' organization system; b). fostering community institutions; c). fostering

institutions and customary law; d). Village cash land management; and e). development of the role of the village community”.

F. Bali Provincial Regulation Number 2 of 2012 concerning Cultural Tourism of Bali

Article 16, management of tourist attractions can be carried out by the Provincial government, customary village, traditional institutions, individuals and business entities. Furthermore, Article 25 customary village and / or other traditional institutions, can work together with the regional government to make efforts to prevent tourism activities that are not in accordance with the cultural tourism of Bali.

G. Bali Provincial Regulation Number 4 of 2019 concerning Customary Villages

In Bali Provincial Regulation Number 4 of 2019 concerning Customary Villages in Article 21 contains settings about customary village has the task of realizing *kasukretan* customary village which includes peace, prosperity, happiness, and peace of the *sakala* and noetic. Next in Article 22 contains settings about the task of customary village in realizing *sakukretan sakala* and *niskala* includes: “a). organize, manage, and protect the implementation of *parahyangan*, *pawongan*, and *palemahan* customary village; b). maintain and develop systems and implementation of customary law; c). organize *sabha kerta* and *kerta desa*; d). promote customs, religion, traditions, arts and culture, and local wisdom customary village community; e). carrying out activities in accordance with *sad kerthi's* values; f). organizes Hindu-based *pasraman* for development of identity, moral integrity, and quality of Balinese society; g). maintain the security of customary village; h). developing the economy of customary village; i). maintain the continuation of the status of land rights in *padruwen* customary village; j). maintain the sanctity, preservation, cleanliness and order of *palemahan* customary village; k). carry out coaching and empowering *krama* in improving environmental responsibility; l). carry out waste management in *wewidangan* customary village; m). carry out *panca yadnya* activities in accordance with the guidance of literature Hindu religion; n). carry out other activities in accordance with *awig-awig* and / or *dresta*; and o). carry out other tasks assigned by the government and regional government”.

The authority of customary village based on original rights regulated in Article 24 includes: “a). the establishment of *awig-awig*, *pararem*, and other traditional regulations; b). determination of the development plan of the customary village; c). stipulation of customary village revenue and expenditure budgets; d). implementation of government based on original arrangement; e). development and preservation of traditional, religious, cultural, artistic and cultural values and local wisdom; f). management of the *wewidangan* and *padruwen* lands of the customary village; g). management of *padruwen* customary village; h). the development of customary law life in accordance with Balinese principles *mawacara* and *mawacara* customary village; i). establishment of customary legal organization and system systems; j). participate in decision making and implementation of development in the *wewidangan* customary village; k). maintaining the peace and order of *krama* in the customary village; l). the holding of a tribal / customary village speech dialogue session civil nature; and m). settlement of customary / speech cases based on customary law”.

Article 25 paragraph (1) regulated states that the local authority on the scale of the customary village covers the management of: “a). shrines and sanctuaries; b). customary forest; c). water sources; d). *pasisi* and *sagara*; e). *padruwen* customary village / customary territories; f). agriculture, plantation, fisheries, and animal husbandry; g). food and handicraft industry of the people; h). customary village market; i). boat moorings; j). public baths; k). art, culture and *pasraman* studio; l). library and reading garden; m). travel destinations and / or attractions; n). *krama* settlement environment”.

Theoretically in the management of tourism objects by customary village, customary villages have authority originating from more than one source of law, both state and customary law, this is a portrait of legal pluralism. Legal pluralism is a fact of legal life in multicultural Indonesian society. Therefore, in order to improve the purpose, function and role of law in the unitary state of the Republic of Indonesia, in order to maintain, strengthen, strengthen the integration of all components of the nation's children, there is no reason for the ruling government and legislative body to immediately reorient and reforming the legal development paradigm that is legal centralism to the adoption of legal development that has the ideology of legal pluralism, responsive legal type, and progressive legal characteristics in the packaging of national law.

Legal pluralism will reduce the tension between universalism and localism so that social stability will be maintained [5]. Pluralism is a legal concept that contains more than one principle and substance of law and looks at situations with different circumstances of existing social facts [6]. States that legal pluralism is everywhere, both at the level of local law, national law, transnational law, and international law [7]. That is, both local and national level law. The study of legal pluralism opposes the statement that state law has the highest authority compared to the others. Legal pluralism emerged as a challenge to legal concepts centered on the state. He criticized the idea that state law is the only form of law used to regulate society [8]. In fact, legal pluralism can be a mediator in the occurrence of normative conflicts [9]. Legal pluralism can see changes in law that occur in society because of the different legal systems that govern that society [10]. Law in the study of legal pluralism puts more emphasis on contextually in the law. Legal pluralism is a normative assimilation that occurs due to various interacting laws [11].

The theory of legal pluralism basically emphasizes the importance of recognizing that non-state legal systems, such as customary villages or religious systems can work together with state systems. It has been used mainly by experts to produce descriptive and non-comparative work [12]. Laws in the community must be diverse so there needs to be a meeting point [13]. Legal pluralism is a prominent feature in many development contexts with negative and positive implications for the rule of law [14]. Legal pluralism is a fact that cannot be avoided [15]. Legal pluralism approach is not contrary to constitutional [16]. Legal pluralism is a step towards respecting the collective recognition of human rights [17]. In the legal pluralism approach, the relationship between different legal systems should lead to strengthening their respective legal systems.

The relationship between customary villages and the state, even though the current law on customary village does not mean that customary villages are under the state structure, but must be interpreted that customary villages are actually outside the state structure which has the role of strengthening the state's existence based on traditional rights. Owned by an customary village. Thus, customary village regulations, in this case customary law in Bali specifically referred to as *awig-awig* (customary law), customary villages are certainly not under the hierarchy of laws and regulations in force in Indonesia. Customary law should also be interpreted to strengthen state law in regulating customary villages, so that the relationship between the two is a parallel relationship, or co-existence not a hierarchical relationship. Arrangements for the management of tourism objects that originate from State law and customary law are forms of legal pluralism.

3.2 Tourism Object Management Models by Customary Villages in Various Places in Bali (Autonomous Model and Partnership Model)

Customary village is a customary law community unit in which indigenous peoples are included. Customary law communities are divided into territorial societies and *geneology*

societies [18]. Indigenous peoples are groups of people whose ancestors are beginners in that place, whose relationship with agrarian sources is governed by local customary law. In their consciousness, agrarian sources are not only an economic source, but also a cultural base. That is, if these sources disappear (or move control over to other groups), then the ones who disappear will not only be their economic power, but also cultural identity [19]. Regarding the traditional rights function stated that there were four functions relating to traditional rights in the communion of the customary community regarding the maintenance of harmony between the community and the universe, including: the function of government, the function of caring for spirits, the function of preserving religion, and the function of fostering customary law [20].

In the management of tourism objects by customary villages at least there is an outline of relations between traditional villages, local governments and other private parties. Customary villages can exercise their authority to manage tourist attractions independently, customary villages can work together with the local government, customary village can work together with the private sector or even have cooperation from three parties at the same time in managing tourism objects, both from the customary village itself, local government and private parties. Below are several tourism management models that involve customary villages.

A. Kutuh Customary Village Manages Pandawa Beach

The customary village of Kutuh manages Pandawa beach tourism objects, besides having 8 (eight) business units namely, LPD (Customary Village Credit Institution), Pandawa beach management, Gunung Payung tourism management, Paragliding attractions, cultural arts attractions, *Yadnya* device units, service goods and transportation units (Pandawa Mandiri Transportation) which is still in the form of a stub. Kutuh customary village income from existing business units reaches Rp 12.6 billion per year (2017). With the achievements currently achieved, the village manager is committed to optimizing the existing human resources (HR). The village prepares a number of scholarships for the community who continue their studies up to bachelor. Even this year it began to open scholarships for master. There is the decision of the Bendesa Kutuh customary villages as a result of *perarem* in the management of Pandawa beach. Synergy of BUMDA (company which is owned customary villages) and BUMDES (company which is owned villages), Kutuh customary village opportunities to be able to participate in managing the land owned by customary villages. There are two options given related to the use of land/ land belonging to the customary villages. First he gave the choice of capital participation or cooperation, where later businesses that stood on customary village land would be managed by BUMDES and customary villages in this case the obligation and the right to supervise. The second option is a contract system, where businesses that stand on customary village land are contracted by BUMDES. Surely the value of the contract will not be equated with the contract in force with investors or other entrepreneurs, because this involves the empowerment of the people of customary villages Kutuh itself.

B. Customary Village Attack Has BUMDA Turtle Breeding

The Turtle Conservation and Education Center (TCEC) and managed by a customary villages also functions as a tourist attraction. A single model, only managed by the customary villages of Serangan.

C. Seminyak Customary Village Managing Seminyak Beach

To explore the potential of villages in the Seminyak customary villages, especially in the economic field and maintain order, the Seminyak customary village customary villages formed an institution called BAPEDES (Village Development Agency), which was established in 2003. The length of the beach managed by the Seminyak customary villages is more or less 1.9 km. along the beach there are 186 beach traders. Beach traders offer various types of goods that are included in five categories, namely: (1) Umbrella traders or so-called longcer (2) Food and

beverage traders (3) Souvenir traders (4) Fabric and massage merchants and (5) Pedicure / hair tie plates.

D. Customary Village of Beraban Manages Tanah Lot Temple

The collaboration of government and community forces became a new force constructed in the form of a management body and operational management of Tanah Lot tourism attraction. The attraction of Tanah Lot tourism is managed by three components, namely the customary villages of Beraban, the private party and the local government of Tabanan regency with a profit sharing pattern. This agreement was finally stated in the Tanah Lot tourism management Agreement Letter No: 01 / HK / 2000 dated June 30, 2000. And the issuance of the Tabanan Regent Decree Number: 644 of 2000 concerning the Establishment of the Tanah Lot tourism object management agency. Until now, the Tanah Lot tourism object management cooperation agreement letter has been revised once, namely in 2002, which became the Tanah Lot tourism object management cooperation Agreement Letter Number: 01 / HK / 2002. Substantially, in this agreement, there was a change in the determination of operational costs. The Tanah Lot Tourism Attraction Operations Agency (BODTW) which manages the Tanah Lot tourism object in Tabanan, Bali, in 2017 managed to record an opinion of around Rp 147 billion.

E. Batuan Customary Village, Gianyar Regency

Every time they receive a tourist visit to Batuan Temple, Batuan customary villages, they do not collect any contribution fees. Only a donation box is prepared, so that tourists who visit can give a generous donation of *Punia*. There is no charge with tickets or the like, because what is used is a donation system for the maintenance of temples, donation money given by tourists, is used to repair temple, and tourist comfort, for example officers who cross guests, in addition to cleaning services, cleaning of toilets, security personnel such as *pecalang* and operational costs. As for the details, the officers who are involved every day are *pecalang* 30 people who work alternately, janitor and gardener 5 people, *upakara* temple officers 8 people, and *jero mangku* who are on duty every day 2 people. In addition, the traditional village has also prepared manners that provide recurs or shawls to tourists who lead to temples. Tourists who visit here when going to enter the temple must wear a shawl and a recipe that has been provided by the committee.

Another management model is the management of Tegenungan waterfall which is under the customary village, but managed by CV. Tegenungan Wahana Tirta. Through this mechanism the manager can set a final entrance ticket. The tickets enter Rp 15,000 / person and are deducted by a 2 percent tax to be deposited to the Gianyar Regency Government. For children under 5 years is free. While for domestic tourists Rp 10,000. If the person from Sukawati visits by showing their KTP, they are free of charge. " This ticket collection is also based on the results of a traditional village decision in the form of a *pararem*. In addition, this object is managed by CV. Tegenungan Wahana Tirta has paid taxes to the Gianyar Regency Government. There is a Basic Contract or Agreement as a legal basis.

F. Pecatu Customary Villages Managing the Tourism Objects

There are seven tourist attractions that are assets of the Pecatu customary villages, which are the outer regions of Uluwatu Temple, Suluban Beach, Padang Padang Beach, Labuhan Sait Beach, Bingin Beach, Nyang Nyang Beach and Dream Land Beach. Outside the Uluwatu Temple a direct management body has formed by the Pecatu customary villages. Pecatu customary villages has responsibilities, rights and obligations to maintain, maintain and manage existing beaches in an effort to preserve nature, customs, culture and religion and improve the welfare of its people. Indirect benefits that are felt by the community are where the results of the management of tourist attraction are used by the preacher of Pecatu customary villages to

finance various development programs both physical and non-physical as well as funding various religious ceremonial activities, so that citizens are not burdened with costs for development and religious ceremonies in the village of Pecatu customary villages. The pattern of the distribution of the results of retribution into the outer area of Uluwatu Temple amounting to 25% is deposited into the Badung Regency Regional treasury and 75% for the Pecatu customary villages as the manager. Revenue from the management of Uluwatu Temple's outer tourism attractions apart from tourist entrance fees also comes from rental of village government-owned merchant stalls, daily parking fees, parking fees on *piodalan*, special days levies and fees for *kecak* dance performances.

The management of attractions by traditional villages there are several problems that occur in practice in the field, including:

- a. The Issue of Customary Villages and Wild Charges in Tourism Objects (Country vs Customary Villages), Example of a case in Sanur, Tampaksiring
- b. Basic Legal Issues do not exist, if not regulated *awig-awig* or *perarem* may not run
- c. Issues of conflict between customary law and state law
- d. Share issues between customary villages and local government
- e. Issues of Financial Liability Reports

4. Conclusions

Tourism has an important role in the development of Bali, in addition to supporting the economy can also reduce unemployment in Bali. Customary villages have authority in managing tourism objects based on legal pluralism. State law and customary law have given this authority. However, the negative effects of tourism must still get attention, must be able to distinguish between the sacred and profane. The threat of capitalization to Balinese culture as a tourism commodity cannot be separated from the economic power that is an attraction. It must also be filtrated by a customary village with the authority it has in managing tourist objects that come into direct contact with tourists. Sustainable tourism based on customs and culture of Bali must from the beginning become a vision in the management of tourism objects by customary villages.

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Strengthening Law and Protection System of Geographical Indications in Maintaining the Value of a Local Product in the Globalization Era

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Abstract. Geographical indication products have advantages both in terms of quality, value, and characteristics of a product indicating the origin of an item that has been recognized by the Regulation through a registration mechanism. Utilization Protection geographical indications give the value of an item to be relatively high to be marketed. This has an impact on the marketing and counterfeiting systems of products marketed on the local and international markets without having to follow the procedures and mechanisms in the Geographical Indication protection requirements book. This study aims to strengthen the value of Geographical Indications products of counterfeiting and marketing mechanisms in maintaining the quality and value and quality of an item by using empirical Normative legal research methods. The discussion that in the current free-market era, the concept of agreement in TRIPs has given authority to the State to protect local products with the potential for geographical indications with intellectual property protection. In the field, there are still many similar local products that have the same name as local product names. Geographical Indications, but have different qualities, tastes, and characteristics. These marketing practices allow forgeries to have an impact on the level of value of a product.

Keywords: Legal Reinforcement, Marketing Systems, Geographic Indication Products.

1 Introduction

In the era of free trade, Geographical Indication Products receive special attention and treatment in The Related Aspects of Intellectual Property Rights, specifically an agreement to protect all kinds of products both raw products and products produced through a system of geographical indication protection or origin of goods.

The protection of geographical indications is regulated in several international agreements or conventions, including the Paris Convention, the Madrid Agreement, the Lisbon Agreement, and the TRIPs Agreement. The Agreement or Convention has similarities and differences with each other for example in the use of the term geographical indication but has a role in the development of the protection of geographical indications. International agreements or Conventions on geographical indications are useful both in terms of consumers and producers of a commodity product. This agreement avoids producers from being disadvantaged from artificial product commodities which of course have different characteristics and qualities to create a different reputation from the original product. While in terms of consumers can get authentic products with quality tested and

guaranteed. In Indonesia, protection of geographical indications contained in Law Number 20 the Year 2016 Regarding Geographical Marks and Indications and Government Regulation Number 51 the Year 2007 Regarding Geographical Indications.

In this study, there are three important elements in the protection of geographical indications [1] viz:

1.1 Legal Protection System

Counterfeiting is the basis for the legal protection of a geographical indication product so that the authenticity of a product can be guaranteed its authenticity. The TRIPs Agreement provides an opportunity for a country to provide legal guarantees and protection for products that give the country of origin the characteristic.

1.2 Characteristics of a Product

The characteristics that are maintained in a product both raw and processed products that have distinguishing features characterize the quality of similar products both in terms of geographical and human behavior giving special characteristics. Protection of geographical indications must be able to maintain a reputation both in terms of geography and the level of processing to keep the order of the product from extinction resulting in loss of protection of geographical indications.

1.3 Quality

Quality assurance of a product's geographical indications affects the economic value of a product. With the protection of geographical indications, it is expected that product quality can be maintained both from the empowerment system and its processing.[2]

Some countries, especially France, which are already known as producers of wines and spirits, and several other countries such as India as the country of origin of the "Basmati" rice variety, proposed a new concept of special protection for quality goods and have character or characteristics. Typical that is only found in the country, so the product outside the country has a very high economic value. However, the emergence of free trade and open business competition with a high technology system now has positive and negative impacts on the trade of a geographical indication product. With the legal protection of product geographical indications provide high value to the product marketing system.[3] The main reason for providing a geographical indication protection system is because in reality, both wine products from France and rice from Basmati varieties originating from India, are also grown and mass-produced in several other countries by using indications (signs) as if originating from his home country. For France, the act of producing a product that seems to originate from its place of origin is one mode of cheating categorized as unfair business competition (Unfair contest). Actions by other producers outside their home country are considered by France as a trade practice that is contrary to the Fairtrade principles. [4]

The Protection of geographical indications in Indonesia is considered not optimal because the majority of geographical indication products are agricultural and plantation products so that the use of geographical indication brands and Plant Varieties is difficult to distinguish among consumers.[5] Many entrepreneurs still market products by the refinement of geographical indication products because they see the type of registered varieties that are the same as the geographical indication products. We still find many local products such as the types of salak pondoh and sweet potato Cilembu but have different qualities and characteristics from the original protected products with the protection of

geographical indications that can affect the type of quality and value of a geographical indication product. Also, the case of Kopi Toraja registered in Japan as a trademark of Toarco Toraja No. Registration 75884722; as well as the Gayo Mountain Coffee trademark claim against Gayo Coffee with CTM Registration. 001242965 by a Dutch company, at a time when there will be a repeat of other Indonesian original products. [6]

In the example case above, consumers in other countries may not know that the product consumed is not authentic (geographical indication) from their home country. Likewise, what is considered to be no less important is that the act of producing goods as if they were originally from their original place has economically disadvantaged the company or the community that produces the product from which the product originated. From the substance aspect, the issue of product protection through the registration system of geographical indications is not only related to the concept of protection of Intellectual Property especially the protection of [7] Trademarks that refer to the TRIPs Agreement, but it also has to do with the concept of [8] protection of Germplasm (Biodiversity) as a genetic source and protection of Traditional Knowledge The community (The farmer indicates geography and traditional knowledge) as stipulated in the Rio Conventions, Cartagena Conventions and UPOV Conventions for Plant Varieties. The problem is how the geographical indication protection law can maintain and maintain the characteristics and quality of a geographical indication product from counterfeiting not only in the registration procedure but can guarantee authenticity to the level of entrepreneurs and consumers both locally and internationally to maintain and increase the economic value of a geographical indication product in increasing economic value and maintaining the original reputation of a product. The purpose of this study as a reference for the strengthening and legal protection system of Geographical Indications products as a basis for strengthening the economy of the local community in the area of origin of the geographical indication.

2 Research Method

The research method used is a descriptive qualitative research method, which is by trying to give an idea of the actual problem today based on the facts that appear. This research method opens up opportunities for a juridical analysis approach in finding justice in the protection of geographical indications.

2.1 Nature of Research

This research is normative juridical with the type of legal research that takes library data. In this research, library materials are basic research data classified as secondary data.

2.2 Data Types

This research is normative juridical, therefore using secondary data consisting of:

- 2.2.1 Primary data, This primary data includes laws governing intellectual property, specifically regarding geographical indications.
- 2.2.2 Secondary data, namely library materials that contain information about primary legal materials, consisting of literature on intellectual property, especially geographical indications, seminar materials,[9] newspapers and magazines, symposiums, and so on.

2.2.3 Tertiary data, that is supporting legal materials that guide primary and secondary legal materials between other forms of a legal dictionary.

2.3 Data Analysis Techniques Data analysis techniques are used with a qualitative approach. In a qualitative approach, no statistical parameters are used.

3. Discussion

3.1 Legal Protection of Geographical Indications [10]

Based on the theory of legal protection can be done in 2 (ways) namely preventive legal protection and repressive legal protection. Relating to legal protection through geographical indications as part of intellectual property has received international attention,[11] so various international treaties regulate it. International legal protection of geographical indications can be found in the Paris Convention for the Protection of Industrial Property in 1883 and the Madrid Agreement in 1891.[12] Both Agreements mention "Indication of Source as an indication referring to a country or a place in that country, as being the country or place of a geographical indication of a product.[13] " The origin indication is a sign that points to a country or a place in a particular country, where the goods were produced. Article 22 of the Geographical indications are for the purposes of this agreement, indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin. TRIPs defines geographical indications as a sign that identifies a territory of a member country, or region, or region within the territory as the origin of the goods, where the reputation, quality, and characteristics of the goods concerned are largely determined by geographical factors. Thus, the origin of a particular item that is attached to the reputation, characteristics, and quality of an item that is associated with a particular area is protected legally.

Trade-Related Aspects of Intellectual Property Geographical references including Trade in Counterfeit Goods / TRIPs [14] aim to:

- 3.1.1 Increase protection of Intellectual Property of traded products;
- 3.1.2 Guarantee the procedures for implementing Intellectual Property that does not hamper trading activities;
- 3.1.3 Formulating rules and disciplines regarding the implementation of protection of Intellectual Property;
- 3.1.4 Develop principles, rules, and mechanisms of international cooperation to deal with the trade in counterfeit goods or piracy of Intellectual Property.

Preventive protection arrangements at the national legal level relating to geographical indications are definitively regulated in the Trademark Law and Geographical Indications and Government Regulations on Geographical Indications. In Chapter VIII Article 53 paragraph (1) of the [15] Trademark Law and Geographical Indications[16] explicitly stated that the protection of geographical indications is given after the registration of geographical indications.[17] This means that the protection of the right to geographical indications[18] must be done through registration with the Directorate General of Intellectual Property.[19] Further, it is regulated in paragraph (3) that the Applicant who will register the protection of Geographical Indications is: 1) an institution representing the community in a certain geographical area that is commercializing an item and/or product in the form of (a)

natural resources, (b) handicraft goods hand, or (c) industrial products; 2) provincial or district/city government.[20]

According to Satjipto Raharjo, legal protection is to protect human rights that have been harmed by others and that protection is given to the public so that they can enjoy all the rights granted by law.[21] The law can function to realize protection that is not merely adaptive and flexible, but also predictive and anticipatory. Law is needed for those who are weak and not yet strong socially, economically, and politically to obtain social justice.[22]

3.2 Strengthening Characteristics, Quality, and Value of a Local Product Geographical Indications

The protection of geographical indications as part of intellectual property is inseparable from the consideration of the economic value inherent in a product. This is because the use of labels or marks Geographical indication embodies the quality of products or goods produced by a particular region or region. This is what will indirectly add economic value to the products or goods produced by the country or region. Moreover, Indonesia is rich in traditional knowledge, traditions, and culture. Indications must have distinctive characteristics that are indeed a distinguishing power/characteristic of products produced from other regions. Because it is indeed a geographical indication as one of the signs that indicate the origin of the product, its characteristics, and its reputation.

Characteristics of products that have been registered in the protection of geographical indications in general, several added values affect the competitiveness of the products concerned when entering the market, as follows:

- 3.2.1 International recognition of geographical indications as part of intellectual property means that the status of the holder of geographical indications is that of exclusive rights holders protected by law as is the case with other Intellectual Property objects;
- 3.2.2 The Geographical Indication is not given to a particular individual, but rather is given to a group of people so that the holder of this geographical indication right is shared or communal;
- 3.2.3 Unlike the protection of trademarks that are individualistic so that the economic benefits of the trademark are only enjoyed by the trademark owner, the concept of ownership in geographical indications is communal ownership, so that the economic benefits are automatically enjoyed by the community concerned which is much wider if compared to brands that are only owned individually;
- 3.2.4 Within a trademark, parties to geographical indications who wish to enjoy the economic benefits of a registered trademark can obtain through a business contract mechanism such as a licensing contract. Whereas ownership of geographical indications cannot be licensed so that economic benefits are only enjoyed by the community groups concerned;
- 3.2.5 Since economic rights are only owned by the holder of geographical indications, then from the trading strategy, of course, the community group will always maintain aspects of the quality (reputation) of the products it produces, so that maintaining the substantive conditions given the relevant geographical indications are consistently maintained, once geographical indications maintain consumer loyalty;

- 3.2.6 In terms of product marketing (marketing), with the limited holders of geographical indications, then automatically, they do not have competitors so they can sell their products above the prices of other similar products. Meanwhile, from the consumers themselves, of course, they do not mind paying more, because they realize that the quality of their products is certain to meet the standards;
- 3.2.7 In the area of production, centers can be used as a model of the tourism industry.

The urgency of this legal protection is also very important, given that Indonesia is a member of the WTO, which has ratified the GATT (including TRIPs). Ideally, it has been prepared in such a way that it is not just a legal instrument oriented to legal protection of intellectual property which has implications for the interests of the community. Further implications will certainly be very helpful in creating a country profile that truly protects local products.

The TRIPs Agreement also contains elements that need to be considered in terms of national laws and regulations regarding Intellectual Property, namely: a. Make new norms; b. Have a higher standard; c. Contains law enforcement provisions that obey. The signing of the TRIPs agreement for Indonesia in particular geographical indications has a high enough value because the ownership character of collective or communalistic geographical indications is in line with the cultural values of Indonesian people who value mutual ownership rather than private ownership. The existence of this characteristic of communal ownership shows the principles of intellectual property ownership in geographical indications namely the territorial principle, collective principle, communal principle, agreement principle, and mutual benefit, the principle of justice. Geographical indications have the potential to be developed to protect the products of indigenous peoples and local communities which are generally named not after individual names, but where the origin of a product will be protected by geographical indications.

At present, Indonesia is a country rich in potential geographical indication products such as Cilembu Sweet Potato, Gayo Coffee, Bali Kintamani Coffee, Lampung Black Pepper, Muntok White Pepper, Toraja Coffee, Malang Stone Apples, Malang Dinoyo Ceramics, Kasongan Pottery, and others. The natural potential is a gift for the Indonesian people for economic growth if the potential can be exploited and indicated as a trade asset. In this context, if the potential is included in the category of business or trade assets, the rule of law must be able to guarantee that the rights of those who exploit this potential can be protected. Especially if the potential has been traded internationally (export and import). This encourages protection not only in substance but acts of protection both from right holders and falsification of geographical indication products.

Some reasons for the lack of maximum legal protection for the protection of geographical indication products include the indication of the still weak legal protection of local products, as a condition of substance and enforcement and carrying out the protection of geographical indication products. With the change in protection, especially in Indonesia with Law No. 20 of 2016 concerning Brands and Geographical Indications, is adequately regulated from protection requirements to the process mechanism of maintaining the quality of a product's geographical indications. Having an effect on law enforcement based on the said legal protection is the supervision of the processing and marketing process of products that can provide

solutions to the public to be able to distinguish which forms are geographical indication products and plant variety products. Therefore, the relevant parties must immediately conduct an inventory of the problem, both for the short and long term. Of course, the sponsor must be from a government that ideally has a high sensitivity to the problems that arise in the community. The government's efforts are oriented towards the maximum encouragement to the public to register geographical indications of local products to obtain legal protection in a manner that reflects orderly management. Not only as stated. At the practical level, institutions that have the authority must be able to carry out their duties in managing IP, especially helping the community to bring geographical indications, by the ideal of legal protection to the community. The above course is of course in a sustainable and structured manner through the socialization of legislation to the community, both ordinary citizens and government officials are very important. The aim is that the rules established are known, understood, and implemented by the community. Basically that many local community products are taken by outsiders and commercialized for profit, therefore local products need to be protected and have great control over geographical indication products so that they can improve the economy of the local communities that produce these geographical indication products to prevent the taking of carried out by outsiders as well as falsification of geographical indication products that affect the marketing level of a geographical indication product. This can be done product registration for the welfare of the community in the area because it has economic value that is not small. These legal safeguards are very important values for the continued development of products. Without adequate legal protection, not only gives a negative meaning to legal certainty but will eliminate the creativity and innovation of the community in making and developing new products. This is where the role of government as a form of responsibility in carrying out the mandate for the welfare of the people can be achieved. A very important and new sector is the development of local community products.

From the aspect of international trade law, the existence of the TRIPs policy is very beneficial to the economic interests of developing countries like Indonesia. Indonesia has a diversity of natural resources (resources) and biological resources (germplasm) scattered in various regions, which have been protected with the protection of geographical indications. The influence of the name of a variety of a product that has been protected by geographical indication is an obstacle in law enforcement and economic improvement of geographical indication products so that it is expected that both consumers and producers will not use the name of a similar variety with Geographical Indication products in the marketing system both locally and internationally. It is hoped that the community will be able to distinguish products as plant varieties and geographical indication products. Because many varieties of products are traded in the traditional market which for consumers are considered as similar products with geographical indication products. This can be known from the origin, characteristics, and quality of the product geographical indications. One variety of salak fruit (*Salacca edulis*) such as Salak Pondoh in the form of fresh fruit and its processed products has become a characteristic of Turi District, Sleman Regency, Special Region of Yogyakarta. Based on the information that in Japan, consumers only want to receive salak pondoh originating from Sleman, Yogyakarta. Whereas in Indonesia this type of salak pondoh variety is also widely planted in various regions under the name Salak pondoh. For consumers, especially in

China, Singapore, or Japan, they certainly can distinguish between the "aroma" (Fragrance) and "taste" (flavor) that is typical of salak pondoh originating or grown in Sleman, when compared to other regions. With assistance from the Regional Government and after being formally requested by the Pondoh Salak Farmers Community of Sleman Regency, finally, this pondoh salak variety succeeded in obtaining a certificate of geographical indication in August 2013. This the geographical indication for the salak pondoh variety has become a "distinguishing sign" from salak pondoh varieties from other regions, even with salak varieties in general.

Geographical indications have positioned salak pondoh as a trade commodity whose quality is recognized so that it has added value to compete competitively. As long as the nature and characteristics of these products are maintained, they hope to contribute to the welfare of the community through various economic activities related to the salak commodity concerned.

Analysis of the discussion above that the implementation and application of law number 20 of 2016 concerning brands and geographical indications should provide a guarantee of protection regarding authenticity and quality that affect the characteristics and value of a product of geographical indications that are expected to be able to increase the economic value of the local communities producing regions. by taking into account the following matters:

3.2.1 Continual outreach to the people.

The community is expected to be able to distinguish the quality and value of geographical indication products from other superior products which are similar varieties. This continuous socialization must be further improved up to the consumer level.

3.2.2 Increased Control of the use of Products by related parties.

The government and the association of geographical indication product protection associations collaborate to supervise the application of the geographical indication product registration requirements book in the community to reduce the level of counterfeiting of products.

3.2.3 Use of labels by Geographical Indication Products.

Each geographical indication product that has received protection has labeling that has been approved in the implementation of product marketing as the consistency of product production and marketing. This labeling is expected to be used up to the marketing of geographical indication products even in the smallest products so that the public can know the original products of geographical indications.

3.2.4 Ongoing monitoring, evaluation, and coaching; legal protection.

The production of geographical indications is continuously maintained by the geographical indication protection requirements book.

3.2.5 Special facilitation for the development,

Processing and marketing of goods and/or Geographical Indication products by the local Government. The government is expected to provide special facilities in the marketing of geographical indication products in the sense that there is a separation between geographical indication products and other similar products in marketing. This familiarizes people with knowing more about the characteristics and quality of geographical indication products.

4. Conclusion

Based on TRIPs Agreement Article 22 regarding geographical indications which states that: geographical indications are signs that identify an area of a member country, or region or region within that region as the origin of the goods, where the reputation, quality, and characteristics of the goods concerned are largely determined by factors geographical. Thus, the origin of a particular item attached to the reputation, characteristics, and quality of an item with a certain area is legally protected. Strengthening the law in the protection of geographical indications is greatly influenced by the system and implementation of legal protection in the supervision, management, and marketing of geographical indication products. Also, Geographical indication products in Indonesia are still dominated by agricultural products that have been registered as plant varieties. In the local marketing of the community as consumers, it is very difficult to distinguish between product varieties of plants and products of geographical indication, this affects the level of local demand for the results of geographical indication products.

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Legal Relationship in Health Services

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Abstract. The doctor-patient relationship originally occurs as a therapeutic relationship, because of the existence of a medical transaction, then arise a legal relationship between both of two parties. Indeed, the doctor-patient relationship in this article is just within the context of legal relation. Using a normative juridical writing method, the result of this study aims the concept of therapeutic agreements that give rise to legal relation in health services. The doctor must always be responsible for carrying out his profession, and also understand the legal provisions that apply in the implementation of their profession, including the rights and obligations of doctors and patients.

Keywords: therapeutic relationship, medical transaction, legal relationship

1 Introduction

Health Law can be formulated as all legal regulations that are directly related to the maintenance of health and its application to the civil law, administrative law, and criminal law.¹ The influence of globalization changes view of life causes socio-culture alteration, and ways of thinking. In the health sector, the development of science and technology may increase in the critical thought on society. The doctor-patient relationship that had been paternalistic and based on trust (fiduciary relationship) was shifted to a partnership pattern (patient-center care).

In Indonesia, health law develops along with the dynamics of life, regulates more legal relationships in health services, and more specifically health law regulates health services among doctor, hospital, health center, and other health care workers with patients.² Because of it's a basic right that must be fulfilled, a health law is united in one regulation, namely the ratification of Act Number 23 of 1992 concerning Health, that was amended by Act Number 36 of 2009 concerning Health.

Health law in Indonesia is expected to be more flexible and able to follow the development of science and technology in the field of medicine. One of the objectives of the law, regulation, declaration or code of health ethics is to protect the interest of patients while developing the quality of the profession of doctors or health care workers.³ Harmony between the interest of patients and the interest of health care workers is one of the supports for the success of the

¹ Guwandi, J.: *Hukum Medik (Medical Law)*. Balai Penerbit FKUI, Jakarta (2010).

² Suherman, A.M.: *Aspek Hukum Dalam Ekonomi Global*. Ghalia Indonesia, Jakarta (2002).

³ Guwandi, J.: *Hukum Medik (Medical Law)*. Balai Penerbit FKUI, Jakarta (2010).

development of the health system. Therefore, health law which governing health services to the patient is closely related to the problems that will arise within the relationship between doctor and patient, and/or negligence and mistake are made by doctor, which result in law, whether it's civil or criminal law.

Indeed, the doctor-patient relationship in this article is just within the context of legal relation. Although the doctor-patient relationship originally occurs as a medical/therapeutic relationship, because of the existence of a medical transaction between both of them, then arises a legal relationship between both of two parties. Both of doctor and patient are expected to know this legal relationship, so that all parties may know their rights and obligations when the legal problems occur in the future.

2 Method

This article uses normative juridical writing method, by using statute approach and conceptual approach, by examining the laws and regulations related to the health law and conceptual understanding in doctrines and opinions of experts in the legal relationship in health services.

3 Result and Discussion

3.1 Therapeutic transactions

Health services in the term of health care means an effort to maintain and improve the less function organ, helping the weak or dangerous human condition, and who are always moving towards better, stronger, safer and more comfortable, towards perfection. These efforts are not only material, but also the immaterial activities which directed to personal service. The purpose of these health services are motivation of dedicated and prudent health care.⁴ Other aspects of health services are technical skills of health care providing.

Health services must appropriate and sustainable. Appropriate could have a subjective and relative meaning. Subjective describes a manner, for example, health services experience from someone can provide good, in accordance with his or her expectation. More than that, subjectivity must be seen and linked to the time, place, and circumstances. For example, special health services with sophisticated facilities and infrastructure in the United States are not necessarily considered appropriate by Indonesian people.

According to Jusuf Hanafiah and Amri Amir, in a medical or health profession work place, when the patients see the doctor to solve his or her health problems including preventive, curative, or rehabilitative services, then there have been a transaction and agreement between the two parties in the health sector⁵. According to the provisions of the law, such relations apply as law. It means that each party has rights and obligations that must be obeyed. In case, one party does not fulfill its obligations, the injured party can sue the other party.

Transaction means engagement and agreement that is correlation on both sides between two parties who agreed with one thing. Therapeutic means within medicinal treatment. It is a little bit different with therapy, which means treatment. Actually, the doctor-patient agreement is not just

⁴ Tengker, F.: Hak Pasien. Penerbit CV Mandar Maju, Bandung (2007).

⁵ Hanafiah, J. & Amir, A.: Etika Kedokteran dan Hukum Kesehatan. Penerbit Buku Kedokteran EGC, Jakarta (2012).

therapy, but more than that, including the diagnostic, promotion, preventive, curative, and rehabilitative services, so this agreement is called therapeutic transaction.

In the field of medication, doctors and the public must realize that it is not possible for doctors to guarantee that treatment efforts will always succeed as desired by the patient or patient's family. What a doctor can give is maximum effort. Jusuf Hanafiah and Amri Amir argued that the doctor-patient relationship in a civil law agreement was included in the engagement category based on maximum effort (*inspaningsverbintenis*). This is different from the engagement based on work results (*resultverbintenis*).⁶

The doctor-patient relationship that has a legal basis can be seen from Article 1313 of the Civil Code, *An agreement is an act by one or more people who commit themselves to one or more people*. In medication sector, there is a clear relationship or agreement between the patient side and the doctor side. The patient or patient's family in one side needs the intelligence and skills of the doctor to deal with himself or herself and his or her family's health problems, while on the other hand the doctors have that intelligence and skills that can provide the patient's recovery.⁷ Therefore, as a consequence of this agreement, an engagement between the two parties will occur. Both of them agree and promise to do something medication or health services. Finally, this agreement between the doctor and the patient will becomes an engagement between the two parties.

The regulation explains that engagement means a legal relationship between two or more people, which one party entitled to demand something from the other party, while the other party is obliged to fulfill these demands. From this provision, it can be seen that in health services, there is a relationship between patient or patient's family who ask for help the doctors, and by their expertise are able to meet the assistance requested by patient or patient's family. In this case, it is mention that the patient or patient's family demands an achievement from the doctor.

The meaning of achievements according to the law is:

1. Delivering the goods;
2. Do something; or
3. Did not commit an act. In the context of doctor-patient relationship, the main achievement is *doing an act*, both in the framework of promotional, preventive, curative, and rehabilitation.

In the certain cases, this achievement can also mean *not doing anything*. For example, when a doctor faced a patient suffering from abscess appendicitis, then the doctor decides to do not perform appendectomy at this stage, it is an achievement.

The legal requirement for a doctor-patient agreement is to fulfill the following conditions according to Article 1320 of the Civil Code:

1. Agreement to commit.

In term of the doctor-patient relationship, it is easily understood, because of when one party disagrees, there will be no therapeutic transaction. The patient agrees with the doctor he chooses, and the doctor is able to deal with the health problems of patient who come to see him.

2. Ability to make an agreement.

⁶ Hanafiah, J. & Amir, A.: *Etika Kedokteran dan Hukum Kesehatan*. Penerbit Buku Kedokteran EGC, Jakarta (2012).

⁷ Ide, A.: *Etika dan Hukum dalam Pelayanan Kesehatan*. Gracia Publicer, Yogyakarta (2012).

This skill must exist on both sides, those who provide and require services. On the part of the patient according to this provision requires competent people to make a statement, namely a sane adult. In different condition, there must be someone who escorts as a patient companion. Likewise the doctors and other health care workers side. Physicians must have skills required by patients, as a general practitioner or specialist according to their specialization. That must have proof, such as a certificate of competence recognized by government or the expert association.

3. A certain thing.

Certain thing in a doctor-patient agreement is a disease or condition that needs to be covered by a doctor. Something here does not mean just one thing; it can be more than one. The outpatient may submit complaints to be overcome from head to toe. However, the problem is the specific action such as surgery and other invasive measures. In Caesarean section, delivering baby through surgery accompanied with removing the patient's appendix with no pathological condition actually violates the agreement. In the same condition, the doctor found the patient's appendix is inflamed and needs to be removed immediately, it isn't appropriate if the Caesarean section is closed first, then the appendix surgery is done. The doctor can remove the pathological appendix, but after the patient has regained consciousness, it must be stated that the action is forced to be carried out. This is regulated in Minister of Health Regulation Number 290 of 2008 concerning Approval of Medical Measures (article 7, paragraph 2 and 3).

4. Halal causes.

The point is that something bound doesn't break the law. In this case, everything against the law is illegal abortion, cosmetic surgery to avoid the police arrest, or removing fingerprints, etc.

Therapeutic approval does not always run smoothly. Sometimes the one party does not want to continue the transaction. Generally, those who do not want to continue the transaction is the patient or the patient's family. For the outpatient, it is easy to do that. No longer visiting for re-examination is an act of breaking ties. However, if this happens on the patient being hospitalized, the doctor must be careful. Letting patient discharge from the hospital, even though all treatment costs have been paid is a rash action. Patients or their families are asked to sign a statement going *home at their own request* in the medical record document. Although it is sufficient, it would be better if the cancellation of the original agreement was done correctly, through official cancellation as well. In a special sheet stated that the doctor has explained the patient's condition and the actions needed, but the patient and family asked to go home with all risks outside the doctor's responsibility. Cancellation sheets like this will have stronger legal force.^{8,9}

On the other hand, the doctor can also decide to break the agreement with the patient, for example, in case of the doctor facing an uncooperative patient and unsure of his treatment efforts, the doctor can ask the patient to see another doctor. In this case, the doctor should include a final resume for the doctor who will continue treatment and care.

In the cancellation of therapeutic approval must pay attention to the provisions of Article 1338 of the Civil Code, which states that all agreements made legally apply as a law to the party

⁸ Isfandyarie A.: *Tanggung Jawab Hukum dan Sanksi bagi Dokter* Buku 1. Prestasi Pustaka Publisher, Jakarta (2006).

⁹ Kusumastuti, E.: *Transaksi Terepeutik dalam Upaya Pelayanan Medis di Rumah Sakit*. PT Citra Aditya Bakti, Bandung (2009).

who made it, and cannot be withdrawn other than by the agreement of both parties or for reasons stated sufficiently by law. Cancellation of this agreement does not always have to be written. In circumstances deemed sufficient by law, the agreement can be declared null and void. However, in canceling therapeutic consent, the doctor needs to be careful of risks that can arise in the future.

3.2 The principles in medical services as an implementation of therapeutic transaction

According to Komalawati, the underlying legal principle to implements the therapeutic transactions are:¹⁰

1. The principle of legality
Health care workers in charge of organizing health activities must have expertise in accordance with the field of expertise and/or an authority of the health worker concerned. It means that the medical services can only performed after fulfill the regulated requirement and permit in legislation, namely Act Number 29 of 2004 concerning Medical Practices.
2. The principle of balance
Depends on this principle, the health services must be carried out in a balanced manner between the individual and society interests, physical and mental health, material and spiritual properties. In medical services, it can also be interpreted as a balance between goal and facility, facility and result, risk and benefit, arising from undertaken medical efforts.
3. *On time* principles
In health services, this is a quite important principle, because due to negligence to provide right help when needed can harm the patient. This principle must be considered by doctors, because the law cannot provide any reason in terms of the safety of life of threatened patient due to the doctor's delay in handling him.
4. The principle of good faith
This principle is based on the ethical principle of doing well (beneficence) that must be applied in the implementation of doctor's obligation to the patient. As a professional, the application of this principle will be reflected in respect for the rights of patient and the implementation of medical practices that always adhere to professional standard. The obligation to do well benefit is not certainly without limits, because doing well benefit may not harm them.
5. The principle of honesty
Honesty is one of the important principles to be able to foster patient confident in doctors. Based on this principle of honesty, doctors are required to provide assistance in accordance with what patient needed, which is in accordance with professional standard. The available various facilities at a medical service institution are only carried out in accordance with the patient needed. This principle is the basis for the delivery of correct information, both in patient and doctor communication. Honesty in conveying information will be very helpful in the patient's recovery. The truth of this information is closely related to the right of every human being to know the truth.
6. The Principle of carefulness

¹⁰ Komalawati, D.V.: Peranan Informed Consent dalam Transaksi Terapeutik: Persetujuan dalam Hubungan Dokter dan Pasien, Suatu Tinjauan Yuridis. Penerbit Citra Aditya Bakti, Bandung (2002).

As a professional medical worker, the doctor's performance must be based on accuracy in carrying out their function and responsibilities, because of carelessness in a medical service can cause life threatened; then the doctor being exposed to a criminal prosecution. While carrying out the obligation of doctor, this principle is applied by completing professional standard and respecting the rights of patient, especially the rights of information and the right to give consent (informed consent); that is closely related to therapeutic transactions.¹¹ The doctor's negligence in carrying out his duties without adhering to professional standard and without making informed consent letter can be considered as an act that harms the patient, until the patient is entitled to compensation. Ethically, health services have the principle of no harm (non-maleficent), which is technically as the form of an obligation not to harm others. This non-harm principle is the *primum non-nocere* principles (importantly, not to harm).

7. The principle of openness

The effective and succeed medical services can only be achieved if there are openness and good cooperation between doctor and patient based on mutual trust.¹² This attitude is grown when openness communication is established between doctor and patient; the patient gets an explanation from the doctor in transparent communication.

Slightly different from Komalawati and Fuady mentions opinion about some of the principles of modern ethics from medical practice, as follows:^{13,14}

1. The principle of autonomy

This principle requires the patient who has capacity to act as capable legal subject is given the opportunity to make rational choices; as a form of respect for their human rights to determine their own destiny (self-determination). Although the patient made a mistaken, the doctors must respect him constantly and try to explain the truth according to their knowledge and professional skills until the patient really understands the consequences of his or her choice if it's not in accordance with the doctor's recommendations.

2. The principle of generosity

This is known as beneficence, namely a suggestion for the doctor to always giving help to their patients generously. Doing virtue, kindness and generosity are generally accepted recommendation for doctors and those are applied in professional service.

3. *Do not hurt* principle

Along treating the patient, doctor should try not to hurt the patient (non-maleficent). Sometimes, this is difficult to do because during treating the patient, the treatment itself causes pain to the patient. In such case, the doctor must provide an explanation about the pain that might arise during following a medical treatment.

4. The principle of justice

Justice in this case is in providing medical services in the sense that the doctor must provide treatment fairly regardless of socioeconomic status.

5. The principle of loyalty

¹¹ Guwandi, J.: Informed Consent. Balai Penerbit FKUI, Jakarta (2004).

¹² Guwandi, J.: Dokter, Pasien, dan Hukum. Balai Penerbit FKUI, Jakarta (1996).

¹³ Komalawati, D.V.: Peranan Informed Consent dalam Transaksi Terapeutik: Persetujuan dalam Hubungan Dokter dan Pasien, Suatu Tinjauan Yuridis. Penerbit Citra Aditya Bakti, Bandung (2002).

¹⁴ Munir, F.: Sumpah Hipocrates: Aspek Hukum Malpraktek Dokter. PT Citra Aditya Bakti, Bandung (2005).

This principle is a translation of fidelity which means the doctor must be trustworthy and loyal to the mandate given by the patient with a full sense of responsibility to use all their knowledge and skills for the safety of his patients' lives.

6. The principle of honesty

The principle of honesty (veracity) requires honesty from both parties, both doctors and patients. The doctor must honestly state the results of observations and examinations conducted on patients, and patients must also honestly reveal the history of the disease.

3.3 The rights and obligations of doctors and patients

According to Article 1 of Act Number 29 of 2004 concerning Medical Practice, a patient is any person who consults his health problems to obtain the necessary health services either directly or indirectly to doctor or dentist.

The legal aspects of health care workers originate from Government Regulation Number 32 of 1996 concerning Health Care Workers and are detailed in Act Number 36 of 2009 concerning Health. Within this law it is regulated that health care workers must have minimum qualifications.

In addition to qualifications, health care workers have the authority to organize these health services in accordance with the following provisions:¹⁵

1. Done in accordance with the field of expertise possessed
2. During providing the health services, every health care worker must have government license
3. While providing these health services, prohibited to prioritize materially valued interests

The government regulates the planning, procurement, utilization, guidance, and supervision of the quality of health care workers in the framework of organizing health services. Provisions regarding the planning, procurement, utilization, guidance and quality control of health care workers are regulated in a Government Regulation. Likewise, the provisions regarding health care workers will be regulated by law. In addition, the government also organizes education, and improves the quality of health care workers through education and/or training.

The authorized health care workers must meet the following provisions:

1. Code of ethic
2. Professional standard
3. User rights of health services
4. Service standard
5. Standard operational procedure

Provisions on codes of ethics and professional standards are regulated by the professional organizations concerned. Whereas provisions regarding the user rights of health services, service standard, and standard operating procedures are regulated by a Minister of Health Regulation. The government regulates the placement of health care workers to average out distribution of health services. While a province or district governments can organize and utilize health care workers in accordance with the needs of their respective regions. Provision of utilization of health care workers must consider:

¹⁵ Notoadmodjo, S.: Etika dan Hukum Kesehatan. Penerbit Rineka Cipta, Jakarta (2010).

1. Types of health services needed by the community
2. Number of health services facilities
3. The number of health care workers in accordance with the workload of existing health services

It should be remembered that the placement of health care workers is carried out regarding the rights of each health care worker and the community to obtain equitable health services.

Health care workers have rights, obligations and authorities, including:

1. Get compensation and legal protection in carrying out their duties in accordance with their profession
2. Obligated to develop and enhance their knowledge and skills. Provisions regarding the rights and obligations of health care workers are regulated in a Government Regulation
3. For the legal interest, health care workers are required to conduct a health services on demand of law enforcement with costs borne by the state
4. The government rules of placement is based on each scientific competence and authority

Doctor's obligation to patient are contained in the Indonesian Medical Ethics Code (KODEKI) in articles 10 to 13, and are clarified in articles 50 and 51 of Act Number 29 of 2004 concerning Medical Practice, while the right and obligation of patient in articles 52 and 53. Violations of the obligation may result in the doctor being exposed to criminal threats. Article 50 of the Medical Practice Law states that doctors and dentists in medical practices have the right:

1. Obtain legal protection as long as carrying out duties in accordance with professional standards and standard operating procedures
2. Providing medical services according to the professional standards and operational procedure standards
3. Obtain complete and honest information from patients or their families
4. Receive service fees

Associated with a therapeutic contract between doctor and patient, the doctor rights regarding Komalawati are added as follows:¹⁶

1. The right to patient information regarding complaints
2. Right to service and honorarium fees
3. The right to terminate the relationship with the patient, if the patient does not comply with the given advice
4. The right to patient good faith in carrying out therapeutic transactions
5. Right to privacy

According to the doctor rights listed in Article 50 of the Medical Practice Act, the patient obligations arose outlined in article 53, namely:

1. Provide complete and honest information about his health problems
2. Obey the doctor advice and instructions
3. Comply with applicable provisions in health service facilities
4. Providing service fees for service obtained

¹⁶ Komalawati, D.V.: Peranan Informed Consent dalam Transaksi Terapeutik: Persetujuan dalam Hubungan Dokter dan Pasien, Suatu Tinjauan Yuridis. Penerbit Citra Aditya Bakti, Bandung (2002).

Related to the patient obligations to provide complete and honest information, there is the doctrine of contributory negligence, which can be translated as problem patients. Here it is seen that not only health care workers can be considered negligent, but patients can also be guilty of causing the disease to worsen.¹⁷

The contributory negligence category, are includes:

1. Patients do not obey their doctor's instructions (including not buying medicines that are in accordance with the doctor's prescription),
2. Patient refuses the proposed treatment method (the patient refuses surgery, then dies, then the doctor cannot be blamed),
3. Patients are not honest in providing information or provide inaccurate information or misleading

In addition to being listed in the Medical Practice Law, KODEKI also mentions the rights of patients, as follows:

1. The right to life, the right to his owns body and the right to die naturally
2. The right to obtain humanity medical services in accordance with the standard of the medical profession. In case the doctor does not provide services as professional standards, and then causes in disability or death, then the doctor has violated the patient's right to obtain such humanity services, so that the patient has the right to sue the doctor.
3. The right to obtain an explanation of the diagnosis and therapy from the doctor. The point of this information right is the patient's right to obtain information as clearly as possible about matters relating to his illness. In the event of a doctor-patient relationship, the patient rights to this information automatically becomes the doctor's obligation to be carried out whether requested or not by the patient.¹⁸
4. The right to get an approved diagnostic and therapeutic procedure, and even withdraw from a therapeutic contract. Accepting and rejecting something offered is a part of human rights, as is the case with medical measure. In the event that a patient refuses an offered medical measure, the doctor must not impose his will as long as he knows that it can have a negative impact on patient healing.¹⁹ The coercion of the doctor for the patient to take certain medical measure on the patient's body, while the doctor has good intentions to save the patient's life, will result in the doctor being sued at the request of malpractice.
5. The right to obtain an explanation of medical research to be followed and to refuse or accept its participation in that's medical research.
6. The right to be referred to a specialist if necessary, and returned to the doctor who referred him after the completion of consultation or treatment to obtain treatment or follow up.
7. The right to confidentiality or personal medical record. The patient's right to the confidentiality of his illness is protected by Article 322 of the Criminal Code (KUHP) and clarified in the Medical Practice Act.
8. The right to obtain an explanation of hospital regulations.
9. The right to deal with family, counselors or clergy, etc. as needed during treatment in hospital.
10. The right to obtain an explanation all details of medical costs for inpatient or outpatient care.

¹⁷ Guwandi, J.: *Hukum Medik (Medical Law)*. Balai Penerbit FKUI, Jakarta (2010).

¹⁸ Supriadi, W.C.: *Hukum Kedokteran*. Penerbit CV Mandar Maju, Bandung (2001).

¹⁹ Machmud, S.: *Penegakan Hukum dan Perlindungan Hukum bagi Dokter yang Diduga Melakukan Malpraktik*. Penerbit Mandar Maju, Bandung (2008).

Based on article 51 and 52 of The Medical Practice Law, doctors have obligations to:

1. Providing medical services in accordance with professional standard and standard operational procedure, and medical needs of patients
2. Referring patients to other doctors who have better skills or abilities, if unable to conduct an examination or treatment
3. Keep everything he knows about the patient, even if the patient was died
4. Carry out emergency relief on the basis of humanity, unless the doctor believes that someone else is on duty and is able to do so
5. Adding knowledge and following medical science development

The most frequent legal problems arising from the relationship between doctors and patients are malpractice and negligence. Between malpractice and negligence there are differences as follows:²⁰

1. Malpractice that is done intentionally (a term of malpractice in the narrow sense) or can be referred to criminal malpractice, which is doctor actions clearly violate the law, including:
 - a. Having an abortion
 - b. Euthanasia
 - c. Giving false certificates or their contents is not in accordance with the actual situation, etc.
2. Negligence is a form of deed committed without being learned, such as:
 - a. Due to the medical record being exchanged, the doctor mistakenly performed surgery on the patient
 - b. The doctor forgets to provide information to patient who will undergo surgery, so the operation is done without informed consent.

Guwandi also stated the difference between malpractice and negligence can be seen from the motives and goals of the action, namely:²¹

1. Malpractice (in the narrow sense), is an action carried out consciously, with a purpose to the predictable effect or the doctor does not care about the consequences of the actions that he knows violates the law
2. Negligence, the doctor does not expect the consequences of his actions. Those consequences occur outside the doctor will and there is no motive to cause these effects

Furthermore, Guwandi explained that medical accidents are different from malpractice or negligence. The characteristics of medical accidents are:²²

1. An accident is an unexpected event, an accidental action (accident, misfortune, bad fortune, mischance, ill luck)
2. No element of fault (*schuld*) was found in the accident
3. Doctors have done their work in accordance with the medical profession standard and professional ethics.

²⁰ Isfandyarie A.: Tanggung Jawab Hukum dan Sanksi bagi Dokter Buku 1. Prestasi Pustaka Publisher, Jakarta (2006).

²¹ Guwandi, J.: Hukum Medik (Medical Law). Balai Penerbit FKUI, Jakarta (2010).

²² Guwandi, J.: Hukum Medik (Medical Law). Balai Penerbit FKUI, Jakarta (2010).

4. Accidents contain elements which cannot be blamed (*venwiltbaarheid*), cannot be prevented (*vermijdbaarheid*) and the events cannot be predicted
5. Doctors have taken fully caution action, make efforts seriously by using all their knowledge, skills and experiences
6. Doctor has tried to minimize the possible risks by conducting a thorough anamnesis, adequate preliminary examination, and necessary investigation
7. In the case of surgery/anesthesia, the doctor has tried to do initial therapy for the abnormality found or has consulted with other specialist doctors who are competent with the patient disorder.

In case of health care workers suspected of negligence in carrying out their profession, that's negligence must be resolved first through mediation.²³ Before reaching the level of dispute, usually preceded by a gap between the patient's expected and a fact, then causes a sentiment problem, both interpreted internally (inner conflict) or externally to be disclosed out in the form of complaint; this is called conflict.^{24,25}

Doctor legal responsibility in civil law has two main forms of responsibility, namely:

1. Liability for losses caused by default
2. Liability for losses caused by unlawful acts

Basically, civil liability aims to obtain compensation for losses.²⁶ Therefore, the basis for claiming doctor responsibility is regarding unlawful acts or defaults; it is given the right to the injured person to receive compensation as an obligation from the other parties.

Claims for default are usually in the form of compensation claims against doctors who are considered to have committed an adverse act. Patient must have evidences of loss as a result of the doctor's unfulfilled obligations to him.

In a lawsuit against a doctor for unlawful conduct (*onrechtmatige daad*), patient must show the doctor's error which, due to his negligence in carrying out his professional obligations, causes harm to the patient. The occurring losses must be explained as a result of the doctor's negligent actions, or in the other words there is a clear causal relationship and no justification reason.^{27,28}

A doctor can be declared wrong and pay compensation if between the losses incurred there is a close relationship with the doctor mistakes. In determining the doctor mistakes, we must refer to the professional standards.²⁹ So that in the implementation of medical practice, acts against the law

²³ Junaidi, E.: *Mediasi dalam Penyelesaian Sengketa Medik*. Penerbit Rajagrafindo Persada, Jakarta (2011).

²⁴ Bahar, A.: *Menjadi Pasien Cerdas: Terhindar dari Malpraktik*. PT Kawan Pustaka, Jakarta (2005).

²⁵ Ratman, D.: *Mediasi Non Litigasi terhadap Sengketa Medik dengan Konsep Win-Win Solution*. Penerbit PT Elex Media Komputindo, Jakarta (2012).

²⁶ Ta'adi, *Hukum Kesehatan: Sanksi dan Motivasi bagi Perawat*. Penerbit Buku Kedokteran EGC, Jakarta (2013).

²⁷ Hariyani, S.: *Sengketa Medik: Alternatif Penyelesaian Perselisihan antara Dokter dengan Pasien*. Penerbit Diadit Media, Jakarta (2005).

²⁸ Isfandyarie A.: *Tanggung Jawab Hukum dan Sanksi bagi Dokter Buku 1*. Prestasi Pustaka Publisher, Jakarta (2006).

²⁹ Iskandarsyah, M.: *Tuntutan Pidana dan Perdata Malpraktik*. Permata Aksara, Jakarta (2011).

can be identified with the doctor contrary actions or not in accordance with the medical professional standard.

Types of threats of punishment that can be imposed on doctor include:

1. Administrative punishment by the authorized health official based on Act Number 29 of 2004 concerning Medical Practices, Regulation of the Minister of Health Number 1419 / Minister of Health / Regulation / X / 2005 concerning the Implementation of Doctor and Dentist Practices, and Indonesian Medical Council Regulation Number 1 of 2005 concerning Doctor and Dentist Registration.
2. Penalty compensation for patients based on The Civil Code (KUH Perdata) and Act Number 8 of 1999 concerning Consumer Protection.
3. Criminal penalties based on Act Number 36 of 2009 concerning Health, The Criminal Code (KUHP), and Act Number 29 of 2004 concerning Medical Practices.

4 Conclusion

In the legal responsibility of a doctor as the bearer of the profession, the doctor must always be responsible for carrying out his profession. Because the responsibilities of doctors in law are so broad, doctors must also understand the legal provisions that apply in the implementation of their profession, including the rights and obligations of doctors and patients.

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Legal Politics In The Establishment Of State-Owned Enterprise Holding & Its Impact

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Abstract. The research aims to find a design model of legal aspects in the formation of a holding SOE after the issuance of Government Regulation Number 72 of 2016. This research uses a descriptive or doctrinal normative approach using secondary data types. The results show that there are still overlapping regulations in various laws and regulations that cause contradictions and legal uncertainty in the management, supervision and guidance of SOEs. The government should together with the Parliament to revise Law No. 17 of 2003 concerning State Finance and Law No. 19 of 2003 concerning SOEs to be perfected by including elements of the holding of SOEs

Keywords; Political Law, BUMN Holding

1. Introduction

"BUMN for Indonesia", this is the latest tagline that was tried to be built by the Ministry of SOE since February 2020 ago.[1] The hope of this tagline change is certainly not merely a sentence change but is expected to have a broad and meaningful meaning. The tagline "BUMN for Indonesia" gives more understanding that BUMN is owned by all Indonesian citizens and has the right to enjoy the services of all existing SOEs. BUMN is a real manifestation of the fourth paragraph of the Preamble to the 1945 Constitution.[2]

In line 4 of the Constitution 1945 : "Then to form a government of Indonesia that protects the whole Indonesian nation and the whole blood of Indonesia and to promote the common good, to sanctify the nation, and to enact world order based on independence, eternal peace and social justice, then Indonesia's independence was enshrined in the Constitution of Indonesia, established in a constitution of the Republic of Indonesia, which is governed by the people on the basis of; the Divine Divinity;; the just and civilized humanity; the Indonesian Society;; led by the wisdom of counseling / representation, and by establishing a social justice for all Indonesian people.[2]

Emphasized in Constitution 1945 Article 33;

- (1) The economy is organized as a joint venture based on a family basis.
- (2) The branches of production that are important to the country and which dominate the lives of the people are dominated by the state.
- (3) The earth and the water and the natural resources contained therein are controlled by the nation and used for the greater prosperity of the people.
- (4) The national economy is organized on the basis of economic democracy with the principles of togetherness, efficiency of justice, sustainability, environmental awareness, independence, and by maintaining a balance of progress and unity of national economy.
- (5) Further provisions on the implementation of this article shall be governed by law.[2]

Based on the two elements of the above State policy to realize it in the national life, the government finally established a State Owned Enterprises (PERSERO) as defined in Government Regulation Number 12 of 1998 and Public Enterprises (PERUM) as intended in Government Regulations. Number 13 of 1998. [3] However, lately SOEs have always been hit by various issues up to the National level.[4] One of the most widespread issues is the presence of steam by the Government conducting a "Holding Company" of StateOwned Enterprises (SOEs) spread throughout Indonesia based on the qualifications of their core businesses.[5]

The urgency of establishing a Holding Company has been started since 2016[6], namely since the issuance of Government Regulation No. 72 of 2016 concerning Amendments to Government Regulation No. 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies.[7]

Since then many opinions have alternated between the Pros and Cons of the Holding Company plan.[8] The process and procedure for the formation of a Holding Company is strongly influenced by the political atmosphere of government law in the effort to empower and renew the structure of the development and management of SOEs in order to accelerate the achievement of target goals and fulfillment of the benefits to be used to meet the welfare of the Indonesian people.[9]

This paper will raise issues relating to legal politics in the formation of BUMN holding companies in the mining sector as well as the impacts caused by holding companies.

2. Method

This study uses a normative juridical research method (Legal research) that is descriptive, describing the research qualitatively. The secondary data collection used in this study focused on: (a) the primary legal entity, in the form of legislation related to the research theme; and (b) secondary legal material, in the form of reference books and journals related to the research theme and further elaborating primary legal materials into theoretical contexts.

3. Research and Discussion

3.1. State-Owned Enterprises (BUMN)

Based on the Law of the Republic of Indonesia Number 19 of 2003 concerning State-Owned Enterprises (SOEs) in particular article 2. SOEs have the purpose and objectives in the form of[10]:

- 1) Contribute to the development of the national economy in general and state revenue in particular;
- 2) Pursuing profits; [11]
- 3) Carrying out public benefits in the form of high quality and adequate provision and / or services for fulfilling the lives of many people;
- 4) Pioneering business activities that cannot yet be carried out by the private sector and cooperatives;
- 5) Also actively providing guidance and assistance to economically disadvantaged entrepreneurs, cooperatives, and the community.[12]

State-Owned Enterprises which are one of the agents of economic activity in the national economy based on economic democracy have an important role in administering the

national economy in order to realize the welfare of society as mandated by the 1945 Constitution. These goals are then translated into SOE Functions and Roles, namely:[13]

- 1) As a provider of economic goods and services that are not provided by the private sector; [14]
- 2) Is a government tool in managing economic policies; [15]
- 3) As manager of the branches of natural resource production for the community at large;
- 4) As a service provider in community needs; [16]
- 5) As a producer of goods and services for the fulfillment of many people;
- 6) As a pioneer in the business sectors that have not been interested in by the private sector; [17]
- 7) Job opening;
- 8) State foreign exchange earners;
- 9) Assistance in the development of cooperative small businesses,
- 10) Drivers of community activities in various business fields.

BUMN is a State-Owned Enterprise in the form of a Company Company (PERSERO) as referred to in Government Regulation Number 12 of 1998 and Public Corporation (PERUM) as referred to in Government Regulation Number 13 of 1998.[18] A State-Owned Enterprise (BUMN) is one of the perpetrators of activities an important economy in the national economy, which together with other economic actors, namely the private sector (large-small, domestic-foreign) and cooperatives, is an embodiment of the form of building an economic democracy that we will continue to develop gradually and sustainably. [19]

BUMN is a Government-owned company in which the ownership of shares is fully owned by the Government with a mechanism of capital participation where the capital participation is based on the separated state assets.[20] BUMN with its various business units is divided into two different legal entities, yani:[21]

- 1) BUMN Legal Entity. This SOE is a BUMN that has limited capital, so that to meet the needs of the total capital is given the opportunity for other parties (other than the government) to invest capital provided that [capital participation from third parties must not exceed the amount of capital owned by the Government by at least 51% (fifty one percent) so that the main goal of pursuing profits can be achieved;[22]
- 2) Publicly traded legal entities (PERUM) are SOEs whose entire capital is owned by the state and is not divided into shares. The main objective of PERUM's legal entity BUMN is for public benefit in the form of providing high quality goods and / or services and at the same time pursuing profits based on the principles of company management.[23]

3.2. Legality and Concept of BUMN Holding Company.

The concept of holding for downsizing the number of State-Owned Enterprises (SOEs) in Indonesia has been poured since 1998. The idea of holding SOEs by grouping SOEs into each industry was raised in the era of the first SOE Minister, the Tanri Abeng era.[24] The concept of holding BUMNs is considered by Tanri to create a strong BUMN. The state-owned company is also considered to be increasingly focused on developing its business from upstream to downstream. The holdin concept began in the days of the Minister of SOEs held by Tanri Abeng. The concept of the BUMN Holding Company proposes that several SOEs be combined, namely:[25]

- 1) BUMN engaged in the Energy and mining business, united into one BUMN only; [8]

- 2) BUMN engaged in infrastructure business such as ports, airports, transportation and telecommunications. [26] Then the financial sector holding, the contents are all banks and non-banks combined combined into one BUMN; [27]
- 3) BUMN engaged in cement and construction.[28]
- 4) BUMN engaged in fertilizer and plantations. [29]

The Ministry of State-Owned Enterprises (BUMN) is currently trying to form a holding BUMN mine. The establishment of a mining SOE holding is done by appointing PT Indonesia Asahan Aluminum (Persero) (Inalum) as the holding holding company.[30] Inalum will be the parent of three mining SOEs, including PT Timah (Persero) Tbk, PT Aneka Tambang (Persero) Tbk (Antam) and PT Bukit Asam (Persero) Tbk (PTBA). State ownership status in the three SOEs has been lost through the Extraordinary General Meeting of Shareholders (EGMS) November 29, 2017. Elimination of state ownership is carried out by transferring government-owned shares in the three mining SOEs to PT Indonesia Asahan Aluminum (Persero) (Inalum) as holding parent BUMN BUMN.[25] The government currently holds majority shares in the three mining SOEs that have also gone public, namely Antam 65%, PTBA 65.02%, and Tin 65%. The majority shares owned by the government in the three SOEs were transferred to Inalum, which is 100% still owned by the state. The Deputy for Mining, Strategic Industry and Media at the Ministry of SOEs, emphasized that the transfer of the shares of the three mining SOEs to Inalum does not necessarily mean that government control is lost. The government still has the authority to supervise the three BUMNs even though a holding has been formed under Inalum with the existence of a dual A series stock. "The answer is that there are stateowned companies because there are dual-colored shares," said Harry in Jakarta, as written in Kompas newspaper Friday (11/24/2017).

The steps that have been taken by the Government in forming a holding company of a BUMN in Indonesia by appointing a certain BUMN BUMN as a holding company and merging a similar BUMN BUMN into a subsidiary through a share transfer mechanism (inbreng) is something new in Government companies (BUMN).[20] So far, there are no specific legal rules governing the existence of a holding company in Indonesia, but since the Government Regulation No. 72 of 2016 concerning Amendments to Government Regulation no. 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies.[7]

The existence of a BUMN holding company and an inbreng (share transfer) mechanism must be able to be an encouragement and a new moral injection for all levels of BUMN stake holders in order to advance a company that is developed and competitive so that it becomes a highly competitive company at regional and international levels. Apart from that, after the establishment of the BUMN holding company, the performance of all BUMN employees remains to be watched and guarded to the maximum in order to avoid the mis BUMN vision for Indonesia becoming a one-sided and a group of people. Thus the benefits obtained by SOEs can truly be felt by all levels of citizens throughout Indonesia.

3.3. Impact of BUMN Holding Company

Zainal C. Airlangga, an observer of BUMN stated (Ekonomi Daily Balance 07/26/2019) "The government is now working on the concept of holding State-Owned Enterprises (SOEs) in various sectors. Later SOEs will be combined in one holding company in accordance with their respective sectors. This plan was reaffirmed by President Joko Widodo (Jokowi) while speaking at the Final Debate of the 2019 Presidential Election at the Sultan Hotel, Central Jakarta, last Saturday (13/4).

"There will be holding parties, on top of which there will be superholding. The BUMN holding is to strengthen the ability of many state-owned companies in developing business. "If we do all this, and the private sector will follow behind it, this is Indonesia Incorporation," Jokowi explained.

Zainal C Airlangga highlighted that the government's plan has been stated in Government Regulation Number 72 of 2016 concerning Procedures for the Participation and Administration of State Capital in SOEs and Limited Companies. So that the potential to cause negative impacts, among others:[7]

1) Covert Privatization

Although the government claims that holding has a variety of benefits, there are also threats behind the formation of this sectoral BUMN holding. Businessmen, for example, highlight the possibility of monopolistic practices and cartelization. The formation of this holding also has the potential to violate Law Number 5 of 1999 concerning Business Competition which does not tolerate SOEs. The Business Competition Supervisory Commission (KPPU) has warned about this danger. Article 12 based on the Law: "Business actors are prohibited from making agreements with other business actors to cooperate with forming a joint company or a larger company." [31]

2) SOEs that turn out to be much bigger will potentially become unhealthy. In this process, cross-funding cannot run optimally if many of the subsidiaries under it are unhealthy. In this case a healthy company is forced to bear losses. [8]

3) There is a legal loophole that has the potential to become a dispute in the future, namely the decision to transfer ownership from the government to the private sector and even to foreigners so that the formation of BUMN holding and superholding is suspected of being a hidden privatization.[6] Moreover PP No. 27 of 2016 gives flexibility to the government to form a holding without the approval of the DPR. This can also revoke the identity of SOEs from Article 33 paragraph (2) of the Constitution "The important branches of production are for the state and which control the livelihoods of the people are controlled by the state".

4) Potential problems in the legal status of BUMN. In Law Number 19 Year 2003 concerning SOEs, it is stated that what is categorized as BUMN is limited to the holding company.[21] By becoming a subsidiary, (under the PT Law) there is no longer a government oversight function. Related to this, the government has indeed proposed revision of the BUMN Law No. 19/2003. Unfortunately, the contents of the bill (article 4 paragraph 1) contains the DPR's authority over SOEs to be superior: they have the right to determine the board of directors, commissioners, and corporate business strategy.

Meanwhile, University of Indonesia economist Faisal Basri considers that the SOE Ministry's plan related to holding is only as a smoothing tool to increase its debt capacity. "I also had a chat with one of the deputies of the Ministry of SOEs, he said that the capacity of his debt to increase," said Faisal in the event of Exploring Profit and Loss Holding BUMN, Jakarta, some time ago. alone, but state control and people's constitutional rights to SOEs (in accordance with article 33) must not be negated because historically, SOEs are part of the struggle of the Indonesian people. This is the

philosophical and constitutional basis why the people give a mandate to the government to manage the country's wealth and interests the lives of many people through state enterprises.[32]

4. Conclusions

- a. That the legal substance issued for the establishment of BUMN holding companies is often in contradiction with and contradictory with Law No. 17 of 2003 concerning State Finances, Law No. 19 of 2003 concerning SOEs and Law Number 40 of 2007 concerning Limited company.
- b. The thick legal policy behind BUMU's Holding Company still concerns issues - problems that could become a time bomb in the future, namely:
 - 1) There is potential for Covert Privatization.
 - 2) The potential of BUMN will suffer from the large capital expenditure in running the business wheels;
 - 3) Potential legal loopholes in the occurrence of disputes regarding the transfer and transfer of BUMN share ownership;
 - 4) Potential violations of the legal basis where Government Regulation Number 72 of 2016 concerning Procedures for Participation and Administration of State Capital in SOEs and Limited Liability Companies is contrary to Law Number 19 of 2003 concerning SOEs;

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The Development of National Law Based on Constitutional Court Decisions

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Abstract. Indonesia is a country that adopts a civil law system. The main source of law for states that adopt a civil law system is the law. After amendment 1945 constitution which occurs in 1999 until 2002 and the Constitutional Court was born in 2003 because of its amendment 1945 constitution. There is a new source of law that has a very strategic role in efforts to develop a national legal system, namely the Constitutional Court's Decision. The Constitutional Court's decisions often contain orders, recommendations, and prohibitions to form legislators to amend laws that are declared unconstitutional. Sometimes, The Constitutional Court was ignored by the legislator. It means that The Constitutional Court decision has not a primary source of law. This paper aims to discuss the character of the Constitutional Court decision and how is the concept of national legal development based on the Constitutional Court decision. The method used in this study is juridical-normative through the regulatory approach and case study approach. According to the research result, the character of the Constitutional Court decision is final and binding. The judicial policy or judicial order must be put in the planning of development of national law document.

Keywords: Constitutional Court, Judicial Order, Legal Development

1. Introduction

Before the amendment of 1945 Constitution, the development of law based on two sources of material law, namely the pre-independence material legal source and the post-independence material legal source. As for the material sources of pre-independence material law consisting of (1) customary law, as a living law that has lived and developed in Indonesian society; (2) religious law both Islamic law and other religious law; (3) Dutch law; (4) Japanese law. Whereas post-independence legal material sources consist of: (1) international legal instruments; (2) legal developments in the civil law system; (3) legal developments in the common law system [1]. However, after changing the constitution there is a new source of law that must be considered in the development of domestic law.

The implications of the amendment 1945 Constitution have already created several new state institutions,[2] one of a new state institution is the Constitutional Court which was born as a result of the constitutional supremacy which adopted after the amendment of the 1945 Constitution [3]. Based on Article 24C paragraph (1) of the 1945 Constitution, The Court has 4 (four) authorities and 1 (one) obligation, namely: The Court has the authority to adjudicate at

the first and last level whose decisions are final for:

- (1) testing the law against the Constitution;
- (2) decide upon disputes over the authority of state institutions whose authority is granted by the Constitution;
- (3) decide upon the dissolution of political parties; and
- (4) decide upon disputes over the results of general elections.

Meanwhile, the Constitutional Court shall render a judgement on the petition of the People's Representative Council regarding an alleged violation by the President and/or Vice President have violated according to the Consitution. The Court also gained additional authority to decide on disputes over the results of the election of governors/mayors/regents based on Article 157 paragraph (3) of Law Number 8 of 2015 concerning Amendment to Law Number 1 of 2015 concerning the Establishment of Government Regulations in lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayors into law as amended lastly through Act Number 10 of 2016 concerning the Election of Governors, Regents and Mayors.

One of the functions of the Constitutional Court is creating a mechanism of checks and balances between state institutions so that there is no abuse of authority in the administration of the state as stated by Lord Acton, "power tends to corrupt, absolute power is corrupt absolutely [4]. Herefore, as the implementation of the checks and balances function, if the law as a legislative product turns out to violate the constitution, it can be cancelled by the Constitutional Court. Aside from being a constitutional court, the Court is also known as a norm court. Due to the authority of the Constitutional Court in examining the constitutionality of a law. In its development, especially after the amendment to the 1945 Constitution, there is a new source of law which must be used as a guideline when reforming national law, namely the Constitutional Court's Decision. Normatively, the Constitutional Court has a negative legislative role which functions to annul norms in the law. According to Hans Kelsen, "The annulment of law is the legislative function, an act-so to speak-of negative legislation. A court which is competent to abolish laws-individually or generally-function as a negative legislature." [5] Meanwhile, the People's Representative Council and the President acted as a positive legislature because they functioned to make laws.

In general, Bagir Manan stated that efforts to renew colonial law were not only limited through the establishment of legislation but could also be through judges' decisions [6]. Especially after the change in the constitution, the 1945 Constitution currently has no explanation. Therefore, the Constitutional Court, which functions as the final interpreter of the constitution, plays a role in filling the vacuum of constitutional interpretation and making efforts to renew colonial law through its rulings.

Decisions on judicial review of the 1945 Constitution that have been made by the Constitutional Court against various submitted petition requests must be considered in efforts to develop national law, especially changes in legislation [7]. The Constitutional Court's decision contains elements of legal politics so it is crucial to be accommodated in the national legal planning document. The Constitutional Court's decision often guides legislators on how and where the development of domestic law is carried out. Sometimes the Constitutional Court acts as a positive legislature because the Constitutional Court does not only state that a legal norm is contrary to the constitution and not legally binding, but also formulating the norm through conditionally constitutional or conditional unconstitutional decisions. According to Alec Stone, the Court's involvement in the legislative process by formulating rules in its decision could also be referred to as judicialization of politics. The following is Alec Stone's full opinion [8].

“Judicialization of politics is the intervention of constitutional judges in legislative processes, establishing limits on law-making behaviour, reconfiguring policymaking environments, and sometimes, drafting the precise terms of legislations.”

The Constitutional Court must now be seen as a law-making body other than the President and the Parliament. According to Jimly Asshiddiqie, this was seen as a convergence between legal systems. Because today there is a strong tendency in countries that adopt a common law system to give a greater role to the law as in the civil law system. On the contrary, in the civil law environment there is also an effort to enlarge the role of the court as a law-making institution [9].

However, in reality, the Constitutional Court's Decision is often ignored or the follow-up of its decision is not in accordance with the judicial legal politics or judicial order that have been decided by the Constitutional Court, thus causing a condition that is not harmonious between the Constitutional Court's decision and the intended law. Research conducted by Trisakti University regarding the level of compliance with the judicial review decision in the Constitutional Court by Addresat Decision. Decisions that became the object of study totalling 109 decisions were granted since 2013-2018. The following table complies with the Constitutional Court's decision [10].

Table
Level of Compliance with Judicial Verdicts 2013-2018

Level of Compliance	Total	Percentage
Obeded All	59	54,12 %
Partially Obeded	6	5,50 %
Not Obeded	41	37,61 %
Not Yet Known	3	2,75 %
Total	109	100

Sources : Tri Sulistiyowati etc (Trisakti University)

From the table above it can be seen that the level of compliance with the Constitutional Court's decision by the addresat of the Constitutional Court's decision can be divided into four categories, namely:

- (1) Decisions that have been complied with as many as 59 decisions (54.12%);
- (2) Decisions that were complied with were six decisions (5.50%);
- (3) Decisions not complied with 41 (37.61%);
- (4) Not yet known as many as three decisions (2.75%).

This problem is a mutual concern. There fore, it is necessary to discuss two issues.

The article will discuss, first, the character of the constitutional court; Second, the concept of legal development based on the constitutional decision. Thus, the process of harmonization of laws and regulations from the upstream to downstream sectors occurs.

2. Method

The method used in this study is juridical-normative through the regulatory approach and case study approach. The case study approach is carried out on a number of cases which contain the efforts of the Constitutional Court in carrying out the development and reform of national law.

3. Result and Discussion

3.1. The Characteristics of The Constitutional Court Decision

In the provisions of Article 24C Paragraph (1) of the 1945 Constitution it is only emphasized that the Constitutional Court's decision is final. There is no legal remedy that can be taken after the Constitutional Court's decision. This is also confirmed by the principle of *res judicata pro veritate habetur* which means that the judicial decision must be considered correct. On the other hand, the word "final" which come from article 24C of 1945 Constitution was derivated into several articles in the Constitutional Court Law. Article 10 Paragraph (1) of the Constitutional Court Law states, "The Constitutional Court has the authority to adjudicate at the first and final instance, whose judgment shall be final for following:...etc". The word "final" is explained at the explanation of Article 10 of the Constitutional Court Law. Its article stipulates, "The Constitutional Court's decision is final, that is, the Constitutional Court's Decision directly obtains permanent legal force since it is pronounced and no legal remedies can be taken." (ii) Article 47 of the Constitutional Court Law which states, "The Constitutional Court's decision to obtain permanent legal force since it was finished pronounced in a plenary session open to the public." (iii) Article 29 paragraph (1) of Law Number 48 the Year 2009 (Law on Judicial Power) which states, "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final ... etc."

In addition to the Constitutional Court Law and the Judicial Power Law, the follow-up to the Constitutional Court's decision is also regulated in Law Number 12 the Year 2011 Regarding the Formation of Legislation Act, namely Article 10 paragraph (1) and paragraph (2) which states as follows.

"(1) The content of the material which must be regulated by Law contains:

- a. further regulation on the provision of Constgitation of the Republic of Indonesia 1945;
- b. instruction of the law for will be governed by Law;
- c. ratification of certain international agreement;
- d. The follow-up to the decision of the Constitutional Court; and/or
- e. fulfill legal needs in the people;

(2) Follow-up on the decision of the Constitutional Court as referred to in paragraph (1) letter d shall be carried out by the Parliament or the President. "

Article 23 Paragraph (1) in Law Number 12 the Year 2011 Regarding the Formation of Legislation Act which states.

"(1) The Prolegnas contains open cumulative list consisting of:

- a. Ratification of certain international agreement;
- b. due to the decree of the Constitutional Court;
- c. State Revenue and Expenditure Budget;
- d. establishment, expansion, and merger of the Province and/or Regency/Municipality;and
- e. determination/revocation of Government Regulation In Lieu of Law"

Although in the 1945 Constitution, the Law on Judicial Power, and the Constitutional Court Law have been stated explicitly that the Constitutional Court's decision is final. However, this does not make the legislators fully obey the Constitutional Court's decision. The Constitutional Court Law only stipulates that the character of the Constitutional Court's decision is "final". With this formulation, apparently there is still neglect of the Constitutional Court's decision. Even in the amendment to the Constitutional Court Law, namely the enactment of Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court, there are articles which reduce the degree of the decision of the Constitutional Court. This article offers options to the legislators to be able to follow up or not follow up on the Constitutional Court's decision. The material referred to in the provisions contained in Article 59 Paragraph (2) which states, "If necessary changes to the law that has been tested, the Parliament or the President immediately follow up on the decision of the Constitutional Court as referred to in paragraph (1) in accordance with statutory regulations." but this article has been canceled by the Constitutional Court through Decision Number 49/PUU-IX/2011, dated October 18, 2011. In its legal considerations, the Court stated the following [11].

"... that the Constitutional Court's decision is final and binding on the public (*erga omnes*) which is directly implemented (self-executing). Decisions of the Constitutional Court are the same as laws which must be implemented by the state, all citizens and existing stakeholders. The norm of Article 59 paragraph (2) of Law 8/2011 is unclear and causes legal uncertainty because the People's Representative Council and the President will only follow up on the Court's decision if necessary. Even though the Court's decision is a final and binding decision which must be followed up by the Parliament and the President as a form of constitutional system based on the 1945 Constitution as well as a consequence of constitutional democratic state ideology ... "

In other words, the legislators are obliged to implement the Constitutional Court's decision, and there is no room for not implementing the Constitutional Court's decision. This decision reinforces and emphasizes that there is no other choice for legislators, except to implement what the Constitutional Court has decided. There are also other questions, whether by doing so, the legislators (the Parliament and the President) have limited authority by having an obligation to implement the Constitutional Court's decision. According to Howard Ball who stated that the Act as a product of the political process tested by the Constitutional Court as an authority applied to prevent policy processes that could deviate far from the constitutional mandate, so that undemocratic institutions such as the Constitutional Court actually help and support democratic majoritarianism by insisting urging political institutions to act within the framework of power referred to in the constitution, so that when formulating laws taking into account existing constitutional boundaries. Howard Ball's opinion confirms the existence of the Constitutional Court which functions to formulate constitutional boundaries through constitutional interpretation in each of its decisions [12]. Indeed, in a democratic perspective, the legislators have the authority to regulate all aspects of life through the legislative process by interpreting the constitution, but whenever there is a Constitutional Court ruling that contains the interpretation of the constitution, then in the context of the rule of law, the legislator must follow the constitutional interpretation made by the Constitutional Court .

In 2012 there was a request to the Constitutional Court in examining the constitutionality of the articles related to the follow-up to the Constitutional Court's decision. First, the Article 10 Paragraph (1) of the Constitutional Court Law states, "The Constitutional Court has the authority to decide at the first and last level whose decisions final ... etc. " Second, The Article 47 of the Constitutional Court Law states, "The Constitutional Court's decision to obtain permanent legal

force since it was finished pronounced in a plenary session open to the public." Third, Article 29 paragraph (1) of Law Number 48 the Year 2009 (Law on Judicial Power) which states, "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final...etc." These articles, according to the Petitioner, are unconstitutional because they do not contain the phrase "and must be implemented". In other words, the Petitioner intends to add the phrase "and must be implemented". The absence of this phrase, according to the Petitioner, is unconstitutional.

However, through Decision Number 105/PUU-XIV/2016 states that the Petitioners' petition cannot be accepted because the Petitioners do not suffer constitutional impairment. Even though the decision is not acceptable, the Court has assessed and considered the constitutionality of the articles being petitioned. The Court stated that theoretically and practically, with the statement "final and binding" a judge's decision had a message and at the same time the meaning that the decision must be implemented [13].

The Constitutional Court also emphasized that the nature of the Constitutional Court's verdict in judicial review is a declaration of the constitution. That is, the Court only declared a norm contrary or not to the constitution. If the Constitutional Court declares a certain norm or part of the law contrary to the constitution, the Constitutional Court will state that the norm will be declared to have no binding legal force. At the same time, the judicial review decision also contains constitutive nature because in the decision, a legal condition is absent or a new legal state is formed [14].

On the other hand, according to Maruarar Siahaan, in the judicial review decision, some decisions were self-implementing and non-implementing. Self-implementing decisions contain the meaning that the Constitutional Court's decision can be implemented immediately after being announced in a public hearing and announced in the State Gazette as a new legal norm that can be implemented quickly. Meanwhile, there are also constitutional court decisions that are non-implementing implementing a new legal policy. Implementation of this new legal policy requires a new legal basis as the basis for implementing public policies that have been determined in the Constitutional Court's decision [15].

Meanwhile, according to Maria Farida Indrati, the Basic Rules are contained in the 1945 Constitution, the People's Consultative Assamby Decree and in the basic unwritten law which is often referred to as the Constitutional Convention. These Basic Rules of the Country are the basis for the formation of the Law (formell gesetz) and other lower regulations [16]. One of the Basic Rules of the State in the context of norm hierarchy theory is the 1945 Constitution. In the stufen theory, the Constitutional Court's decision is not included in the norm hierarchy structure which according to Hans Nawiasky consists of:

- 1) State fundamental norms (staatsfundamental norm);
- 2) Basic Rules of the State (staatsgrundgesetz);
- 3) Formal Act (formell gesetz), and

4) Implementation and Autonomy Regulations (Verordnung & Autonome Satzung), because the Constitutional Court's decision is not included in the regulation family, but is included in the verdict category. However, the Constitutional Court's decision often includes the interpretation and explanation of the 1945 Constitution in its legal considerations, namely:

1. Decision Number 001-021-022/PUU-I/2003 concerning Judicial Review of Law Number 20 The Year 2002 concerning Electricity which interprets the phrase "state-controlled" and the phrase "production branches" contained in Article 33 of the 1945 Constitution.

2. Decision Number 066/PUU-II/2004 concerning Judicial Review of Law Number 24 of 2003 concerning the Constitutional Court and Law of the Republic of Indonesia Number 1 of 1987 concerning the Chamber of Commerce and Industry. The Constitutional Court interpreted Article 24C of the 1945 Constitution. It gave the message to legislators that the law must not reduce the authority of a state institution whose power is regulated by the constitution.
3. Decision Number 005/PUU-IV/2006 concerning the review of Law Number 22 of 2004 concerning the Judicial Commission and Testing of the Law of the Republic of Indonesia Number 4 of 2004 concerning Judicial Power which interprets the phrase authority "the judge" and the phrase "other authorities "In Article 24B paragraph (1) of the 1945 Constitution relating to the authority of the Judicial Commission. The Constitutional Court also gives direction to legislators to carry out legal reforms by making integrative improvements in the law on the Judicial Commission and harmonizing and synchronizing the Judicial Power Law, the Judicial Commission Law, and the Law Constitutional Court.
4. Decision Number 10/PUU-VI/2008 concerning the review of Law Number 10 of 2008 concerning General Elections. The Constitutional Court interpreted Article 22C paragraph (1) The 1945 Constitution is related to the conditions of domicile of members of the Regional Representative Council which are constitutional norms so that there must be a requirement for nominating members of the Regional Representative Council.
5. Decision Number 11/PUU-VIII/2010 concerning Judicial Review of Law Number 22 the Year 2007 concerning General Election Organizer where the Constitutional Court interpreted the sentence "a general election commission" in Article 22E paragraph (5) of the 1945 Constitution. According to the Constitutional Court interpretation, the word "An election commission" does not refer to one institution, but rather refers to the function of organizing elections that are national, permanent, and independent. It's clarified the position of the Election Supervisory Body and Election Supervisory Board in the electoral legal system in Indonesia, namely as the elections organizer.
6. Decision Number 92/PUU-X/2012 concerning the Testing of Law Number 27 of 2009 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council and Law Number 12 of 2011 concerning the Formation of Legislation. In this decision, the Constitutional Court has reconstructed and strengthened the authority of the Regional Representative Council (DPD) in the legislation process.

Some examples of the above decisions have confirmed the Court's position as an interpreter of the constitution and played an active role in determining the political direction of constitutional law. Sometimes, the Constitutional Court has made changes to the constitution through its judicial interpretation mechanism. For example, in Decision Number 2-3/PUU-V/2007, the Court affirmed that in the context of narcotics crime, the right to life could be reduced and limited by Article 28J of the 1945 Constitution. This is different from what has been regulated in Article 28I paragraph (1) The 1945 Constitution which states that the right to life is a right that cannot be reduced under any circumstances. In The decision Number 138/PUU-

VII/2009, the Constitutional Court also affirmed having the authority to examine government regulations in lieu of laws (Perpu) that are not regulated in the constitution.

In exercising its constitutional authority to examine laws against the 1945 Constitution, the Constitutional Court often clarifies the meaning of the 1945 Constitution by giving an interpretation of the articles in the 1945 Constitution after the amendment. Because of the effect of its amendment, the 1945 Constitution no longer recognizes any "explanation".

However, the absence of the explanation potentially makes the 1945 Constitution a string of textual sentences without meaning. According to Ronald Dworkin, one method of interpreting the constitution is by using "moral reading". This method rests on the basis upon which to understand the constitution as moral principles of dignity and justice [17].

Meanwhile, to ensure that the 1945 Constitution can adjust to the times and changes in society, there needs to be an institution that interprets it. In this position, all institutions may have an interpretation of the 1945 Constitution. Still, based on Article 24C paragraph (1) of the 1945 Constitution, one of the Constitutional Court's authorities is to examine the law against the 1945 Constitution, so that only the Constitutional Court acts as the final interpreter of the constitution. That is, all parties must submit to the interpretation of the constitution made by the Constitutional Court.

From the description of the Constitutional Court's decision above, it is clear that the Constitutional Court's decision that interprets the constitution has a function as an "explanation of the Constitution". It becomes a guideline for the legislators to implement the constitution by making laws based on the Constitutional Court's decision. Especially because the current 1945 Constitution no longer has an explanation. Based on the theoretical perspective, the position of the Constitutional Court's decision can be aligned with the constitution. Because of its function as an interpretation and explanation of the constitution. Even in certain cases, it can change the constitution through its judicial interpretation mechanism.

3.2. Concept of National Law Development

In general, the development of the national legal system is based on the Proclamation of Independence of the Republic of Indonesia as the starting point for the development of the national legal system. It is based on the 1945 Constitution in which the preamble and the articles in the constitution contain the objectives, grounds, constitutional ideals, and basic norms the Indonesian state which must be the goal and foundation of the development of the national legal system. In the fourth paragraph of the opening of the 1945 Constitution set forth the purpose of the establishment of the Indonesian state, namely: [18]

"... protect all Indonesians and all Indonesian blood and to promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace and social justice, the Indonesian National Independence was compiled in an Indonesian Constitution. It was formed in an arrangement of the Republic of Indonesia which sovereignty of the people based on the Almighty God, Humanity that is just and civilized, Indonesian Unity and Popularity led by wisdom in Consultative/Representative, and by realizing social justice for all Indonesian people. "

In order to support and realize the ideals of the Indonesian people, a national legal development system was developed based on the proclamation and the 1945 Constitution. However, the dynamics of the state administration of Indonesia after the reforms changed along with changes in law and society. The change in law was marked by a constitutional amendment that took place in the period 1999 to 2002. A judicial power institution other than the Supreme Court was born, namely the Constitutional Court which played a role in strengthening the

mechanism of checks and balances between branches of state power to avoid irregularities. In other words, the presence of the Constitutional Court with its constitutional review function is tasked with ensuring that the law made has consistency, coherence, and corresponds to the 1945 Constitution as the supreme law of the land. The legal position of the Constitutional Court's ruling as an explanation of the 1945 Constitution helped direct the direction of national law development because it appeared that the Constitutional Court's decision contained important judicial legal politics or judicial order in the legislative process.

The concept of planning, development and renewal of the national legal system based on the Constitutional Court's decision is needed because after the reformation, and our country has had the Constitutional Court which initially functioned as a negative legislature, now shifting towards the positive legislature. It means, originally the Constitutional Court was only tasked with abolishing norms, but now it is formulating new norms. In fact, often the legal considerations section contains judicial legal politics or judicial order that include orders, messages, prohibitions, and permissions to the legislators in making laws. Based on case data obtained from the Registrar's Office and the General Secretariat, in the period 2003 to 2016, the Court has decided 954 cases of judicial review with the following details of the case:

Table
The Decision Since 2003-2016

CASES					
Granted	Decline	Not Acceptable	Fall	Pulled Back	Not Authority
222	331	281	16	98	6

Sources : The Registrar and The Secretariat General of The Constitutional Court

Based on the table above, there are 222 decisions which stated that the petition was granted. This means that there are at least 222 norms declared by the unconstitutional Court, including decisions that abolish norms, conditional unconstitutional and conditional constitutional decisions. Conditional cancellation or interpretation of these norms is a particular concern for lawmakers in planning and developing law.

Although in theory, Indonesia adheres to civil law. However, the convergence between the legal systems is unavoidable because there is a strong tendency in countries that adopt a judge-made law or common law system to give a greater role to the law as in the civil law system. On the contrary, in the civil law environment there is also an effort to enlarge the role of the court as a law-making institution. According to Natabaya, although in civil law system, the law is an important and primary source of law, but because the drafting of laws is increasingly difficult to follow the acceleration of the legal needs of the community, due to social, economic and technological changes that are very fast. It is necessary to fill the written legal vacuum developed permanent jurisprudence [19].

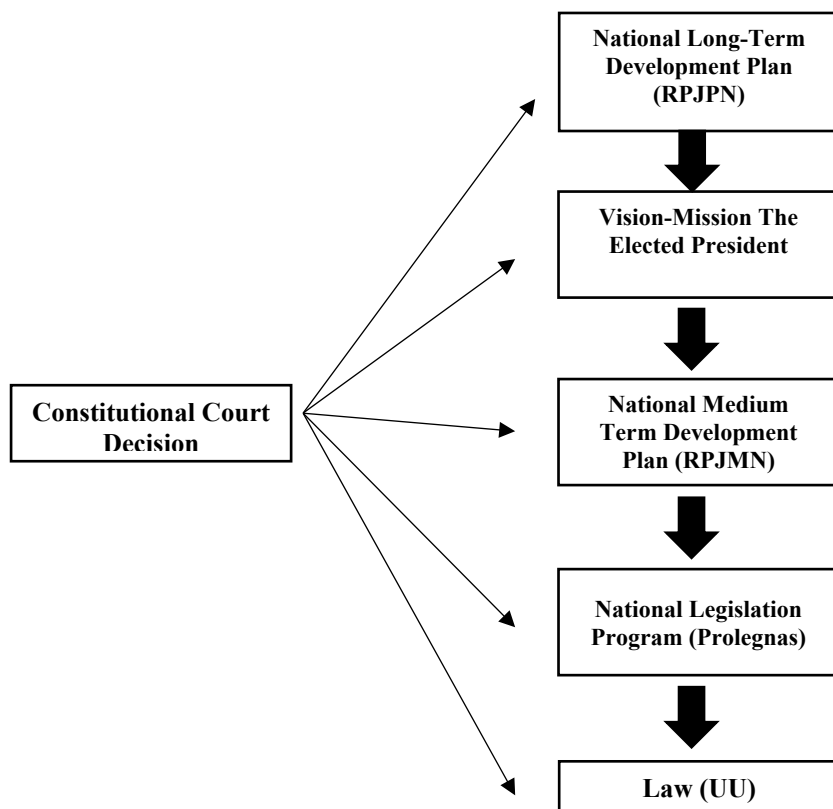
The next question is how to make the Constitutional Court's decision taken into account in the planning and development of the national legal system. According to a research report by Ni'matul Huda and friends regarding the Formulation of the Concept of Follow-Up to the Judgment of the Judicial Review of the Law by the Constitutional Court. There are a variety of legal products as a follow-up to the Constitutional Court's ruling Laws, Government Regulations, Presidential Regulations, Presidential Decrees, Supreme Court Regulations, Ministerial Regulations, Supreme Court Circular Letters, Minister Circular Letters, Circular

Director General of the Ministry, General Election Commission Regulations, Circular Letters of the General Election Commission, Election Supervisory Body Regulations, and Regional Regulations [20]. Whereas according to Article 10 paragraph (1) letter d in Law Number 12 the Year 2011 Regarding the Formation of Legislation Act Law, the follow-up to the Constitutional Court's decision is one of the material content that must be regulated by law [21].

According to this research, the obligation to follow up the Constitutional Court's decision with the legal container of the law is often distorted by the addresat of the Constitutional Court's decision. For example, when the Constitutional Court overturned the Law on Elections, the addresat of the Constitutional Court's decision regarding this matter was the General Election Commission. A follow-up to the Constitutional Court's decision by the General Election Commission in general by making the General Election Commission Regulation related to the Constitutional Court's decision without waiting for changes to the Election Law [22].

In Indonesia, referring to Sunaryati Hartono's opinion, judicial decisions are a source of law. However, the role of the judiciary as a law-making institution is still secondary with the presence of the Constitutional Court as a judicial institution authorized to examine the constitutionality of a law and function as the final interpreter of the constitution. Whether the Constitutional Court's decision as a source of law-making is also secondary. This certainly can be seen and measured from the extent to which the Constitutional Court's decision affects the law making process. Whether the interpretation of the articles in the 1945 Constitution and the interpretation of the material content of norms in a law so as not to conflict with the 1945 Constitution by the Constitutional Court has been used as a guide to determine the direction of legal politics or judicial order in the development of the national legal system or not.

Table
The Concept of Law Development Based on The Constitutional Court Decision



Based on the table above, the concept of planning and national law development must be based on the Constitutional Court's decision. Previously, the Constitutional Court's decision was only used as a second source in planning and updating national law whereas the legal position of the Constitutional Court's decision as described in the previous section has a strategic position in the effort to develop national law.

Some things that need to be done to conceptualize the development and renewal of the national legal system based on the Constitutional Court's decision are:

- a. Conduct an inventory of judicial legal politics or judicial order in the Constitutional Court's decision, both in decisions where the grants are granted, rejected or not acceptable. Why is it also necessary to pay attention to decisions that are rejected and unacceptable when both types of decisions do not cause a new legal situation or negate new legal conditions, so they are not ordered to be published in the State Gazette. Only decisions that have been granted have to be published in the Official Gazette. If that is the rule contained in Article 57 paragraph (3) of the Constitutional Court Law which states, "The Constitutional Court's decision that grants the mandatory application must be published in the State Gazette no later than 30 (thirty) working days after the verdict is pronounced." Therefore, decisions which are rejected and unacceptable are not a concern of the legislators.
- b. On the other hand the rejected decision or unacceptable decision has potentially contained the politics of judicial law or judicial order. For example, the authority of the Constitutional Court to test the Perpu because according to the Constitutional Court the Perpu has the same legal force as the law contained in the decision of Decision Number 138/PUU-VII/2009 where the "unacceptable" ruling is accepted. An inventory of "judicial legal politics or judicial order" should be carried out by legislators (the DPR and the President) with their respective authorities.
- c. After the legislators have a database on the list of "judicial legal politics or judicial order", what needs to be done is to determine the priority scale of "judicial legal politics" to be included in the open cumulative list.
- d. After the legislators have a database on the list of "judicial legal politics or judicial order", what needs to be done is to determine the priority scale of "judicial legal politics or judicial order" to be included in the open cumulative list.
- e. It is necessary to declare the importance of the Constitutional Court decision to the National Long-Term Development Plan (RPJPN) as a reference in the framework of planning, development and national law reform. The National Long-Term Development Plan (RPJPN) is a national development planning document that plays a role in determining the direction of the country's development in the next 20 years. The National Long-Term Development Plan (RPJPN) is also a substitute for the outline of the direction of the state (GBHN) which includes national development directions,

including development in the legal sector. Therefore, the importance of The National Long-Term Development Plan (RPJPN) emphasizes the importance of the Constitutional Court's decision in the planning and development of the national legal system.

- f. The National Medium Term Development Plan (RPJMN) is a manifestation of the vision and mission of the elected President that contains the direction of national law development. Therefore, judicial legal politics or judicial order in the Constitutional Court's decision is important to be used as a guide and reference for the elected President in the planning, development and reform of national law as it is known that all aspects of domestic life are regulated in the Law. The National Medium Term Development Plan (RPJMN) is an instrument for carrying out national legal development, one of which is developed in the Legal Field. Even considering the importance of the RPJMN in national even, during the nomination of the 2019 presidential and vice-presidential candidate pair, the General Election Commission and the Ministry of National Development Planning (PPN/Bappenas) held a technocratic design for the 2020-2024 RPJMN. According to Bambang Brodjonegoro (PPN Minister/Chairperson of Bappenas) at the event, the vision and mission of the elected presidential candidate pair will be translated into RPJMN 2020-2024 [23].
- g. The dynamics of state administration in each period of national development must be used as a reference in national development in the next period, including development in the legal sector. The RPJMN contains a "regulatory framework" that contains policies in all fields. In this context, the Constitutional Court's decision, which was decided during the previous RPJMN periodization, should be a reference in the preparation of the next RPJMN. Therefore it is important to make an inventory of judicial legal politics or judicial order in the Constitutional Court's decision to put in the regulatory framework in the RPJMN document. Therefore, during the preparation of the National Legislation Program whose source is the RPJMN, the judicial legal politics or judicial order contained in the Constitutional Court's decision was poured into the regulations to be made. Thus a harmonious condition will occur so that later licensed products are made that do not conflict with the constitution because the rules drawn up are based on the Constitutional Court's decision.
- h. In the preparation of the National Legislation Program, the judicial legal politics or judicial order contained in the Constitutional Court's decision must be used as the main guideline in developing the "policy direction".Prolegnas is a national legal development planning document that contains the legal politics of national law development. Therefore, it is crucial to put the politics of judicial law or judicial order included in the decisions of the Constitutional Court in the documents referred to, so that between regulations there is mutual consistency, coherence, and correspondence with the 1945 Constitution as the highest law. When formulating the policy direction of law should be guided by the politics of judicial law or judicial order made by the Constitutional Court. The decision of the Constitutional Court whose ruling states that the application is unacceptable or rejected, for example, Decision Number 138/PUU-

VII/2009 (Requirements for the Interest of Forcing and the Authority of the Court to examine The Perpu) and Decision Number 2-3/PUU-V/2007 (Constitutionality of capital punishment) need to be observant to map and carry out an inventory not only of the Constitutional Court's decision which was granted, but also of the Constitutional Court's decision which stated the application was unacceptable and the Constitutional Court's decision which stated the request was rejected.

4. Conclusion

From the discussion above, two things that constitute a conclusion, namely, first, the decision of the Constitutional Court is final and binding. Therefore, the judicial order in the constitutional court decision include prohibitions, suggestions, permissions, recommendations or messages is binding on all parties. Second, in the context of legal formation, decisions of the Constitutional Court are binding on the legislators in making laws and must pay attention to the decisions of the Constitutional Court as the primary source of law in the formation of law. This is in line with current developments where there are symptoms of convergence between legal systems. In countries that adopt a civil law system, there is an effort to enlarge the role of the judiciary as a law-making institution. Vice versa, in countries that adopt the common law system, there is an effort to enlarge the role of the law as in the civil law system.

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The Validity of Fixed-Term Employment Contract With The Remote Working Concept Based on Indonesian Laws

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Abstract. Industrial era 4.0 is an era in which almost everything that exists is integrated with the internet (*internet of things*), including employment which supports the development of remote working in Indonesia. Remote working by using a specific time work agreement carried out through electronic transactions must of course be reviewed with three regulations, namely the Civil Code, the Manpower Law, and the Information and Electronic Transactions Law. Moreover, in fact, the issue of work agreements for a certain time in Indonesia often occurs. Therefore, this paper aims to examine: 1) What is the model of a particular time labor agreement with the Remote Working concept?; 2) How is the validity of a certain time work agreement with the *remote working concept* based on Indonesian Law?. Using normative juridical research methods, it is known that a fixed-term employment contract with remote working concept is in principle the same as a specific time work agreement in general which must be subject to the Manpower Law. Based on the three regulations, the validity of a fixed-term employment contract with the concept of remote working in Agreement Number: 17/PKWT/PT XX/VIII/2019 is considered invalid and weak against its proof.

Keywords: Validity; fixed-term employment contract; Remote Working.

1 Introduction

The development of information and communication technology currently occurs very rapidly and provides many changes in all fields, like in the social, cultural, economic, and other fields. This Development requires every sector to reform, especially in the aspect of technological mastery. Such conditions are part of the Industrial Revolution 4.0 which requires each sector to make full use of information and communication technology.[1] This has an impact on the development of global markets with increasingly dynamic nature and the birth of the concept of the industrial internet of things.[2] Industrial internet of things is a device on the internet that can be used to communicate with other people who are not only in close range but can cross various networks, thus creating closer distance relationships.[3] This of course provides convenience for the global community which in turn gives birth to the implementation of internet-based production. This is as conveyed by the Minister of Industry of Indonesia that the Industrial Revolution 4.0 is one of the efforts to make changes towards

improvement by utilizing the development of the online world in the industrial world whose processes are carried out with the internet.[4]

The 4.0 Industrial Revolution is supporting the development of new concepts of work in several sectors. The concept of working is a working concept that uses a remote work method or referred to as remote working.[5] Remote working is a condition where workers do work with remote control work done anywhere, even at home.[6] The concept of remote working is born not only because it is supported by the development of information technology, but also because of the different leadership characteristics, views, and perspectives on the world of work.[7] The characters, views, and perspectives of work are closely influenced by the era of birth which is then classified in the concept of the Multigeneration workplace.[7]

The concept of *remote working* is currently increasingly popular in Indonesia, even the Government of Indonesia through the Ministry of National Development Planning will apply this concept to Civil Servants.[8] This is of course influenced by several views that *remote working* has many advantages that can be obtained from both the workers and employers. Based on research from Nicholas Bloom, *Remote Working* has a positive impact on employees because employees who apply to work from home have high satisfaction with their work.[9] Besides, they can be more focused, have a better family life, do not need to travel to save more money because they do not need to use routine transportation to the office every day. From the entrepreneur side, the positive impact obtained is that they can obtain a professional workforce from various regions, do not need to prepare workspace and equipment, and certainly do not need to issue transportation allowances.

Like *office work*, *remote work* certainly also creates a legal relationship between Employers and Workers because the engagement that arises between them is due to an agreement in the form of a work agreement. After the agreement is made by the parties, then the legal actions cause a legal relationship which essentially raises the rights and obligations owned by each party.[10] Legal relations in this case by Article 1 Number 15 of the Law Number 13 of 2013 concerning Manpower (hereinafter referred to as Manpower Law) are referred to as Employment Relations which have elements of work, wages, and orders.[11] Employment relationships between employers and workers must be made with an employment agreement, either through a fixed-term employment contract or an Unspecified Time employment contract.[12] Regarding the employment agreement, Article 51 in the Explanation of the Manpower Law explains that in principle the work agreement is made in writing, but by looking at the diverse conditions of the community in Indonesia, it is also possible for an employment contract to be made verbally with several arrangements.[11]

Employment contract according to the Manpower Law are divided into two types, namely a fixed-term employment contract and an Unspecified Time employment contract. Based on these two types of agreements, fixed-term employment contract often cause problems in the world of employment. Issues fixed-term employment contract or generally known as contract labor systems often dominate from several labor cases handled by the Department of Manpower and Transmigration.[13] Of course, this is one of the writer's attention to take one example of a fixed-term employment contract associated with the concept of remote working which in practice is done through electronic transactions. An example of a case of a working relationship with the concept of remote working is between XX company and Mrs. Y Y. Company X is a company engaged in Information Technology with a holding company in Singapore and has branches in Jakarta, Indonesia. Acting for and on behalf of XX Company, the director of Mr.XX recruits workers named Mrs. YY. Between the two there is a working relationship that is bound through a fixed-term employment contract since 1 August 2019.

Mrs. YY works with a job position as a Back-end-Developer. Until now Mrs. YY is still a work in XX Company (Interview, 5 January 2020).

Based on the agreement signed by Mrs. YY, there are several problems. In essence, the Parties bound in the employment contract certainly cannot make a employment contract that deviates from the provisions of the legislation, specifically the Manpower Law. However, in a employment contract between XX company and Mrs. YY stated in the fixed-term employment contract Number 17 / PKWT / PT XX / VIII / 2019 is identified as conflicting with the Labor Law, which is related to the Probation Period, place and date of the employment contract. According to the author, the issue of a fixed-term employment contract with the concept of remote work carried out through electronic transactions must, of course, be reviewed with three regulations, namely regarding 1) general agreement in the Civil Code; 2) employment agreements that are specifically regulated in the Manpower Law; and 3) Electronic contract regulated in Law Number 19 of 2016 concerning Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as the Electronic Information and Transaction Law). Therefore, this research will identify and analyze various matters related to the legal principle of work agreement with some formulation of the problem as follows: 1) What is the model of the fixed-term employment contract with the Remote Working concept?; 2) How is the validity of a fixed-term employment contract between employers and workers with the remote working Concept based on Indonesian Law ?.

In connection with the idea of this research it is known that previous studies discuss the following matters: implementation of work agreements in limited companies[12], analysis of Unspecified Time employment contract[14][15], analysis of legal relations between employers and freelancers but between them not tied to work relations but legal relations based on service agreements[16], discussing the assessment of growth in remote work and its consequences for effort, welfare and work-life balance[17], protection of workers in the 4.0 era[18], and the binding force of agreements work through electronic transactions. [19] Based on previous studies that have been described above, there has not been found any research that discusses the analysis of certain time work agreements in the case of legal relations between employers and workers remote working. This juridical analysis of the work contract aims to find the ideal format for a particular time contract between the employer and the worker with the concept of remote working based on Indonesian law. references.

2 Research Methods

The research method used in this study is normative juridical research that examines legal products in the form of regulations while still observing the reality that occurs in the community and relating to the problems in this study.[20] Legal materials used in this normative study include, legislation, books, work agreements, and other legal documents.[21] Approach methods used in this study include 1) Statute approach, which is a method of conducting an analysis of statutory regulations[22]; 2) Concept approach, which is a method by conducting studies and understanding of legal concepts[23]. The technique used to analyze is by using the interpretation system, such as grammatical interpretation, and systematic interpretation.

3 Results and Discussion

3.1 Model of Fixed-Term Employment Contract With The Remote Working Concept

Fixed-Term Employment Contract is one form of employment agreement in Indonesia. Yunus Shamad in the *Fitriatus Shalihah Journal* believes that the employment agreement is part of the source of labor law.[24] In full, Shamad identified the sources of labor law consisting of: statutory regulations, customs and habits, decisions of Officials or Government Agencies, Treaty, Labor Regulations, and employment Agreements.[24] Under Article 56 of the Manpower Law, there are two kinds of employment agreements, which are employment agreements that can be made for a certain time (a fixed-term employment contract) and employment agreements for an indefinite time (an Unspecified Time employment contract). Furthermore, Article 56 Paragraph (2) of the Manpower Law further elaborates on work agreements referred to as certain time agreements, namely work agreements based on the period and completion of an occupation. At a fixed-term employment contract is limited to a maximum of three years and in general the community knows as a contract employee, while the employment contract does not have a fixed time limit that is generally the public knows as a permanent employee. In more detail, the understanding of both of them is regulated in Article 1[25] of the Decree of the Minister of Manpower and Transmigration of the Republic of Indonesia. Article 1 number 1[25] explains that a fixed-term employment contract is an employment agreement between the employee and the employer within the scope of work that aims to establish employment relations within a predetermined period of time or for a predetermined occupation. While the definition of an Unspecified Time employment contract is explained in Article 1 number 2[11] which means: an employment agreement made between the employee and the employer to establish a permanent employment relationship.

Based on the conditions in Indonesia that are different from developed countries, the country of Indonesia as a developing country still has a tendency that workers in Indonesia prefer to be bound in work relationships that are permanent in one company.[24] This is understandable because there are some rights from employees with Unspecified Time employment contract not obtained by employees with a certain time work status for example: 1) Fulfillment of the company's obligations in providing civil rights to workers is only at the highest wage of working period that has not been expires at the time of termination of the employment relationship unilaterally by the company before the agreed time, and 2) The employer has no obligation to provide severance pay or other rights as time workers do not specify when the employment relationship has ended. In this position, a fixed-term worker approves the action because it requires a job. Although on the other hand, Unspecified Time Workers expect to become Indefinite Time Workers /Permanent Workers in a Company. The impact, sometimes in practice, is that a Certain Time Work Agreement that has exceeded three years and wants to be extended by the Employee /Employer is made by not mentioning the extension of a fixed-term employment contract, but rather by renewing a fixed-term employment contract.[26]

After knowing the differences between the two types of employment agreements that exist in Indonesia, then the next author will focus more on discussing the fixed-term employment contract because as the Author has explained previously that fixed-term employment contract often cause various kinds of problems among Indonesian people. The problem with the fixed-term employment contract is of course already being realized by the Government of Indonesia so that the Manpower Law was established as a form of protection for workers. The protection of workers is to guarantee workers the basic rights of workers and provide guarantees for

equal opportunities and treatment and without discrimination from the Employer, which in the end will bring prosperity to workers and their families while maintaining economic stability in the business.[11] This Manpower Law is a legal umbrella of Labor Law and serves as a basic guideline for making employment agreements, including a fixed-term employment contract. Therefore, in any form of work methods (including Remote Working), the employment relationship between Employers and Workers must be subject to the Manpower Law.

Remote working is another naming of remote work (telecommuting). Remote work develops over time which was originally known as 'electronic homework', develops into 'telecommuting', then 'flexiwork', and in the end the naming of remote work develops in various forms, such as: 'remote working', 'distance working' 'or' 'outwork'. [27] Furthermore, according to Konradt, Schmook, and Malecke in Oswar Mungkasa, it is argued that remote work is a method of working in an organization that is carried out partially or completely outside conventional offices with the help of telecommunications and information services.[27] Thus, Remote working has 3 characteristics that distinguish it from office working, namely: the place / location of work done outside the office, flexible time / schedule, and the existence of modern communication and information technology utilization.

Remote working does have both positive and negative impacts[27] on Workers and Employers, but its existence still needs to be studied further in the scope of labor law, especially in work agreements that underlie the emergence of remote work and are a part of Manpower Law. In addition, basically, remote working (as always Office Working) also creates a legal relationship between Employers and Workers based on an agreement in the form of a employment contract/agreement. This employment relationship has elements of work, wages, and orders.[11] With the employment agreement, the legal relationship between workers and employers has a strong legality before the law. Especially if the work is a work with a certain time which by Article 57 of the Manpower Law must have a fixed-term employment contract in writing. As conducted by the Respondents (MRs. YY) who currently carry out work with the concept of remote working in Company XX.

Fixed-Term Employment Contract with the concept of remote working is in principle the same as Fixed-Term Employment in general (office working), as previously stated that the employment relationship between Employers and Manpower must be subject to the Manpower Law. Based on the results of an interview with Mrs. YY, the Employment agreement between Mrs. YY and XX Companies are done online or in the form of electronic mail. Systematic Fixed-Term Employment Contract on the employment contract Number 17/ PKWT/PT-XX/VIII/2019 includes:

- 1) Opening, which contains the time of making the contract;
- 2) Comparison, which contains the identity and position of the parties in the work agreement;
- 3) The premise, which explains the position and the main purpose of the parties to an employment agreement;
- 4) The contents of the Agreement, which contains 11 Articles governing: the time of the agreement, duties and placement, probation period, rights and obligations of the first party, rights and obligations of the Second Party, Annual Working Hours and Leave, Main Wages-Benefits-and Income Taxes, Confidentiality, termination of employment agreements, Disputes, and Closing. It is this part of the agreement that needs to be further studied with the Manpower Law.
- 5) Signatures of the parties.

Based on the systematics of a Fixed-Term Employment Contract in the employment agreement Number 17 / PKWT / PT-XX / VIII / 2019 certainly does not have a difference

with the work agreement in general. Regarding the clause that shows the workplace in the agreement, the company name is still written. In other words, there are no specific clauses regarding remote working systems.

3.2 The Validity of a Fixed-Term Employment Contract with the Remote Working Concept Based on Indonesian Law

Reviewing the validity of a Fixed-term employment contract with the concept of Remote Working that is listed in the Fixed-term employment contract Number 17/PKWT PT-XX/VIII/2019 is an effort to analyze and find out things that should be a guideline for the Employers/Employers and Workers to agree with each other by taking into account the interests of each other that does not harm each other and does not violate the provisions of the legislation. Mrs. YY relationship with Company XX was carried out based on the agreement signed by Mrs. Y Y. Furthermore, in the work agreement between XX company and Mrs. YY stated in the Fixed-term employment contract Number 17/PKWT PT-XX/VIII/2019 is identified as being in conflict with the Manpower Law. But according to the author, the issue of work agreements for a certain time with the concept of remote work carried out through electronic transactions must of course be reviewed with three regulations in force in Indonesia, namely regarding: 1) agreements in general in the Civil Code; 2) employment agreements that are specifically regulated in the Manpower Law; and 3) Information and Electronic Transaction Law. This is done so that the strength of a Fixed-term employment contract is strong before the law and can be used as evidence when a dispute occurs between the Company and the Worker. Based on the above problems, it is necessary for the writer to present an analysis of Fixed-term employment contract with the concept of Remote Working that uses a Fixed-term employment contract between Mrs. YY with Company XX Number 17/PKWT PT-XX/VIII/2019 as follows:

3.2.1 The Validity of Fixed-term employment contract in General agreement in the Civil Code.

The validity of a employment contract/agreement in general can be assessed based on the law of the agreement governing the legal conditions of the agreement listed in Article 1320 of the Civil Code. Based on Article 1320 of the Civil Code, the agreement stated before the law is an agreement that fulfills the four saints, namely: 1) there is an agreement for those who bind themselves; 2) the ability of the parties in making an engagement; 3) there must be a certain thing / object; and 4) fulfilling halal cause. These requirements can be categorized into two conditions, namely subjective conditions and objective conditions. Subjective conditions include conditions relating to the subject of the agreement, namely the terms of the agreement and the ability of the parties in making the agreement. Meanwhile, objective conditions include conditions relating to the object of the agreement, namely the existence of certain objects and causal causes. Identifying the fulfillment of the legal conditions of the agreement must be carried out by the parties at the beginning of the agreement or in the preparation stage of the contract design so that the parties should agree before the agreement (in this case the work agreement) to understand beforehand who he has made the agreement to and know clearly causa and object of agreement.[28] Based on the agreement Mrs. YY with Company XX Number 17 / PKWT / PT-XX / VIII / 2019, several problems were found in terms of halal agreements and causa. Meanwhile, certain Skill and object requirements have been met according to the provisions in the Civil Code. Following are issues related to the validity of

the employment agreement between Mrs. YY with Company XX Number 17 / PKWT / PT-XX / VIII / 2019:

- 1) There is no signing of the employer in the Fixed-term employment contract as proof of agreement.

Regarding the agreement in the Contract can be interpreted as awareness to mutually guarantee the fulfillment of the rights and obligations of each party. The agreement is the initial step of the parties to commit themselves to the agreement. Therefore, as stated by Kartini Muljadi and Gunawan Widjaja in Glenn Biondi that a binding agreement and applies to the parties in principle does not require a formality.[29] However, agreements which are part of certain legal actions must of course also be subject to other laws and regulations, as happened in the Manpower Law which requires that certain time work agreements must be made in writing. This is of course also to safeguard the interests of Workers and Employers / Employers in the future. In order to reach a legal agreement and protect the interests of each individual, the parties when making conformity will have to pay attention to several factors, namely the offer of the will to the other party, the statement of will expressly, the acceptance of the will of others, the statement of acceptance of the will of others , the application of the precautionary principle based on good faith, and the application of Article 1321 of the Civil Code.[30]

Fixed-term employment contract between Mrs. YY with Company XX Number 17/PKWT/PT-XX/VIII/201 can be known through proof of signature in the employment agreement. This signature evidence shows that the parties have agreed and know the contents of the agreement. In addition, the signature listed in the agreement is a form of consensus / agreement as well as deliberate between the two parties.[31] However, in the Fixed-term employment contract Number 17/PKWT/PT-XX/VIII/2019 there is only the signature of Mrs. YY as Workers. The Worker Party does not accept the return of the work agreement signed by the Company. In fact, it has been stated in Article 11 (Closing) paragraph 3 that the work agreement is made in duplicate namely one agreement for the First Party and one Party for the Second Party, each of which has the same legal force. Although, until now the implementation of the work agreement between Mrs. YY with Company XX runs as it should according to what has been stated in the agreement. Of course, this will not be a legal problem if the parties have good faith and carry out their rights and obligations accordingly. However, it would be different if it turns out that at the time of the implementation of the agreement there were problems from one of the parties or it turned out to be in bad faith. The position of the employment agreement does not have legal force, both from the Civil Code and the Manpower Law. In other words, the parties, both workers and employers, do not get legal protection because they do not meet the formal requirements that have been determined by the rules of law.

- 2) Non-fulfillment of halal cause due to not fulfilling the provisions of Manpower Law and regulations

Regarding halal causes is regulated in Article 1335 through Article 1337 of the Civil Code. As stipulated in Article 1337 of the Civil Code, because halal means that the agreement made by the parties must be in accordance with applicable law and does not violate decency or public order. If explained further, the halal cause in the agreement contains the following meanings:[32]

- a. A halal clause means the contents of the agreement do not conflict with public order, decency, and law;

- b. Because it is said to be false if held to cover the real cause;
- c. Because it is said to be forbidden if it is contrary to the law, decency, and public order; and
- d. An agreement without cause, if the intended purpose by the parties at the time of the agreement is not reached.

In contrast to subjective conditions, conditions relating to certain objects and halal causes are objective conditions in fulfilling the legal conditions of the agreement. If these objective conditions are not fulfilled by the parties, then the agreement can be *null and void*. As stated by Elly Erawati and Herlien Budiono that the agreement is null and void, meaning that the agreement was never born, and as such there was never an agreement.[33]

Related to the Fixed-term employment contract between Mrs. YY with Company XX Number 17/PKWT/PT-XX/VIII/2019, obtained provisions that violated the Manpower Law. Based on the agreement, the provisions relating to the Probation Period are found in Article 3 paragraph 1 which states that: "The Second Party must undergo a Probation Period for a maximum period of 3 (three) months from August 1, 2019 to November 1, 2019". This is of course contrary to the provisions of the Manpower Act stated in Article 58 which states that a certain time employment agreement cannot require a trial period and if this is included then the required probation period is null and void by law.

Both of these provisions certainly represent the quality of a fixed-term employment contract in fulfilling the legal conditions of the agreement under Article 1320 of the Civil Code. Failure to fulfill the legal conditions of the agreement will result in legal consequences, which can be canceled and / or null and void by law. If the agreement does not meet the subjective conditions, the agreement can be canceled by the judge on the basis of the request of an incompetent party or party who is not free to give an agreement. This cancellation is limited to 5 years based on Article 1454 of the Civil Code. Meanwhile, if it does not meet objective conditions, then the agreement is null and void which results in the agreement being considered to never exist so that there is no basis for an engagement between the parties.

3.2.2 The Validity of Fixed-term employment contract in Fixed-Term Employment Contract that are specifically regulated in the Manpower Law

The Manpower Law is a legal umbrella of labor provisions in Indonesia, including the provisions of the employment agreement. In practice, work agreements (both certain time work agreements and non-specified time work agreements) are made unilaterally by the employer / entrepreneur without any negotiation with the Prospective Workers. Prospective Workers are only given the choice of agreeing or not agreeing to the work agreement. However, the matter of concern is whether the substance of the employment agreement contains clauses that are prohibited by the Manpower Law, irrationality, and non-compliance. The provisions of the employment agreement in the Manpower Law are coercive, meaning that the parties bound in the work agreement cannot make the work agreement deviate from the provisions of the labor laws.[27] The provisions of certain time work agreements in the Manpower Law are regulated in Article 52, Article 54, Article 57, Article 58, and article 59. The provisions in the work agreement must certainly be considered by employers in making the contents of the agreement. This is due to the government's involvement in overseeing the

Specific Time Work Agreement. The Indonesian government is serious about protecting the rights of workers by imposing sanctions on employers who try to ignore their obligations to the rights of workers, such as providing social security to workers.[34]

Manpower Law provides characteristics of agreements that are categorized as specific time work agreements, namely: (Article 59 of the Manpower Law)

- a. work done once completed or temporary;
- b. work planned for completion of the work within a short / short period of time and no later than 3 (three) years;
- c. work that has a seasonal nature or at a certain time; or
- d. work related to renewal or still in trial or exploration.

Work agreements are generally made based on four things, namely: agreements agreed upon by Workers and Employers, the ability and authority to take legal action, the existence of work promised to be performed by Workers, and such work does not conflict with politeness, public order, and statutory regulations in Indonesia. This is based on Article 52 paragraph (1) of the Manpower Law. If examined further, in essence the provisions of Article 52 paragraph (1) are duplications of the provisions of the legal conditions of the agreement provided for in Article 1320 of the Civil Code. The legal consequences determined by Article 52 paragraph (2) and (3) of the Manpower Law are also the same as the provisions in the Civil Code that is can be canceled or null and void by law. Therefore, it is known which formulation of the Fixed-term employment contract between Mrs. YY with Company XX that is not in accordance with the Manpower Law, namely: the agreement of both parties and the work promised not to conflict with public order, decency, and applicable laws and regulations. Related to Agreement Number 17/PKWT/PT-XX/VIII/2019 that is contrary to the Manpower Law, namely the inclusion of probation which is contrary to Article 58 of the Manpower Law. Provisions for this probation by Article 58 paragraph (2) of the Manpower Law are null and void.

Furthermore, Article 54 of the Manpower Law regulates matters that must be in a minimum in an employment agreement. In this regard, the following is a systematic comparison of work agreements based on the Manpower Act with a systematic Work Agreement on Specific Time Number 17/PKWT/PT-XX/VIII/2019:

Table 1. Fulfillment of Fixed-term employment contract Number 17/PKWT/PT-XX/VIII/2019 with Systematic Employment contract According to the Manpower Law

Comparator (Article 54 of the Manpower Act)	Contents of Agreement Number 17 / PKWT / PT-XX / VIII / 2019	Information on
name, company address, and type of business	listed	complete
names, sexes, ages, and addresses of workers / laborers	listed	complete
positions or types of work	listed	Software Developer
Where works	listed	Listed, but does not show explicitly and does not describe the concept of remote working. Even though in reality it is done by Remote Working, the
the amount of wages received and the method of payment	listed	Complete related to Wages, Benefits and Income Taxes

general provisions concerning working conditions that govern the rights and obligations held by each party	listed	Rights and Obligations of First Party Rights and obligations of the Second Party
The time the work starts and the length of the work agreement period	listed	within two (2) years of
the place and date of the employment agreement made by the Worker and the Employer	listed with records	only date, not explained employment contract made
the signatures of the Worker and the Employer in the agreement	listed with records	Only Second party as Workers (furthermore there is no reversal of the agreement with the complete signature of the company) which is contrary to article 54 paragraph 3 of the Manpower Law.

3.2.3 The Validity of Fixed-term employment contract in electronically specifically regulated in the Information and Electronic Transactions Law

Work agreement Number 17/PKWT/PT-XX/VIII/2019 is a work agreement with a remote working system that processes the job application until the agreement in the agreement is done online. This electronic implementation by the State of Indonesia has been regulated in the Electronic Information and Transaction Law and the implementing regulations, namely Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Transactions and Systems. Provisions on the Electronic Information and Transaction Law and PP of the Implementation of Electronic Transactions and Systems are part of the rules that resolve problems if this electronic transaction raises a dispute, one of which is related to proving electronic transactions before the court. According to Article 1233 of the Civil Code, if one of the parties in the agreement does not fulfill the achievement that has been agreed (default) so that the consequences of the act committed will result in material losses. Therefore, the adverse action resulting from one of the parties who did not carry out their responsibilities following the agreement agreed upon through an online agreement can be sued legally through the court. [35]

Article 1 number 17 of the Electronic Information and Transaction Law, an electronic contract is an agreement of the parties made through an electronic system. Furthermore, in Article 1 number 13 it is determined that the signatory is a legal subject that is associated or related to the Electronic Signature. The Law on Information and Electronic Transactions in principle is the basis for regulating electronic transactions through internet media such as mobile computers and others, so that these activities result in legal actions that can be accounted for.[36] Therefore, the Information and Electronic Transaction Law also applies in certain time work agreements Number 17/PKWT/PT-XX/VIII/2019 which is carried out through electronic transactions because the employer and prospective workers are in different places.

Based on Article 5 through Article 12 of the Electronic Information and Transaction Law, it is explained that the electronic documents and /or printed outputs are valid evidence in accordance with the applicable procedural law in Indonesia. Furthermore, Article 11

paragraph (1) of the Information and Electronic Transaction Law has also regulated that the electronic signature requirements that have legal force and have legal consequences, namely:

- a. data for making Electronic Signatures are only listed in the name of the Signatory and during the electronic signing process directly under the authority of the Signatory;
- b. all changes that occur to the Electronic Signature can be known;
- c. all changes related to Electronic Information on Electronic Signature after the time of signing can be known;
- d. there is a special method used to identify who the Signer is related to; and
- e. there is a special way to prove that the Signatory has approved the related Electronic Information.

Noting the provisions of Article 11 paragraph 1 of the Information and Electronic Transaction Law, the *scanned* signature is considered as an electronic signature that has legal force and legal consequences if it can fulfill Article 11 paragraph (1) of the Information and Electronic Transaction Law. Therefore, if there is an appearance of an electronic signature, the proof is through proof of the formal requirements stipulated in article 11 paragraph (1) of the Electronic Information and Transaction Law. If it is associated with the existence of the signature of the scan as was done by the Second Party in Agreement Number 17 / PKWT / PT-XX / VIII / 2019 it will be quite difficult to prove the validity of the scan results. The legal strength of the results *scan* wet signature is very low, because the authentication function is very difficult to fulfill and the strength of the proof value is relatively weak.

4 Conclusion

A Fixed-term employment contract with the concept of remote working is in principle the same as a certain time working agreement in general (office working), as previously stated that the employment relationship between Employers and Workers must be subject to the Manpower Act. Based on the results of an interview with Mrs. YY, the work agreement between Mrs. YY and Company XX are done online or in the form of electronic mail. Systematic of Fixed-term employment contract in employment contract Number 17/PKWT/PT-XX/VIII/2019 includes: Opening, which contains the time of making the contract; Identity of the parties, which contains the identity and acting position of the parties in the work agreement; The premise, which explains the position and main purpose of the parties to an employment agreement; The contents of the Agreement, which contains 11 Articles governing: the time of the agreement, duties and placement, probation period, rights and obligations of the first party, rights and obligations of the Second Party, Annual Working Hours and Leave, Main Wages-Benefits-and Income Tax, Confidentiality, the termination of employment agreements, Disputes, and Closing. It is this part of the agreement that needs to be further studied with the Manpower Law; The parties' signatures. A Fixed-term employment contract with the concept of remote working carried out through electronic transactions must of course be reviewed with three regulations in force in Indonesia, namely regarding: 1) general agreement in the Civil Code; 2) employment agreements that are specifically regulated in the Manpower Act; and 3) the Electronic Information and Transaction Law. Sub-definitively Fixed-term employment contract Number 17/PKWT/PT-XX/VIII/2019 are subject to the Civil Code in general and the Manpower Act specifically. However, in the process of making the agreement which in this case until the signing needs to pay attention to the

Information Law and Electronic Transactions so that the legal force of the employment agreement carried out electronically becomes strong and can be used as legal evidence.

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Testing the Existence of Government Regulations in the Legal Regulation System in Indonesia

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Abstract. Existence Rule Government in System Regulations Regulations in Indonesia is considered to be one of the inhibitors in the enforcement of law in Indonesia, due to the implementation of Act became hostage without the issuance of Regulations Government. Evidently there are many laws which can not be implemented immediately into society because of Rule Government which did not immediately issue when have got devolution, so that people are harmed. Regulation of the Government by Decree President also has the role and function almost the same, becomes ambivalence government in issuing the rules are in the system of regulatory legislation. Research is using the approach of juridical normative in the formation of Rule Government who entered into the system formation of regulatory legislation.

Keyword: Rule Government, System Regulation Legislation, Certainty Law

1 Introduction

The history of law can be said to be experiencing sometimes change and improvement. Starting with the legislation that has been passed down by the colonial Dutch had colonized nation Indonesia is quite a long time until the formation of a hierarchy of legislation are considered to be good and in accordance of the needs in the state administration in Indonesia through Law No. 12 of 2011 concerning Formation of Regulations and Regulations . Although Law No.12 of 2011 finally experienced a change also with the enactment of Law No. 15 Year 2019 to cover the shortage of Act No. 12 Year 2011.

But based on the deepening of the material Law No. 15 Year 2019 even this is considered to be still there are cracks that still be the problem of the level in the field, especially against the existence of regulation has, Rule Government and regulation. But at least that development has led to improvements in the issue regarding the formation of legislation.

Regulation of the government in the theory of the formation of regulatory legislation is classified as a regulation implementing (*verordnorn*) as a theory that stated by Hans Nawiasky pupil of Hans Kelsen as theory Stufenbau theories, Regulations implementation of this function to

provide regulation that is more technical than the rules above that legislation (*formalgezet*). So with the regulations of government, laws could be applied in the technical field.

However, precisely to create its own problems in the field. When the legislation has been enacted and has been valid but the issuance of regulations the government did not immediately do the things it can give rise to uncertainty law. Which in the end is a society that is harmed by not any rules that clearly would pose problems of law new. An example is the Law No.11 Year 2008 on Pornography which is new there are Government Regulation its Year 2011, Law 6 Year 2018 on Quarantine Health recently published Government Regulation in the year 2020 and even then more specifically related to the handling of Covid-19. Including the Act 18 Year 2003 concerning Advocates that without PP until the problem is more complicated because it had a lot of norms new that binds him to the problems organizations advocate the single bar corresponding mandate of the Act becomes increasingly not clear.

2 Method

The study is based to some theory of law that is known widely as the theory of the history of law Von Savigny, the theory of certainty, justice and the emergence Gustav Radbrouch and Stufen theory of Hans Kelsen and Hans Nawiasky. Authors see yet any research that depth is specifically related to Rule Government within the system law in Indonesia. The study was conducted based on normative juridical research of primary and secondary materials. It is expected that through the assessment of this can be obtained data is accurate about the issues that will be studied with the rules of the norms of the new.

3 Results and Discussion

System Legislation in Indonesia is a continuation of the system of law that has been there since the time of the colonial Dutch. When the Netherlands there is a change in system his state included in the formation of its laws so states colonies are directly or not directly receive the impact. [1] The Netherlands formulate a constitution written in the form of legislation base is done in year 18 4 8 [2] . Then followed the laws related to civil and criminal who started imposed on his country by adopting of a law in France which subsequently also applied in Indonesia that we are familiar with the Criminal Code, Code Civil and to Code of Businesses Law.

In the history of the colonial Dutch never impose some regulatory legislation in Indonesia which time it was named Indies Netherlands among others , namely *Wet, Algemene Matregel van Bestuur* and *Ordinance* of the same level the Act . Then there are *Regerings Verordening* at the level of Government Regulations, *Besluit Gouverneur General* at the level of Presidential Decrees, *Besluit Departement Shoofde* at the level of Ministerial Decrees and *Besluit Staatsbedrijf* at the level of State Agency Decrees. Not yet added regulations at the level of local as *Locale Verordening, Waterschamps Verordening* and *Verordening Hoof Gewest Bestuur*. [3]

Furthermore, when Indonesia liberate ourselves on the date of 17 August 1945, the Dutch did not and immediately recognize the independence of Indonesia. The Netherlands tried to stick his power back in Indonesia once seized by Japan in the year 1942. Some of the regulatory legislation of the Netherlands were changed by the Japanese attempted to in return by the Netherlands. But

the effort was not easy due to plugging back the power in Indonesia, the Netherlands had to fight in the physical as well as the path of diplomacy to end the Netherlands recognizes the sovereignty of the Republic of Indonesia in the year 1949.

According to Shidarta, Frederick Karl von Savigny (1779-1861), a historical legal theory figure, said that law did not need to be made because law grew with the people. Law is not a product by design. He grew follow a process that runs in the diachronic. Laws in Savigny's eyes do not recognize the word stop (*cessation*). The process that continues to run, so that the law is a product of culture which historically. Because if this process stops and the law becomes a momentary, then the law has the potential to be uprooted from its historical roots. He became a product of political, product by design should view the positivism law. [4]

While it did nature through Home Visits certainty, justice and benefit of law which was developed by Gustav Radbruch, certainty, fairness and expediency the three objectives of law. According fairness, certainty of law and expediency (*Gerechtigkeit, Rechtssicherheit, Zweckmäßigkeit*) are three terms that are often sung in halls lecture and chambers of justice, but not necessarily understood nature or agreed upon meaning. Justice and legal certainty, for example. At first glance the two terms were opposite each other, but may be also not so. [5]

The word justice may be terms analogue, so it presented the term justice procedural, justice legalists, justice commutative, justice distributive, justice vindikatif, justice creative, justice substantive, and so on. Justice procedural, as termed by **Nonet** and **Selznick** to mention one of the indicators of the type of law autonomously, for example, it turns out after scrutiny leads to the certainty of law for the sake of upholding the rule of law. So, in this context justice and legal certainty do not cross, but rather are side by side. Fairness and certainty are two values Axiological in the law. The discourse of philosophy of law is often questioned the value of this as if both an antinomy, so the philosophy of law is defined as a search on justice or certainty that justice.

Gustav Radbruch saw mean that the certainty of the law does not always have to be given priority fulfillment in every system of law positively, as if the certainty of the law it should be no more first, just then justice and expediency. So he then rectified his own theory if the third goal of law is equal.

In Historically, the first by Gustav Radbruch purpose certainty occupy the rank of the most over at the destination to another. However, after seeing the fact that the theory of the German in the bottom of the power of the Nazi legalize practices that are not humane during the period of War World II by road making laws which legalize practices of the atrocities of war at the time was, Radbruch was finally rectify the theory that at the top with put the goal of justice in the top destinations of law to another.

Gustav Radbruch proposed 4 (four) things fundamentally that is associated with the meaning of the certainty of law, namely:

1. That the law was positive, it means that the law positively it is law.
2. That the law is based on facts, the meaning is based on reality.
3. That fact should be formulated in a way that is clear so as to avoid errors in interpretation, in addition to easily implemented.
4. Positive law can not be easily changed.[6]

The laws and regulations are arranged in stages which consist of legal norms. Norms norms of law that form the pyramid is that then called with the composition of the norm, which is the

norm of law is written is called the pyramid law or which are substances called hierarchy of legislation .

Before knowing the theory of general of the pyramid legislation, especially formerly known is the theory *Stufenbau* (*Stufenbau des rechts Theorie*) were presented by Hans Kelsen. He said as follows : *"Every grammar rule of law is an arrangement rather than rules (Stufenbau des rechts Theorie) in peak stufenbau there are rules basis of a system of law national who is a rule fundamental. These basic rules are grundnorm or ursprungnorm . Grundnorm are legal principles that are abstract , general and hypothetical, then move to generalnorm (legal rules), which are further posited to become a real norm (concrettenorm)."*

Norms norms of law tiered and level in a hierarchy of governance arrangement, and a norm which is lower applicable, sourced, and based on the norms that much higher. It 's caused so not no regulation legislation that mutually contradict one each other, both were opposed in the vertical (regulation legislation that is lower odds with the much higher levels of hierarchy) as well as horizontally (regulation legislation that rank parallel to each other contradict one each other). [7]

Related composition laws and the types of regulatory legislation in Indonesia had been governed by an official by the government that in the letter the President to the Chairman of the DPR-GR No. 2262 / HK / 59 dated 30 August, 1959, while the order sequence regulation legislation is formally set first times in Decision Assembly Consultative People While the Republic of Indonesia Number XX / MPR / 1966 of the Memorandum of DPR-GR about Source Conduct Law of the Republic of Indonesia and the Rules of Order legislation of the Republic of Indonesia. Then change based on MPR Decree Number III / MPR / 2000 concerning Legal Sources and Regulatory Order . Then replaced again by basing on the statute, namely Law No. 10 Year 2004 concerning the Establishment of Rules Regulations and the latter as well as the renewal of Law No. 12 Year 2011 to change some in the Act No. 15 of 2019.

In the arrangement or hierarchy and the type of regulatory legislation based on the Act 12 Year 2011 Article 7 stated :

1. The Constitution of the Republic of Indonesia
2. Decree of the People 's Consultative Assembly
3. Act / Regulations Government Lieu of Law
4. Government Regulations
5. Presidential Regulation
6. Provincial Regional Regulations ; and
7. Regulation of the Regional District / City

What is interesting and the writer is highlighting is the type of regulation in the form of Government Regulation. Because s ince the beginning of the history of the formation of regulatory legislation existence is always there in the system of regulation law in Indonesia. Though its function is almost equal to the Regulation of President which is the hierarchy is below. For example, Law No.12 of 2011 concerning Formation of Regulations and Regulations uses the implementing regulations namely Presidential Regulations rather than Government Regulations as they should.

Government regulations in their journey become very important because of their function as implementing regulations of the laws above. Because its function is, ultimately many laws that are not able to run with effectively without the Rule Government, although the rules cover listed apply from the date the legislation is enacted.

For example, Law No. 6 year 2018 about Quarantine Healthy has been applicable since enacted in the year 2018 but not immediately published Rule Government. It's become anomaly in the world of law, because although it already applies, but is not able to run as it should. Regulation of the Government finally published in the year 2020 due to the pandemic Covid-19. So that the material that there is in it more specific to the Covid-19 instead of the provisions of that expected from the law. [8]

By making Government Regulations as implementing regulations of the Act, its position is very strategic in accompanying the existence of the Act. Although the existence of the Act itself is not all require the issuance of a Regulation of the Government as a regulation implementing, but when it is already contained in the provisions of the law then become mandatory for issuance of Rule Government.

The problem is when the legislation has been passed and enacted while in publishing Regulation Governments have not known when the time. In this case if there are legal issues and are brought to the direction of litigation then new legal problems will arise. There is a gap uncertainty of the law as yet the rules implementing the set.

In a product legislation that will be enacted not be separated from the problem that power legitimate, power use, power belts and power behavior. Under the terms of the following explanation. *First*, legitimate power ; i.e. a regulatory law has validity if it is formed by a norm that is higher or institution that is authorized to shape. A Rule Government will be valid if it is formed by the President to carry out the Act and based on Article 5 paragraph (2) of the 1945 Constitution or a Decree of the President which was formed by the President by Article 4 paragraph (1) 1945. This means that if a product regulation legislation established by the institution which is not authority -based attribution and delegation then not valid or not valid .

Second power for that; a regulatory law does not have its usefulness because as the norm that regulates which aims to replace the formula in a regulatory law but not by doing the revocation of the provisions which amended it. An example is the existence of MPR Decree No.III / MPR / 2000 concerning Legal Sources and Order of Laws and Regulations with the enactment of Law No. 10 of 2004 concerning Formation of Regulations and Regulations. By because it formed the Decree of MPR No.I / MPR / 2003 on An overview Against Material and Legal Status Decree of the Assembly, the Decree of MPR RI Year 1960 until the Year 2002, which in Article 4 digits 4 states Stipulation of MPR No.III / MPR / 2000 declared still remain valid until the formation of the Act .

The third is the power tie of a regulation legislation that has been enacted . In principle, a regulation legislation will be binding in general if it had been enacted with evidence got numbering and sheets country . Without the existence of things that are considered still not be enforced .

The fourth is the conduct, namely ; a regulatory legislation may apply when already enacted , as well as power tie. The difference is in terms of the provisions that exist in the matter of laws applicable to public , but sometimes is not binding because it revoked the phrase particular due to have received a judicial review of the Supreme Constitutional . [9]

In connection establishment Rule Government, The should natural formation Act, it simultaneously can be in the study also Rule Government. It is to prevent or closing the gap to the lack of certainty of law which can be detrimental to the parties or stakeholders. Because, effectively, when the discussion of material from regulation legislation has been discussed also in detail and depth -related materials such. All parties related to both of the elements of the

government, Parliament, public or stakeholder has been presented. So, when Act was already ready for promulgation, in essence already prepared also in the level of implementation. By because it should be done also publication of Regulation Government it coincided with the law. Then no longer be known term legislation applicable since its enactment but contains non-certainty of law.

As we all know d natural process of the formation of regulatory law states the process of making regulation legislation that basically starts from the planning, preparation, formulation, discussion, endorsement or promulgation and dissemination [10]. The time is long enough to discuss a law. All stages of the need of the time were not a little, even sometimes cannot correspond with the time that is specified or postponed.

In since the receipt of the letter tentan submission of the bill from the House of Representatives that is no later than 60 days, the President appointed the Minister who was assigned to represent the President to discuss the bill together with the President [11]. With such a team from the ministry were linked to discuss more about related material from the bill that that could be material to Rule Government later.

In the process establishment of a regulatory law there are many stages so that the possible outcome of the material legislation is very comprehensive in the set. Most do not exist Discussion Level I and Discussion Level II prior to the passing of a bill [12]. Even before the talks Level I and Discussion Level II, most are not already prepared manuscript academic and drafting of Act are ready to be discussed.

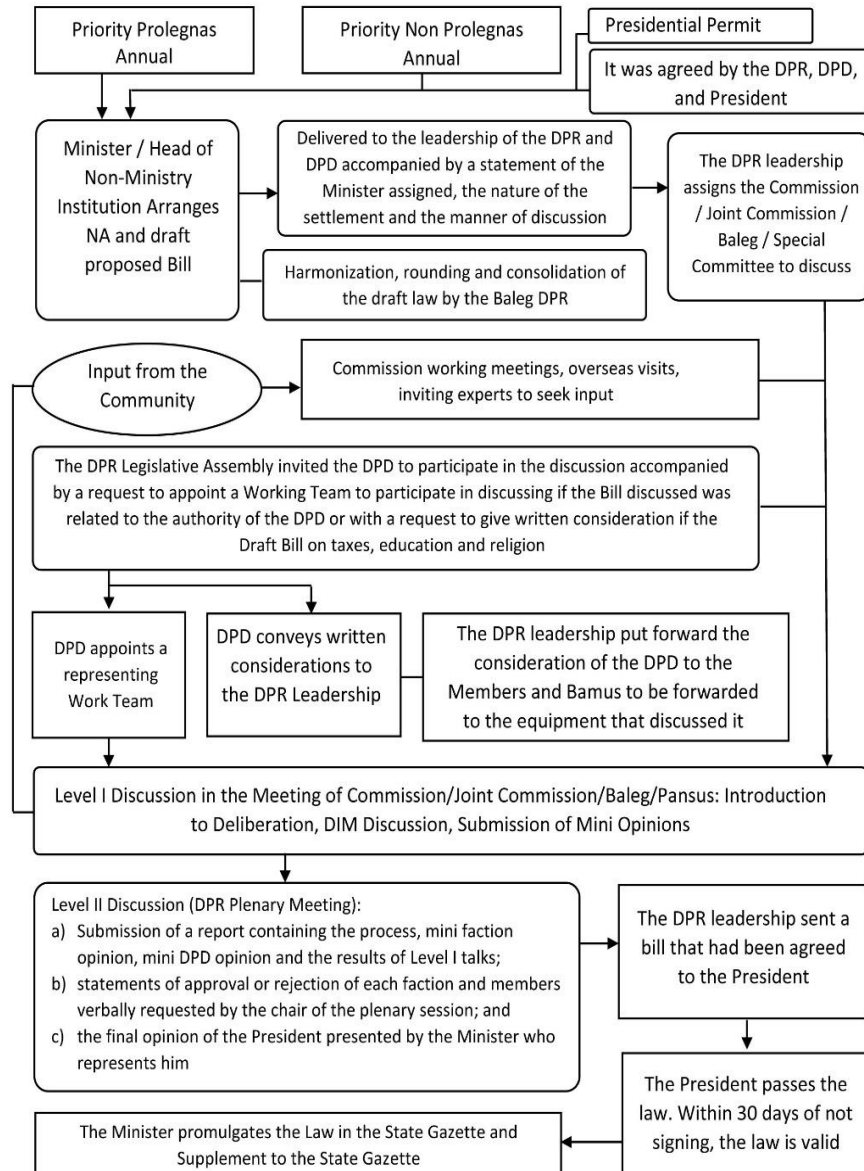


Figure 1. Process Flow Formation of the Law from the Government Proposed Draft Bill

Picture above is one of the examples of the process flow of the formation of an Act through the proposal of the government. The proposal of the House of Representatives and the House in general is almost the same in the process, the only course where the proposal was coming. The process of formation up until the issuance requires time which is quite long so it is expected to get the material from the Act are very mature .

By thus in principle, when an Act about to be formed should be able to also establish the concept of Rule Government. Because the material that there is in fact already done has been reviewed by all parties both from the elements legislative, elements of executives, stakeholders and the public general. By because it is not no harm if when of Act want passed the Regulation of the Government which has been delegated under the provisions of the lid simultaneously also in the publication. Or if it is not possible to delegate Government Regulations, it is better for the law to be more detailed so there is no need for implementing regulations. Excluded if there are problems specific future days which requires Rule Government.

4 Conclusion

System Regulation Legislation in Indonesia in essence a continuation of system Legislation past colonial Dutch. Existence Rule Government the same level with the name Regering Verordening to function as a regulatory executor of the Act which ended in declared in 1945 in Article 5 paragraph (2). However, with the problems that arise and the results of research based on the study of empirical and normative, the existence of Regulation of the Government should be regulated much better again, especially in the promulgation of the Act which mandates the Regulation of the Government but not immediately accompanied by the issuance of Rule Government. Even though the law has been in force since it was enacted. It is causing inconsistencies law and the uncertainty of the law. Therefore we recommend the publication of Regulation Government who received the delegation on the provisions of the lid then coincided with the promulgation of its laws. Or if it is not possible then just break down the law so that there is no need for implementing regulations in the form of Government Regulations whose scope is the same as the law.

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Citizenship Status of ISIS Members from Indonesia

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Abstract. The destruction of ISIS is due to the fate of its followers to be adrift without clarity, one of which is the fate of their citizenship, the legal issue seen by the researcher in this paper is how the citizenship status of former ISIS of Indonesian Citizens based on the laws and regulations that applied in Indonesia, in this regard aims to examine the citizenship status of Indonesian people who have joined ISIS, according to Indonesian laws, they are still Indonesian citizens or have lost their citizenship. The method used in this paper was normative legal research and the results of this research are based on Law Number 12 of 2006 in conjunction with Government Regulation of the Republic of Indonesia Number 2 of 2007, it can be assessed that an Indonesian citizens lose their citizenship if the individual concerned is related to another country or country foreign, so that the former ISIS of Indonesia Citizens is not a country but an organization, hence, it has not been tested that the former ISIS of Indonesia citizens has lost its citizenship.

Keywords: Citizenship Status, The former ISIS of Indonesian Citizens.

1. Introduction

Islamic State of Iraq and Syria (ISIS) is a guerrilla organization formed due to the invasion of US to Iraq in 2003. ISIS declares itself as a country but there is no agreement from Iraq or Syria and no recognition from the PBB and other countries in the world, and constitutionally, ISIS also does not fulfill the elements of state formation (region, society, and government). ISIS has many members from various countries around the world, with different recruitment approaches. The approach is not only the religious approach, but also the economic approach, life style, traveling, which is done through the internet media. Indonesia is also one of the countries whose thousands of people have joined ISIS. After the destruction of ISIS, there are problems for the repatriation of Indonesian Citizens who have joined ISIS, the fear of terrorism and its impact encourages some Indonesian citizens refuse the repatriation, however, the reason of human rights some Indonesian citizens also accept their repatriation.

Dealing with the issue, it arises the government's hesitation, between moral and security that must be noticed. As long as the former ISIS of Indonesian Citizens are in Syria, there have been burning passports, some of them have taken their passports and some of them also have lost their passports. Thus, the assumption that emerges is they have lost their citizenship, especially those who have long left Indonesia. Thus, the legal issue seen in this paper is how

the citizenship status of the former ISIS of Indonesia citizens is accordance with the laws and regulations that applied in Indonesia.

2. Method

The method used in this research was a normative legal research method, using the legislation approach and concept approach. The legal materials were used based on the literature study and then it was processed and analyzed to get answers to the legal issues discussed in this research.

3. Result and Discussion

3.1 Islamic State of Iraq and Syria (ISIS)

The development of ISIS is inseparable from Abu Musab al-Zarqawi, around 2000 Abu Musab went to Afghanistan in order to meet Osama bin Laden to form an organization called Tauhid wal Jihad in order to overthrow the government of Jordanian. "When the United States attacked Afghanistan, Abu Musab fled from Afghanistan to Iran and in 2002 moved from Iran to Iraq". Abu Musab was asked by al-Qaida leadership to facilitate the entry of militants into Iraq with the aim to against the coalition forces of US leadership in Iraq. "At that time Abu Musab al Zarqawi had not officially sworn in allegiance and joined al-Qaeda until 2004". Abu Musab led Tanzim Qaidatul Jihad fil Biladur Rafidain, which was later changed to al-Qaeda Iraqi Branch (AQI) in 2004. Furthermore AQI became Mujahidin Shura Council (MSC) in 2006 and in that year Abu Musab died at the hands of the United States. After his death, the name of the organization became the "Islamic State of Iraq (ISI)" and it was led by Abu Umar al-Baghdadi in October 2006.

The relationship of ISI with al-Qaida became less harmonious, it was marked by an ideological split in which al-Qaida leaders were worried about tactics carried out carelessly and brutally by ISI which will result the ISI isolation from public support in Iraq. In 2013, Abu Umar al Baghdadi as ISI leader sent Abu Muhammad al Jaulani along with several militiamen to Syria to open a new front in Syria, a new front named an-Nusra. "After that in April 2013, Abu Umar al-Baghdadi announced that there had been an expansion of ISI to Syria and at the same time announced the change of a new name namely Islamic State of Iraq and Syria (ISIS)". The ISIS leader who declared the establishment of the Khilafah Islamiyah was Abu Bakar al-Baghdadi and at the same time he announced his appointment as the new elected caliph. The purpose of ISIS is to establish and maintain the institution of caliphate which they call Daulah Islamiyah. ISIS has a different main purpose with Al-Qaeda Center led by Osama bin Laden or Ayman Al-Zawahiri, although the Iraqi branch of Al-Qaeda is one of the main elements of ISIS. The purpose of ISIS is one step ahead of the goals rather than Al-Qaeda, it is due to ISIS has aspired to formal government institutions while Al-Qaeda is still at the level of resistance movements against western tyranny and its allies [1].

The recruitment pattern undertaken by ISIS is powerful and fast because it is conducted through online with maximizing the use of social media to spread announcements, invitations and videos. By using the internet, it will be easy to be accessed by many people, anywhere, and anytime. Apart from the recruitment techniques mentioned earlier, the approach is carried out further by communication built online. Recruiters take a very intensive approach with

candidates, to ensure they join offers in the economy, life style, traveling, all the persuasion are conducted maximally so that the candidates are trapped and eventually joined in the organization. Such a method that emerges many candidates to register and the number of candidate is increasingly day by day, no exception in it including Indonesian Citizens (WNI) who have joined ISIS. The attacks carried out by ISIS regardless of gender, ethnicity, religion or race, and carried out blindly with violence to victims using modern weapons of war. With these actions, their actions are categorized as terrorist acts wrapped in their ideology, the desire to create a caliphate state.

In order to realize its purpose, ISIS accommodates followers from all over the world regardless of origin and religion, not merely limited to the middle eastern region or merely Muslim, but anyone who agrees with the concept offered and is willing to join so then they will be welcomed by ISIS to become followers. Recruitment is carried out from the outside of Iraq and Syria is actually very beneficial for ISIS, because those who come from outside of Iraq and Syria, they do not know the exact situation and conditions over there, while those who are in Iraq and Syria have discovered and known the deeds of inhuman ISIS. War, torture, arson, bombing, rape, murder, are extraordinary forms of human rights violations committed by ISIS as stated in "Article 5 of the Rome Statute of the International Criminal Court, The jurisdiction of the Court should be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression".

As a serious crime, crimes committed by ISIS are categorized as the act of terrorism. Referring to Assad's opinion about terrorism in the article of the Poltak Partogi Nainggolan, that international terminology describes the acts of terrorism carried out, targets, including followers, supporters and sympathizers, and the purpose of the perpetrators who do not recognize boundaries or state entities. Even if state entities are still used, that is in meaning, which is no longer narrow, however, in the perspective of the universe (*mondial*) such as ISIS / IS with the concept of the caliphate. ISIS / IS, with its international acts of terrorism, has been categorized as one of the international terrorist groups. With other names and identities attached to the organization, such as the flag, the background of the perpetrators, and especially the ultimate goal to be realized, ISIS / IS has been categorized as a religious fundamentalist group that wants to fight for the establishment of the Islamic caliphate in the universe in a manner and target any target as it is intended justified by terrorists. Therefore, its followers, supporters and sympathizers deserve to be called as part of an international terrorist organization [2]. Based on the concepts presented, it can be concluded that the former ISIS of Indonesian citizen in its position as a follower, supporter and sympathizer, is part of the terrorists.

3.2 The Citizenship Status of ISIS Members from Indonesia

The issues that have been mentioned previously, it is clearly unknown to those from outside Iraq and Syria, therefore they are easily tricked and persuaded to join ISIS. Not surprisingly, many Indonesian have joined ISIS, due to their ignorance. The large income approach used by ISIS is very influential, seeing the appearance of ISIS which is equipped with a large number of modern weapons, the guarantees of a prosperous life for its members, and the mastery of ISIS toward the oil fields over there, certainly, it becomes an added point for ISIS's image offered to recruit as many members. Indonesian citizens as part of the

recruited members are recruited individually or in groups by bringing family members to participate as ISIS members.

The story of Aleeyah Mujahid (it not the real name) about how she wants to follow ISIS as a religious vocation that feels like a pacifying heart, she wants to get a better life, makes her deceive parents to travel to Turkey but actually she goes to Syria to join ISIS, her interest in ISIS is based on videos uploaded on social media and it is easy to get the contact of people who takes to Syria where ISIS is gathered. After being over there, she gets married and has a child. However, her expectation is not in accordance with the reality. She is currently separated from her husband because men are obliged to fight and is currently in a refugee camp with her children in the hope of returning to Indonesia [3].

In addition, there is also the story of Nada who is in the Al-Hol refugee camp in northeast Syria. Altogether with her family, they left Indonesia to join ISIS and are currently separated from her father who is brought by ISIS. Over there, she watches a lot of violence and experienced a tense atmosphere due to the war. She and her family were taken by their father a few years ago to Syria and at this moment, there is great hope that she can return to Indonesia [4]. Dealing with the two stories conveyed, it can be compared that based on the intention to be part of ISIS so then the desire is a form of desire that is born from oneself or the wishes of others. In this regard, the family which is then obeyed by other family members.

While Indonesian citizens are in Syria and are part of ISIS, some of them have burned Indonesian passports and declared themselves firmly as members of ISIS by accepting ISIS ideology and are eager to be part of ISIS's wars, however some of them also assert that their passports are missing, and some are taken by ISIS leader. The promise of ISIS with a decent life that will be obtained over there and it is also freedom of entry and exit from ISIS, in fact, it is not as sweet as what has been promised because it is not in accordance with the initial promise when they recruit the members. All terrorist acts claimed by ISIS both in Iraq and Syria or in other countries, one of which is Indonesia and then resulting in the fall of innocent victims, it is the main cause of public fear in Indonesia if they return so then they will trigger new acts of terrorism in Indonesia, moreover their number is not small namely it is around 689 people.

After the destruction of ISIS, the problems emerge in relation to the fate of ex- ISIS members residing in Syria. The various pros and contra thoughts about the return of ex-ISIS of Indonesia citizens are a legal problem, which is related to the citizenship status of them. It is caused that there are those who think their citizenship status has been lost when the passport is burned, but some of them also think otherwise. If it is based on the statutory approach, so then in Article 23 of Law Number 12 Year 2006 concerning "Citizenship of the Republic of Indonesia" which states "that Indonesian citizens lose their citizenship" if the concerned:

- a. obtain other nationalities of his own volition;
- b. not refusing or not letting go of the other citizenship, while the person concerned has the opportunity to do so;
- c. is declared lost of citizenship by the President at his own request, the person concerned is 18 (eighteen) years old or has been married, resides abroad, and by being declared missing Citizenship of the Republic of Indonesia does not become without citizenship;
- d. enter the foreign army service without prior permission from the President;
- e. voluntarily enter the service of a foreign country, the position of such service in Indonesia in accordance with the provisions of the legislation can only be held by Indonesian citizens;

- f. voluntarily take an oath or declare a pledge of loyalty to a foreign country or part of that foreign country;
- g. it is not required but to participate in the selection of something constitutional to a foreign country;
- h. has a passport or letter that is a passport from a foreign country or a letter which can be interpreted as a valid citizenship mark from another country on his behalf; or
- i. residing outside the territory of the Republic of Indonesia for 5 (five) years continuously and the purpose is not due to the state service, without a valid reason and deliberately, they do not express their desires to remain an Indonesian citizen before the end of the 5 (five) years period, and every 5 (five) the following year concerned does not submit a statement wanting to remain an Indonesian citizen to the Representative of the Republic of Indonesia whose working area covers the residence in question even though the Representative of the Republic of Indonesia has notified in writing to the person concerned, as long as the person concerned does not become without citizenship.

The same stipulation of the above law can also be found in Article 31 “Government Regulation of the Republic of Indonesia Number 2 of 2007 concerning Procedures for Obtaining, Losing, Cancellation and Reclaiming Indonesian Citizenship”. If it is tested normatively based on Law Number 12 of 2006, starting from letter a, it cannot apply to Indonesian citizens who are ex-ISIS because ISIS has not been eligible to become a state based on the elements of state formation, so, when the individual joins ISIS, it does not mean that they get new citizenship. ISIS status is a non-state organization, unless the ex-ISIS of Indonesian citizens have been accepted by other countries as citizens, however, dealing with the same problems that occur in almost all countries whose citizens are followers of ISIS, it is very difficult to accept ex-ISIS in a country. Letter b is related to letter a, regarding the status of ISIS which is not a country so that Indonesian citizens who join ISIS are not ISIS citizens, even though being ISIS citizens is their desire. In letter c, this can apply to ISIS followers from Indonesia, who have submitted an application to the President of Indonesia to lose their citizenship. Entering the foreign army service in letter d, it cannot be interpreted as foreign army of an organization but foreign army from other countries with the result that in the next article, namely Article 24, it is stated that the provisions referred to in Article 23 letter d do not apply to those who join the program of education in other countries that require the conscription. Furthermore, for letters e to h, the same reasons indicate that ISIS is not a state organization, by itself these points cannot be applied. The provisions in letter i can be used for ex-ISIS of Indonesian citizens if they have been there without a valid reason for 5 (five) years and deliberately do not declare their intention to remain an Indonesian citizen.

Based on all the reasons, for the loss of citizenship that have been described, it is only the provisions of letter i can be used as a basis for losing citizenship although there is a continuation of the article that every 5 (five) years concerned the person does not submit a statement wanting to remain an Indonesian citizen to the Representative of the Republic of Indonesia whose jurisdiction covers the place of residence concerned even though the Representative of the Republic of Indonesia has notified in writing to the relevant person even though the Representative of the Republic of Indonesia has notified in writing to the person concerned, as long as the person concerned does not become stateless. The concessions are carried out due to the conditions beyond the capability of the person such as the limitation of mobility due to its passport is not being in the possession of the relevant person, the official notification is not received, or representative of the Republic of Indonesia is difficult to be

achieved from the place of residence concerned, however, the researcher doubts if the further explanation is the reason for certain the former ISIS of Indonesian citizens, dealing with their enthusiasm for participation and strong idealism. Therefore, if this point is used as a basis, the government must pay attention as long as they are over there. What the researcher means that as long as they are in the ISIS settlement area not in the refugee camp.

With regard to passports that have been burned, lost or taken by ISIS leader, according to the explanation above, there is no element of citizenship loss due to the absence of passports. Proof of citizenship by an Indonesian citizen is based on Article 4 paragraph (2) of the Decree of the President of the Republic of Indonesia Number 56 of 1996 concerning Proof of Citizenship of the Republic of Indonesia mentioned for citizens of the Republic of Indonesia who already have an Identity Card, or Family Card, or Birth Certificate, fulfilling the requirements for certain interests it is sufficient to use an "Identity Card", or "Family Card", or "Birth Certificate". Thus it can be concluded that the Citizenship "Identity Card, Family Card, Birth Certificate" is a type of "proof of citizenship" for citizens "of the Republic of Indonesia", if a former ISIS of Indonesian citizens who do not have a passport can show one of the three types of evidence mentioned, then, it can be used as evidence that the individual is an Indonesian citizen, according to the researcher, it can be further regulated by the government in proving data that is matched with data from immediate family, relatives, neighbors or RT / RW that are concerned, because if the data used is not proven certainty, it can occur infiltration which certainly will occur troubles the government. The problem with not having an ex-ISIS of Indonesian citizen passport is how they will cross national borders if they do not have official documents to be proven, when they will return to Indonesia.

4. Conclusion

The conclusion of this research is the status of Indonesian citizenship of ex-ISIS based on "Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia" in conjunction with "Government Regulation of the Republic of Indonesia Number 2 of 2007 concerning Procedures for Obtaining, Losing, Canceling, and Reclaiming Citizenship of the Republic of Indonesia" are Citizens of the Republic of Indonesia Indonesia, it remains Indonesian citizens because based on the element of losing Indonesian citizenship status, they are not related to other countries or foreign countries moreover the position of ISIS as an organization Unless they had been there for more than 5 (five) years without any legal reason and intentionally not stating their willingness to stay becoming an Indonesian citizen.

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Omnibus Law Copy Work Field: Benefits or Not for Workers?

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Abstract. This study aims to analyze the Draft Omnibus Law on Employment Copyright whether it benefits workers or not. The research method used is a normative research method by reviewing the legislation and related legal material. The Omnibus Law was made to regulated regarding simplification of business licensing, investment requirements, employment, ease and protection of MSMEs, ease of doing business, research and innovation, government administration, imposition of sanctions, land acquisition, as well as ease of government projects and economic zones. This Omnibus Law is controversial for some parties because there are those who feel disadvantaged. the Omnibus Law is formed to create legal harmony for the interests of the community can be accommodated above those of the government or other parties who intentionally do not side with the community.

Keywords: Omnibus Law, Work copyrights, Labor

1. Introduction

The Omnibus Law which is currently being discussed by the government is a combination of several regulations whose substance is different from one regulation into one legal umbrella (Law). Conceptually, Omnibus Law is a legal product that has been implemented by several countries in the world, including the United States, Ireland, Singapore and Canada. The description of the application of this omnibus law in the preparation of regulations, has been practiced since 1970, more clearly explained as follows: “*omnibus legislation has “proliferated” since the 1970s*” [1]. The Academic Drafting Team of the Draft Employment Copyright Bill, in principle, is as follows: “Omnibus law is a practice of drafting legislation, which is mostly carried out in countries that adopt the common law / anglo saxon system such as America, Canada, the United Kingdom, Philippines and others. The process is called omnibus legislating and the product is called omnibus bill. The word omnibus comes from Latin which means everything or everything (for everything)” [2].

According to the Constitutional Law Expert Fahri Bachmid in the world of legal science, the concept of “omnibus law” is a concept of legal products that functions to consolidate various themes, materials, subjects and legislation in each different sector to become one large legal product and holistic [3].

Jimly Asshiddiqie, defines basically as follows: “namely the law that reaches a lot of material or the whole material of other laws that are interrelated, both directly and indirectly. This kind of practice is certainly not uncommon in the ‘civil law’ tradition but is forever seen as good and continues to be practiced today as the ‘Omnibus Law’ or the Omnibus Law” [4].

Some of the objectives of establishing the Omnibus Law include:

- a. Overcoming conflicts of laws and regulations quickly, effectively and efficiently;
- b. Uniforming government policies both at the central and regional levels to support the investment climate;
- c. Licensing management is more integrated, efficient and effective;
- d. Able to break the long bureaucratic chain;
- e. Increased coordination relationships between related agencies because it has been regulated in an integrated omnibus regulation policy;
- f. There is guaranteed legal certainty and legal protection for policy makers [5].

The government is currently drafting 2 (two) regulatory simplification packages, including the Draft Law on Employment and Draft Taxation Law for Strengthening the Economy. President Jokowi's government identified at least 74 laws that were affected by the Omnibus Law. One of them, which triggered many protests by workers is the Labor sector, namely the Employment Copyright Bill. In the labor sector, the Government plans to delete, amend and add articles related to the Manpower Act. The conception of the omnibus law is considered an appropriate solution for the simplification of regulations and the concept of a constructive method for drafting legislation without overruling the order in Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning Formation of Laws and Regulations. This research is expected to be able to analyze whether the Omnibus Law Bill on Employment Creation is beneficial or not for workers / laborers?

2. Methods

The research method that the writer will use in this research is the normative legal research method, where this method is used to find concrete law that is suitable to be applied in order to solve a particular legal problem. Namely to be able to obtain legal material to find out and analyze problems that arise regarding the position of capital market investors in the event of bankruptcy in issuers and their forms of protection. In this study, the approach used is the statute approach and the conceptual approach approach).

The statute approach is carried out by examining all laws and regulations relating to the legal issues being addressed. The facts are related to the laws and regulations that govern them and those that still apply. The laws and regulations used in this study are the Draft Omnibus Law on Work Creation, Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning Formation of Laws and Regulations, and Law Number 13 of 2003 concerning employment. After the statute approach method, the approach used next is the conceptual approach. Conceptual approach (conceptual approach) departs from the views and doctrines that develop in the science of law. In this paper, the conceptual approach used is the views and doctrines in law related to the omnibus law and labor law.

To solve a problem statement, research sources are needed. These sources can be divided into 2 (two), namely primary legal materials and secondary legal materials. Primary legal material is an authoritative legal material, meaning that it has power. Primary legal materials consist of legislation, official records or minutes in the making of legislation, and judges' decisions. The sources of primary legal materials in this study include the Draft Omnibus Law on Work Creation, Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning Formation of Laws and Regulations, Number 13 2003 About Employment. Secondary legal materials used in this study include literature books, legal dictionaries, legal journals. In this study, all legal materials, both primary and secondary legal sources are analyzed using the deductive method, which is a method that analyzes legal provisions as a general matter and then conclusions are drawn specifically.

3. Results and Discussion

The Draft Employment Copyright Law that will be published in the context of the omnibus law, which is one Act which at the same time revises several laws. Omnibus of employment law will contain several regulated matters (11 clusters) including the licensing of business permits, ease of doing business, land acquisition, investment requirements, research and innovation support, ease of government projects, employment, government administration, economic zones, facilities and protection UMK-M and the imposition of sanctions. The ease of investment, the impact of which is creating employment, is still hampered by the complexity of licensing that applies in Indonesia. This is also the case for new ventures undertaken by beginners, which are hampered by the complexity of the bureaucracy for licensing.

Although the purpose of the Omnibus Law is Employment Creation to invite investment, increase entrepreneurship and make it easier for people to get a job, not all people see it positively. This is proven by the existence of various demonstrations against the omnibus of labor copyright, especially from the aspect of employment. Many observers point out that the Omnibus Law is an order law from entrepreneurs or capital owners that makes it easy for entrepreneurs and capital owners to more freely control the natural resources of this country.

On the contrary, this Omnibus Law does not favor the welfare of the people including workers, for example the alleged articles in the Omnibus Law that abolish halal certification and sharia regulations, abolition of minimum wages, the elimination of various leave (such as marriage leave, menstruation, childbirth, worship, and family leave), removal of environmental permit and environmental impact analysis. In addition, there are those who argue that the omnibus law will not increase investment, but instead will reduce the level of welfare of the workers, so that they become poor who will only eliminate the minimum wage, eliminate severance pay, outsourcing and free employment contracts (labor market flexibility), until the entry of unskilled TKA, the issue of loss of social security, and the elimination of criminal sanctions for employers who do not provide labor rights [6].

Under current conditions, where a Covid-19 pandemic was detected by April 23, 2020, more than 2,000,000 cases of Covid-19 have been reported in more than 210 countries and regions, resulting in more than 195,755 people dying and more than 781,109 people recovering [7]. This pandemic besides causing health problems has also caused global socioeconomic disruption, which the International Labor Organization (ILO) noted, as much as 81 percent of the global workforce totaling around 3.3 billion, or 2.67 billion workers are currently affected by workplace closure due to pandemic corona virus (Covid-19). While 1.25 billion workers are threatened with termination of employment [8]. In Indonesia too, the COVID-19 virus pandemic outbreak "has forced the government" to issue a special policy calling for a temporary halt to activities that cause crowds, such as educational activities in schools, work in companies, activities in public spaces, to religious in places of worship. The wave of layoffs in Indonesia during the co-19 pandemic caused the number of laid-off workers laid off by 2,084,593, where in the formal sector it was laid off reaching 1,304,777 and layoffs reaching 241,431 while in the informal sector 538,385 informal workers lost their jobs [9]. Then what about the fate of the workers or employees who were laid off? During this time, if there is a case of layoffs, the company is responsible. Pay employee severance according to work period. In the future, apart from severance pay, employees who lose their jobs due to layoffs will receive a guarantee from the government. In the draft of the Employment Copyright Bill in article 46A reads:

- a. Workers / laborers who are laid off are entitled to a guarantee of losing their jobs
- b. JKP is organized by the Manpower Social Security Organizing Agency (BPJS).

"JKP will be given to workers / laborers who are BPJS Employment participants and actively pay contributions," Article 46C reads.

In Article 46D, JKP benefits will be stipulated to be received by workers who were laid off, namely in the form of:

- a. Training and certification
- b. Cash
- c. Placement facility.

"So the benefits of JKP, the government will provide training (work), provide pocket money for 6 months, and work placement. This is specifically for employees whose companies go bankrupt or are laid off (not due to criminal acts) and actively pay BPJS Employment contributions. Likewise with the amount of severance received by workers if they are laid off is greater than the Labor Law No. 13 of 2003 also mentioned in the Employment Copyright Bill, which is in the form of bonuses or awards. The Employment Copyright Omnibus Bill also regulates the provisions of holidays or rest periods for workers. Mentioned in Article 79:

- 1) Break time between work hours, at least half an hour after working for 4 hours continuously. This break does not include working hours
- 2) Weekly breaks 1 day to 6 working days a week.

If seen in the Manpower Act No. 13 of 2003 it is written that the weekly rest allowance can be 1 day for 6 working days or 2 days for 5 working days a week. While for the same annual leave, given a minimum of 12 working days after 1 Year work period. With the pros and cons that occur in the community related to the Omnibus Law which has a broad reach, it is necessary to do a deeper study and trial process first. Moreover, the Omnibus Law will abort about 72-74 articles which are considered problematic in the employment and taxation sectors. For this reason, the central government of both the President and the Parliament needs to take the right steps before implementing the Omnibus Law as a legal umbrella. It also requires a team of experts who have been accredited in the field of law to be able to explain the concept of applying Omnibus Law both to local governments and the community so that misunderstandings do not arise. Thus, the preparation of the Omnibus Law will be more efficient because there are many elements involved, ranging from policy makers, academics, government and legal practitioners.

Explain the definition of Omnibus Law to the public as a legal product that aims to harmonize the law so that the principle of its usefulness is more felt in the community. The government must be able to convince the public that the Omnibus Law is formed to create legal harmony so that the interests of the community can be accommodated above those of the government or other parties who deliberately do not side with the community. Therefore, the principle of usefulness of this legal product must be clear and reach the public. The Omnibus Law must also clarify workers' rights so as not to create new problems. Especially now that the Omnibus Law is busy getting rejected by the workers because they think the minimum wage will be disrupted. For this reason, the Omnibus Law must be made one of them to protect work rights and labor costs. Some things that can be done are by making special rules for social security for workers and minimum wages that are more pro labor. The goal is to improve the SJSN (National Social Security System) and labor BPJS regulations, which have still been problematic in their application. The involvement of labor groups in the discussion of the Omnibus Law Bill in the Employment Creation sector is also important so that the aspirations of labor groups are conveyed to the government. Related to this, the public, especially workers, should not be in a hurry to prejudice negatively on the omnibus law that is being drafted and we should support the government's steps in resolving the complicated regulations in Indonesia in investing so as to foster economic growth and open up employment opportunities.

4. Conclusions

The draft Omnibus Law aims to be able to unravel the complexity of the existing regulations and enhance the development of the national economy, which specifically will improve every regulation in the economic field which includes Investment, Taxes, Development, as well as the Availability of Employment, this will certainly have a positive impact on Indonesian society, especially business people and workers. But in the course of many pros and cons in criticizing the work copyright omnibus bill, therefore the Government deserves to hear the aspirations of various community groups, especially laborers. With this engagement, the labor group can voice their aspirations in a healthy manner and study critically, but these aspirations should not be channeled with counterproductive street actions but channeled through critical studies as input in the preparation of work copyright omnibuses.

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The Role of Judges to Protect the Apartment Buyers from The Bankruptcy of The Developer's Company

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Abstract. The purpose of this research is to analyze the role of judges in bankruptcy of apartment developer company which is caused the buyers lost their right to own the apartment unit they have paid fully and to find the solution for judges to protect the interest of the apartment buyers from the bankruptcy of developer's apartment company. This research used The Normative Legal Research with judicial formal approach by using secondary data, the result is outlined in a descriptive analytical form. The research findings are if the Judges decision only depend on the written law, the Judges decision can caused the buyers losing their right to own the apartment they have bought and paid fully, but if the Judges have the courage to explore the values which is lived in the community, the interest of buyers can be protected. Judges also have to consider that the fulfillment of the residences is a basic requirement of many people and The breach of contract from the company to fulfill the promise of delivery the unit to the buyers cannot be interpreted as a debt as bankruptcy definition of debt, because it is needed further prove which is complicated.

Keywords: bankruptcy, apartment developer, buyer.

1. Introduction

In the past few years, some developers apartment company have declared bankruptcy by the Judge's decision from commercial court [1], because of it, hundreds of apartment buyers lost their right to own the apartment which they have paid fully. These decisions have met requirements as determined in Law [2], but the apartment buyers felt that they were treated unfair. They protested to get legal protection because they felt, judges did not consider the interest of buyers, and the buyers were interpreted as Concurrent Creditors which are their right only will be considered if all the preference creditors have been paid from the amount of bankruptcy property sold [3]. According to The Theory of Social Dimension of Law, law has to give protection to the society, therefore judges must complete law with values which are lived in the society, so the interest of the peoples can be protected [4].

According to the previous studies, the pre project selling system in apartment does not full fill the principle of balance between the interest of buyers and the interest of developer [5], therefore the apartment's buyers need to be protected [6]. another previous study give solution in bankruptcy to protect creditors and debtors [7] and Separatist creditors are the creditors who get privilege treatment to get first paid from the bankruptcy asset which is the object of guarantee for their credit [8], another study analysis The Protection of Creditors based on Bankruptcy Act [9]. From the study above the writer get the conclusion, the protection of concurrent creditor in bankruptcy are very weak, therefore the apartment buyers who are trying to full fill their basic need of home which are categorised as concurrent creditors has to be protected from the developer's bankruptcy.

The focus of this study are (1) to analyse the role of Judges in Bankruptcy of Developer's Apartment Company which makes buyers lost their right to own the unit which has been paid fully and (2) to find way out so Judges can role to effort protection to the interest of apartment buyers from the bankruptcy of company as developer.

2. Method

This study used Normative Legal Research Methodology [10] with formal juridical approach since the object to be analysed was Judge's decision related to Bankruptcy Act and other Acts related [11]. Source of data in this research was secondary data which is consist of books, journals, Judge's decisions, and other secondary data. Furthermore, the obtained data were then analysed in qualitative juridical way, by connecting to each other to find conclusion which was a unity to be stipulated in descriptive analysis.

3. Result and Discussion

3.1 The Role of Judge in Bankruptcy of Apartment Developer Company Makes Buyers Lose Their Rights To own the Unit Which has been Paid Fully.

Bankruptcy of limited company as developer of apartment started from the Judge's decision from Commercial Court which has granted proposal for Deferment of Debt Payment Obligation to the limited company as apartment developer, which has been proposed by Bank or several apartment buyers, since the limited company breach the promise to pay debt to Bank and to hand over units which has been purchased by buyers.

Based on the decision, the apartment buyers are categorized as Concurrent Creditors because the buyers have the claim to hand over the unit from developer who did not keep the promise based on agreement between company and buyers in the Sale and Purchase Binding Agreement. Judge interpreted the creditors' claim as debts, even though the value of the unit still be debated between buyers and curator (trustee).

Based on the decision of Deferment of Debt Payment Obligation, Curator Team invited Creditors and Debtor to attend the creditor meeting held by the team of curator which was chaired by the Supervisory Judge assigned in the decision. Debtor, as apartment developer, was ordered to propose reconciliation proposal to Creditors to be discussed in the meeting of creditors.

However, the reconciliation proposal was not accepted by majority of the attending Creditors which are consist of Separatist Creditor and Concurrent Creditors include the apartment buyers. As the legal consequence, Supervisory Judge must give recommendation to Judge (Panel of Judges which decide that developer is in Deferment of Debt Payment Obligation), that the developer has to be decided in the condition of bankruptcy [12].

As the next consequence, company asset became bankruptcy property, while apartment units which have been paid by the buyers, were still considered as the property of developer company since its land certificate was still on behalf of the company, also became bankruptcy property. Arrangement and solution of bankruptcy property were done by Curator or trustee [13] assigned by the decision of bankruptcy, in which bankruptcy property will be for sale and used for paying creditors claims on a pro-rata basis based on the levels of Creditors, namely Separatist Creditor, Preference Creditor, and Concurrent Creditor [14]. In some cases of Bankruptcy, The buyers received the share up to only 15% of total money which they paid to the developer.

Buyers complained that apartment unit was included as bankruptcy property, since they have paid unit in full and they thought that apartment has been their property. Thus, they also complained about being categorized as concurrent creditor since they should be the owner of apartment unit.

In order to fight for their right, buyers have filed a lawsuit against the company, but they took the wrong procedure because they sued curator team through common civil lawsuit. They should submit their objection based on Law of Bankruptcy [15], but the decision of Judges would remain the same because it was investigated by the same judges, which decided Deferment of Debt Payment Obligation and Bankruptcy.

At last, buyers of the apartment unit have complained about Judge's decision [16], though Judges have decided this case based on Law of Bankruptcy and Deferment of Debt Payment Obligation.

Based on the aforementioned analysis, Judges role only applied what has been stated in the written law, in order to prove that the breach of contract of the developer obligation to buyers can be categorised as developer's debts and the apartment units are categories as bankruptcy property as defined in Bankruptcy Act.

3.2. The effort by Judge to protect interest of Apartment buyers from the Bankruptcy of company as tenement developer

According to the Theory of Social Dimensions of Law, the main purpose of law is to protect the interests of the peoples [17]. Marrymann & Pérez-Perdomo, although State which embraces Civil Law System is based on the written law, as legal sources beside written law and its derivative regulation, the value which is lived in society can be made as law when it is not contrary to the written law, morality and ethics [18]. In its development, there was integration between civil law system and common law system [19]. Judges in civil law system must get authority to create law through legal interpretations based on the applicable legal provisions. According to Ter haar, Judge must be able to understand and apply the values which exist and grow in the society, so consideration and decision of Judges can be acceptable by society [20], while this decision can be considered fair and in line with structure and character of the related society.

Indonesia which embraces Civil Law System, based on the law of Judicial Power, also stipulates in law that Judge in enforcing the justice must explore these values in the society, for the interest of many people and usefulness to more people. Judges have to act progressive [21] in effort to build justice for many people.

Based on the analysis, with respect to Bankruptcy in limited company in the apartment development, aspects which can be considered by judges in protecting the interest of apartment buyers are as follows below.

Residence is the most fundamental requirement for all people. Government through Private Company (limited company) seeks to meet basic need of society by developing vertical residence. Bankruptcy act only provides exception to state corporation in which its business field relates to livelihood of many people cannot be declared Bankruptcy by Creditor [22], but excluding private limited company. According to the interest of many people and larger usefulness for many people,

judges have the authority to interpret that this article can be able applied to the companies that build apartment in order to full fill the basic need of the peoples of residences.

Another aspect to be considered is the position of Bank as Separatist Creditor, since Bank knows that what is made as debt assurance with Insurance Right is land where the apartment is built, while its unit will be for sale to the buyers. When Developer cannot keep the promise to Bank, it is not fair if land, where building is built, is sold for the interest of Bank, while buyers of the apartment become harmed.

Based on the values in Indonesian society, buying and selling land and house are in cash and immediately transferred, which is means, after the buyers gives money for transaction, the buyers can be the owner of the apartment unit. Therefore, completion of apartment ownership certificate based on the agreement is the developer's authority, unable to eliminate the rights of the buyers of the apartment.

claims from buyers to developer is considered as the debt of developer, while it requires proof which is not simple [23]. Moreover, it still requires details about the amount when that selling price is translated into money as debt. When judges only expect to prove the existence of debt, while issue about its amount will be settled later. The lawsuit process will spend more Bankruptcy cost, and at last will harm Creditors since Bankruptcy property will be reduced for paying court fee.

Based on the reason above judges can refuse the application to state the apartment Developer Company in condition of Deferment of Debt Payment Obligation or bankruptcy, concerning the protection to the apartment buyers from the bankruptcy of apartment developer company.

4. Conclusions

The conclusion of this studies are (1) Judges have role to determine Bankruptcy of apartment Developer Company which makes buyers lose their right to own apartment unit which has been paid fully, because the role of Judges only as the aplicator of written law. As further consequence, many buyers of apartement unit will feel that they are disadvantaged and treated unfair by the law and Judges. (2) Buyers of apartment unit can get protection from the bankruptcy oef the apartemen developer company when Judges can act progressively in facing proposal for Deferment of Debt Payment Obligation or Bankruptcy, based on values in the society, by considering decision do not only meet provision in written law, but also the interest of peoples for the benefit of peoples, in this case, the apartment buyers.

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Judge's Interpretation in Addressing the Updated Dynamic of Balinese Hereditary Common Law

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Abstract. Judge's interpretation in addressing the updated dynamic of Balinese hereditary common law is very dynamic along with the development of justice especially towards the dimension of kapurusa as the legal heir. Originally, kapurusa was only male descendant from the men's side family and male foster child, then it could also include the status of being men, and eventually it also includes women as the legal descendants. Research method A judge interprets based on the development of modern law, progressive law, law of justice based on the philosophy and jurisdiction.

Keywords: Judge's Interpretation, Balinese Hereditary Common Law, Kapurusa

1. Introduction

Hereditary Common Law is a form of local wisdom. From philosophical dimension, local wisdom could be interpreted as empiric and pragmatic indigenous knowledge system. Sunarmi mentioned that local wisdom is a knowledge developed by ancestors in getting around with their surrounding environment [1]. They then made such knowledge as parts of their culture, introduce and pass on from generation to generation. Some forms of traditional knowledge occur through tales, legends, songs, rituals, and also rules or local law. From the dimension of legal unification, the Indonesian nation, until today has not had any hereditary law applied nationally, even though the efforts towards unification have long been carried out. The Provision number 402 lever c sub 2 The Statute of Temporary People's Consultative Assembly of the Republic of Indonesia No. II/MPRS/1960 about the Garis-garis Besar Pola Pembangunan Nasional Semesta Berencana Tahapan Pertama. (Guidelines of Planned National Development Pattern) first edition in 1961-1960 dated on 3 December 1960 stated the need of bills about heritage property based on parental/bilateral principles. The main obstacle of the formation of national hereditary law is because of the plural socio-cultural condition of Indonesian people, as seen in various family system embraced by the people of Indonesia.

Balinese hereditary common law, according Nantri serves as a process of continuation from inheritor to the inheritee about material or immaterial objects where this means that this continuation covers the succession of rights and obligations [2].

In general, within the Balinese hereditary common law, hereditary consists of 4 (four) aspects, Inheritor, Heritage, Inheritee and Heritage. Inheritor is the one that has passed away, and s/he left his/her heritage to other people (inheritee). Inheritee is generally traditionally is

a father, or a man. Such polarization thought is based on the dimension of family system of Patrilineal (*kapurusa/purusa*) Balinese people. In such system, father as the head of the family, the bread maker and the owner of the family property obtained hereditary. Therefore, its logical consequence, *kapurusa* system in Balinese people treat sons and daughters differently in terms of inheritance. Such aspect of different treatment is based on the thought that the essence of inheritance in Balinese common law incurs the balance in rights (*swadikara*) and obligations (*swadarma*). In Balinese common law in terms of heritage property passed on through the male's line, so that all properties belong to the men, while the women are not owner of the properties. Before married, the daughters belong to and the responsibility of the father, and when they are married, they belong to and the responsibility of their husbands.

Next is the aspect of inheritee, which means the descendant. Furthermore, I Wayan Windia stated that inheritee was actually the responsibility towards *parhyangan* such as shrines, *pawongan* means humanity activity based on the Balinese etiquette and *pademangan* responsibility in its relationship with soil (certificate). The logical consequence, inheritee means Child or descendants who have the right for the inherited property. Before the independence of the Republic of Indonesia, what was meant by Inheritee was those who have blood connection to the Inheritor. Its logical consequences, the definition of Inheritee is always correlated to the blood relation. Therefore, widows cannot be inheritee since they do not have blood relation with their husbands. In Balinese hereditary common law, the requirements as an inheritee is that one should have blood relationship with the inheritor based on the patrilineal line (*kapurusa/purusa*) i.e. biological son (*anak sentana*), or a child whose status is male (*anak sentana rajeg*), or foster child (*anak angkat*), or step child (*anak tiri*). If there is no *anak sentana*, *anak sentana rajeg*, *anak angkat*, and *anak tiri* a possibility to replace the group of inheritee occurs based on Hinduism law. Therefore, a daughter only has the right to indulge her parents' or husbands' legacy. Such aspect and dimension are parallel with the Book of *Manawadharmaśāstra* determining that inheritee are the descendants which was called as one *pinda* or children who have blood relation stringed straight up and down. Three descendants down from the inheritor and three up to the inheritee is called as one *pinda* as inheritee with priority right is inheritor's descendants withdrawn through the line of the son.

2. Method

The research method used in this research is a socio-legal research that emphasizes the making of descriptions of social and legal realities, as well as trying to understand and explain the logic of logical connectedness. This research using a non-doctrinal approach. According to Mayhew in the non-doctrinal approach, that the law is not conceptualized as an autonomous normative phenomenon, but a social institution that is in real terms related to other social variables [3]. This study examines issues related to judges' perceptions in resolving cultural matters in Balinese customs. Judges' perceptions are in the spotlight in this study, because in the hands of judges the law enforcement is oriented to seeing the existing cultural conditions can be realized.

3. Result and Discussion

3.1. The Practice of the Judge in Addressing the Dynamic of Balinese Hereditary Common Law

Balinese hereditary common law embraces patrilineal or *kapurusa/purusa* line where they determine sons as their inheritee. This is confirmed by *ratio decidendi* of Decree of Supreme Court of Republic of Indonesia No. 200K/Sip/1955 dated on 3 December 1955 mentioning that, "according to Balinese common law, the ones who have the rights as inheritee are only

male descendants from the men's side family and foster sons. Therefore, Men Sardji as sister is not the inheritee of the late Pan Sarning". Similarly, in the Decree of Supreme Court of Republic of Indonesia No. 3750K/Pdt/1991 dated on 29 June 1993 mentioning that, "by the death of the father, followed by the mother, then the right of this soil passed on and inherited by the inheritee: their three sons mentioned above (Sekehe Tiga)."

The nature of kapurusa/purusa system confirms that inheritee only goes to the descendant from the men's side family and foster son (Decree of Supreme Court of Republic of Indonesia No 200K/Sip/1955 dated on 3 December 1955). It then passes on to the inheritee of sons and daughters (Decree of Supreme Court of Republic of Indonesia No 179/K/1961 dated on 23 October 1961, Decree of Supreme Court of Republic of Indonesia No 4766K/Pdt/1998 dated on 16 November 1999). Further, it goes to those with male status (Decree of Supreme Court of Republic of Indonesia No 707/PK/2011 dated on 3 February 2012). Lastly, the newest update of the Balinese hereditary common law where either Anak Kandung (boys or girls) as well as Anak Angkat (boys or girls) have the right over gunakaya property of their parents, after subtracted by one third as *druwe tengah* (joint property),⁴ swayed (not owned) by the child who is *nguwubang* (taking over the swadharma or the responsibility) of their parents (Decree of Supreme Court of Republic of Indonesia No 1331 K/Pdt/2010 jo Decree of Reconsideration No. 60 PK/Pdt/2012 dated on 24 December 2013).

Law is basically made and enforced to manifest justice. The main objective of law is justice. Law enforcement should be oriented to justice. Aristotle stated that justice would only be manifested when the people obey the general rules applied to them. Therefore, justice would be achieved if: *first*, people obey the law applied, that law may not be violated and it must be obeyed and *second*, someone may not take more than their rights, so that justice means equality in rights or *equel*. *Equel* or equality, means that the benchmark of justice is the equality of rights for each and everyone, what is received and felt by a member of society would also be felt by other member of the society.

Plato explained that justice is a virtue containing harmonization and balance that could be understood or explained under rational argumentation [4]. As for such virtue could be divided into 4 (four) i.e. wisdom, courage, and discipline as well as justice [5]. Principally, justice could provide happiness. Meanwhile, the term happiness or convenience is seen differently or even it is against each other, and finally justice is only a matter of compromise [6]. Greek philosophers saw that justice is the constant and continual purpose which gives to everyone his own" [7].

Along with the above confirmation, justice is constant or continual, Derrida also stated that justice is an experience of continuous searching that needs new and fresh interpretation and continuous suspension as the characteristic of "not being able to be determined." Justice is always beyond the law and provoke the law to always approach it. To approach it, it would not be enough by following the sound of the rules, but it needs to perform "*fresh judgement*"[8]. For Derrida, justice plays within the legal and across the legal area. "Deconstruction takes place in the place in the interval that separates the underconstructibility of justice from the deconstructibility". Justice is in the interval between what is legal and illegal [8]. In the context of searching for justice outside formal legal system, the law living within the people (common law) plays a very important role to guide the judges to find the value of efficient justice.

Justice law based on Pancasila (*the five pillar*) according to Teguh Prasetyo is the formula of justice applied within the Indonesian people i.e justice that emphasizes on the balance between rights and obligation i.e. the right to savor the development result with their obligation to devote. Furthermore, it confirms that with such formula of justice, the development of law

and legal system based on Pancasila aims to protect each and every citizen of Indonesia, the ideas and the objectives of the nation, the people of Indonesia and individual freedom, dignity and property, the implementation of development (the law that functions to support throughout the development of modernization).

In the context of hereditary common law in general and Balinese hereditary common law in specific, justice seems to be in the context of inheritor, inheritee and the inheritance. The dimension of inheritee, as the scope of this research, there occur the dynamic of the shifting based on the theory of justice i.e. in the context of patrilineal (*kapurusa/purusa*) system where only a child who is male gets to be the inheritee has shifted to parental system dynamic where either Biological Children (sons or daughters) as well as Foster Children (Boys or girls) have the right over their parents' *gunakarya* property, after subtracted by one third as the *druwe tengah* (joint property), swayed (not owned) by *nuwubang* child (continuing *swadharma* or the responsibility) of their parents. Similarly, towards the inheritance where the Child with *kapurusa* status has the right over a part of the inheritance properties, while the ones with *predana/ninggal kedaton* status has the right over a part or half of the inherited property received by the child with *kupurusa* status.

Parallel to the principles/value of hereditary common law on "the lap" of common law, then it is normal, harmonious, and aligned if the hereditary common law was born, grow, and develop in the atmosphere of common law and the people of its common law. Therefore, hereditary common law has a special characteristic emerging in traditional nature of Indonesian nation. The common hereditary law style is magical religious (*magisch-religious*), communal, concrete, and straight (*kontante handeling*). What is said to be fair in the process of inheritance is influenced by thoughts and life of the local people. Similarly, what is felt as fair and unfair, normal or abnormal, good or bad, are influenced by thoughts and the surroundings, by religion and everyone's surroundings. With the sense of justice, it does not mean in the hereditary common law divides the ownership or the usage of the same amount of inheritance property, but the one that is aligned and balanced with the interest and its even distribution.

The relation between the existence of the development of justice value in the people of hereditary common law is addressed to the national state formal legal system. Such aspect and element remind the argumentation by van Vollenhoven in 1905 that quite hampered the intention of colonial officers to conquer indigenous people to the law established according to the justice principles of the Dutch's law. Even though the bills of Idenburg was eventually accepted by the parliament, yet Idenburg amendments has confirmed the policy that has been compromised, i.e. that unwritten people's (which at that time had been popularized under the name of common law) might only be replaced by European law if in their daily lives, indigenous people truly needed such law. Under the proposition by Savignian, van Vollenhoven confirmed the needs of indigenous people were truly different from the legal needs of European people and therefore the application of one-sided European law would cause the collapse of indigenous order [9].

Savigny explain that legal codification always brought negative effects, i.e. hamper the development of law [10]. History kept go on, yet the law had been determined, therefore, it was relatively hard to stop the history at certain times. Moreover, to formulate the law based on the national spirits (*volksgeist/inner order*), it takes an investigation on what is actually the spirit of nationalism, which beliefs of the nation that could be made as the basic of adequate legal order. If this was neglected, there would emerge a danger of huge gap between nationalism and the law contained within the state's legal order. In the construction of Indonesian legal order, Pancasila animates each legal order either in written or unwritten that is applied to assure the manifestation of substantive justice for all Indonesian people.

As explained previously that Balinese hereditary common law has experienced shifting dynamic from patrilineal system (*kapurusa/purusa*) where only Boys that get to become inheritee to parental system dynamic where either Biological Children (boys or girls) and Foster Children (boys or girls) have the rights over their parents' *gunakarya* property, after subtracted by one third as *druwe tengah* (joint property), swayed (not owned) by the child who is *nguwubang* (taking over the *swadharma* or responsibility) of their parents. Similarly, for the inheritance property where only *kapurusa* child who has the right over a part of the inheritance property, while the one with the status of *predana/ninggal kedaton* only limited to the right over a part or half of the inheritance property received by the child with *kapurusa* status.

Legal reinterpretation of Balinese hereditary common law about the position of inheritee that changes some standard on the provisions previously applied, reflects the dynamics of its development. Such dynamics problem should be understood and followed by the judges of the district court in either Bali or in other area than Bali where there are Balinese people or Balinese community and wish their hereditary law if there happened to be a dispute may be overcome by Balinese hereditary common law. As a base of the judges' obligation, i.e. reinforcing the law and justice based on the development of value and the sense of justice living and developing within the people.

Actually, the shifting from Patrilineal (*Kapurusa/Purusa*) in Balinese hereditary common law is not the only dynamics occurring in Indonesia. In the Decree of Supreme Court of Republic of Indonesia No. 3123 K/Pdt/1984 dated on 21 April 1986 the Supreme Court stipulated that the prosecutors (daughters) and defendants (sons) are the legal inheritee of the Late Amag-Seniah and together they have the rights over the disputed rice field inherited from their late father. This decision was based on the consideration that in Sasak Custom in Lombok, the people have changed and developed rapidly, many positions and profession have been filled by Sasak women. Because of the obsolete traditional Hereditary Common Law and it no longer fit with the needs of modern era, so that it does not match with the justice within the society. Based on the research by the Faculty of Law of Mataram University in 1979, it was revealed that in fact within the indigenous people of Sasak in Lombok Tmur there had been a shifting in value of Hereditary Common Law about the position of daughter, which before they were not inheritee and they did not have any right for the inheritance property, yet only had the right over the moving objects; jewelry (*pesangu*), today it has developed to the point where they acknowledge daughters as inheritee who have the right over the properties inherited by their parents equals to their brothers.

Related to the existence of the decree of Pasamuan Agung Majelis Utama Desa Pakraman (MUDP) that contains a breakthrough of Balinese hereditary common law updates, then it is appropriate to question if it would directly become a pattern of static behaviour within the society so that it applies to become hereditary common law in reality (*in concreto*) to be made as a guideline, handbook, and build a legal revitalization of Balinese hereditary common law in the form of *awig-awig* of Pakraman village. Therefore, it needs a socialization and internalization among the people of Balinese people about the values contained within the decree of MUDP. Its logical consequence, the decree of MUDP would be made as the guideline and benchmarks by the judge in adjudicate hereditary case in Balinese hereditary common law so that, it enables the judge to perform legal findings to explore the legal values appreciated in lives.

Aspect and dimension of the decision oriented to the patrilineal system (*kapurusa/urusa*) shifted into other parental system are based on the Decree of Supreme Court No 1331 K/Pdt/2010 where legitimacy was given that at one time either girls or boys could together be *kupurasa* (so that they have the right to receive inheritance) through a process of marriage

pada gelahang. The Judge was truly aware of the development of Balinese hereditary common law in providing the way out and alternative solution to its people. In terms of the celebration of marriage of *pada gelahang* by a certain spouse based on the fact that this couple was impossible to choose one out of two existing forms of marriage, i.e. common marriage and *nyentana* marriage. If they chose common marriage, the family from the woman's side must object, since this family would be left by their only daughter. If they chose *nyentana* marriage, the man's family side must disagree, since this family would lose the only son they had. In such condition, they chose to execute *pada gelahang* marriage, a form of alternative marriage other than the two forms of tradition marriage known by the Balinese common law.

However, factually, the issue that emerges related to the *awig-awig* of Pakraman village regulating and acknowledging such marriage there is a doubt around *prajuru* or Village officers of Pakraman village to acknowledge the form of the marriage of *pada gelahang*. Over such doubt, it affects the completion of marriage administration in Pakraman village. To prove that the couple had a marriage of *pada gelahang*, the marriage certificate followed by the agreement of the families known as *mawarang* agreement, confirming the responsibility or *swadharma* that must be carried out by the couple and their descendants after the marriage was carried out, either towards the family or towards the people or Pakraman village.

4. Conclusion

The judge is very dynamic in interpreting the dynamic of update of inheritee of Balinese hereditary common law *kapurusa*. Previously, *kapurusa* is only male descendants of the family from the man's side and foster son, then it shifted to those with male status, and lastly shifted to women as the inheritee. The judge's interpretation was carried out based on the development of modern law, progressive law, justice law under the philosophical and jurisdiction based on the Decree of Pesamuan Agung MUDP Bali.

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Legal Protection for Justice Collaborator in Revealing Criminal Act Cases in Courts

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Abstract. Justice collaborators play a paramount role in dismantling and eradicating crimes. There are several existing forms of legal protection provided to justice collaborators such as the reduction of the prison term given by the Panel of Judges, and special protection against threats or intimidation directed at him or his family. This study was aimed to investigate the forms of legal protection for justice collaborators, requirements for a perpetrator to be categorized as a justice collaborator and benefits for the perpetrator if he is willing to be a justice collaborator. The research method used is descriptive analysis method, the systematic exposure of a fact or reality through a normative juridical approach. The results showed that the legal protection for a justice collaborators are imposing special conditional probation penalties and imposing the lightest prison sentence of any other defendants who are proven guilty in the case. The requirements for a perpetrator to become a justice collaborator are (1) be one of the perpetrators of a certain criminal acts, but not the main perpetrator (2) willing to provide comprehensive information in the judicial process.

Keywords: Justice Collaborator, Legal Protection

1. Introduction

Criminal Justice System is defined as a system in a community to tackling crime. Tackling is defined as controlling crime so that it is within the limits of tolerance. Regarding to Criminal Procedure Code as a whole, it can be seen that the rights of the suspect / defendant are highly prioritized, while the rights of witnesses and victims are ignored. According to Marjono Reksodiputro the Criminal Justice System is considered to have paid too much attention to the problem and the role of the perpetrators of crime (offender-centered) [1].

The role of witnesses in every criminal trial is very important because often witnesses' information can influence and determine the tendency of judges' decisions. A witness is considered to have the ability to determine the direction of the judge's decision. This gives an effect in each witness's testimony always receives great attention both by legal actors involved in the trial and the public observers of the law [2].

In the KUHAP (Criminal Procedure Code) the position of a witness is one of the legal evidences according to the provisions of article 184 of the Criminal Procedure Code, and according to the provisions of article 1 of the Criminal Procedure Code, a witness is a person who can provide information for the purposes of investigation, prosecution and trial of a particular criminal case which he heard himself, he saw for himself and he experienced himself [3].

Based on the Supreme Court Circular Letter No. 04 of 2011 (SEMA 4/2011), Justice collaborator is interpreted as a particular criminal offender, but not the main perpetrator, who acknowledges his actions and is willing to be a witness in the judicial process. In addition to the justice collaborator in the SEMA, it also regulates whistleblowers, the ones who know certain criminal acts then report the case and are not one of the perpetrators of the action.

The role of witnesses in every criminal trial in court is very important because often witness statements can influence and determine the tendency of judges' decisions. The witness becomes one of the judges determining whether a person is guilty or not. This certainly has an effect on each witness's testimony always receiving great attention both by law enforcers involved in the trial as well as the general public. Therefore, the witness should be given legal protection because in revealing a criminal act the witness consciously takes the risk in revealing material truth.

In the General Provisions of Article 1 of Law No. 13 of 2006 concerning Protection of Witnesses and Victims, it is stated that LPSK is an institution which is in charge to provide rights and protection to victims and / or witnesses. Observing the characteristics of the tasks and authorities carried by LPSK, LPSK is an institution in the scope of the criminal justice system, particularly in the investigation, prosecution and trial stages [4]. However, the practice in each institution, especially law enforcement agencies both the KPK, the Police, and the Prosecutors' Office in implementing this regulation have various versions. It's quite strange to have different implementation in the same court, same government with the same rules. Besides, the determination of justice collaborator is not yet clear and there are still different perceptions of each law enforcement especially in treating a *Justice Collaborator* [5].

For instance, several major cases were revealed with a valuable information from justice collaborators, but what happened was that justice collaborators actually received criminal penalties. One of them is Agus Condro. The Corruption Court, on Thursday, June 16, 2011 sentenced him to 15 months in prison and a fine of Rp 50 million. Agus Condro, as the Reporter for the bribery case, the traveler checks for the election of the Deputy Governor of BI, the sentence is not much different from the other defendants in the same case. This ruling is very contradictory to LPSK's recommendation, the Panel of Judges should consider Agus Condro's position as a person who contributes and cooperates with law enforcement officials to uncover corruption cases. As the first person to reveal the bribery case of the election of Agus Condro who was the Senior Deputy Governor of Bank Indonesia should have obtained his rights as stipulated in Law No. 13 of 2011 concerning Protection of Witnesses and Victims [6].

Determination should be an important note of the uncertainty of what is meant by the right of justice collaborators to get "legal protection". Then in special handling, the delay in the legal process will be carried out in the period of time, for prisoners who have the status as justice collaborator will get additional remissions and other prisoners' rights, but it is not explained what those rights are like. Besides, there still some difficulties in determining the main actors and not the main actors.

Based on the background that has been described, the researcher was haunted to investigate the Legal Protection for Acting Witnesses (Justice Collaborator) in Exposing Criminal Cases in Courts).

The formulation in this research is (1) how the forms of legal protection for Justice Collaborator and (2) what are the conditions for a criminal offender can be categorized as Justice Collaborator, and what benefits are obtained by perpetrators who are willing to become Justice Collaborators.

2. Method

The purpose of this study was to investigate the forms of legal protection for justice collaborators, the requirements for a perpetrator to become a justice collaborator and benefits for the perpetrator if he is willing to be a justice collaborator.

The research method used in this study is descriptive analysis method; the systematic exposure of a fact or reality through a normative juridical approach and qualitative analysis. Normative legal approach method, legal research conducted by examining library materials or secondary data is used to support the investigation. Normative legal research is also called doctrinal law research due to the fact that this research is conducted only at written regulations or other legal materials [7]. Supporting secondary data is done by looking at the facts that occur in the Justice Collaborator.

3. Result and Discussion

3.1. Forms of Legal Protection for Justice Collaborators

In Indonesia, non-victim witnesses have been developed in proving organized crime cases, that is what is called as a collaborating witness or justice collaborator. Judging from the terminological perspective, justice collaborator is defined as a "whistleblower" witnesses who collaborate *"pentiti"/"pentito"/"collaboratore della giustizia"*. In the latest developments, the Supreme Court through the Supreme Court Circular Letter Number: 04 of 2011 regarding the treatment of whistleblowers and justice collaborators is one of the perpetrators of certain criminal acts, admitting the crime committed, not the perpetrator major in the crime and provide information as a witness in the trial process [8].

The development of the idea of justice collaborator starts from the provisions of Article 37 paragraph (2) of the 2003 United Nations Convention Against Corruption (UNCAC) which has been ratified by Indonesia through Law Number 7 of 2006 concerning ratification of the convention in 2003. Then in Article 37 paragraph (3) the UNCAC. Furthermore, in a joint decree between the witness and victim protection agency (LPSK), the Attorney General's Office, the Indonesian Police, the KPK, and the Supreme Court. Justice collaborator is a witness, who is also a perpetrator, but wants to cooperate with law enforcement in order to dismantle a case and even return the assets resulting from corruption if the asset is in him [9].

In the provisions of positive Indonesian law, justice collaborators are briefly regulated in Law Number 13 of 2006 in conjunction with Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 (Regarding Witness and Victim Protection), United Nation Convention Against Corruption (UNCAC), Law Number 31 of 1999 jo Law Number 20 of 2001, Joint Regulations on the Law and Human Rights of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Chief of the Indonesian National Police, Corruption Eradication Commission of the Republic of Indonesia, Chair of the Protection Agency Witnesses and Victims of the Republic of Indonesia Number: M.HH-11.HM..03.02.Th. 2011 Number: PER-045 / A / JA / 12/2011, Number: 1 of 2011, Number: KEPB-02 / 01-55 / 12/2011, Number: 4 of 2011 concerning Protection for Reporters, Reporting Witnesses and Acting Witnesses in Collaboration, Indonesian Supreme Court Circular Letter number: 04 of 2011 Concerning Treatment for Reporters of Criminal Acts (whistle blowers) and Witness Actors who Cooperate (justice collaborator) in Certain Criminal Cases [10].

This Joint Regulation cannot run optimally due to the lack of understanding from law enforcers, especially in the regions due to lack of socialization, the constraints on the legal structure are related to the LPSK institution. First, the position of LPSK is independent but must run a program that must be supported by law enforcement agencies, especially in the case of protection of justice collaborators in

the form of special handling. In practice, sometimes it happens because of the independence of this LPSK. LPSK is sometimes considered to intervene in the authority of officials of law enforcement and the problems of the regional LPSK. Second, related tasks and authorities related to the cooperation of related agencies in practice is difficult to apply. Third, the structure and infrastructure of LPSK.

In this joint regulation agreed conditions for obtaining protection for justice collaborators. The protections provided are: *First*, the remission of penalties, including prosecution; second, the granting of additional remission and other inmate rights is in accordance with the prevailing legislation when the Cooperating Witness is a convict. As stated in the Supreme Court Circular No. 4 of 2011 on the treatment for Reporting Crime and Witnesses actors who Work In Case Specific Crime has provided legal protection for Justice Collaborator is dropping criminal trial conditional specifically for Justice Collaborator, convict the form of imprisonment at least among the other defendants who were found guilty on the matter.

3.2 Conditions for a Criminal Actor Who Can Be Categorized as a Justice Collaborator and the Benefits Obtained by Actors Who Willing to Become a Justice Collaborator

The definition of justice collaborator according to the Supreme Court Circular Number 4 of 2011 is someone who is one of the perpetrators of a crime, recognizes the crime he committed, is not the main perpetrator in the crime, and provides information as a witness in a very significant court process so that it can reveal the criminal offense is effectively referred to, revealing other actors who have a greater role and returning the assets / proceeds of a crime.

Justice collaborator is a collaborating agent, a person who is a witness, reporter or informant who provides assistance to law enforcers, for example in the form of providing important information, strong evidence or testimony / under oath, which can reveal a criminal act, in where the person is involved in the reported crime or even another crime [11]. The term justice collaborator can also be referred to as a whistleblower or who wants to work with law enforcement or whistle-blower participants. The whistleblower must be someone in the organization who can be involved or not involved in the reported crime [12].

In Law Number 31 of 2014 concerning Protection of Witnesses and Victims Article 1 number 2, what is meant by witnesses, perpetrators or other terms of justice collaborator, stated that the perpetrators' witnesses are suspects, defendants, or convicts who work closely with law enforcement to uncover a criminal act in a case same. Of course, it is not an easy matter to become a whistleblower and justice collaborator because it is not without risk for someone to take the courageous choice to blow his whistle, hit the block, and divulge the secret to expose the crime. As an insider becoming part of the environment where the information he is leaking, is certainly very understanding about what and how the mode of crime that has been neatly wrapped and is confidential to the public and law enforcement agencies.

Considering the risk and responsibility to become a whistleblower and justice collaborator, therefore Law 31 of 2014 gives a kind of appreciation to those who want to become whistleblowers and justice collaborators as a form of participation in tackling crimes that are extraordinary crimes. Article 10 of Law Number 31 Year 2014 provides protection for both. As regulated in article 10 are as follows: Article 10 (1) Witnesses, victims, witnesses, perpetrators, and / or reporters cannot be prosecuted, both civil and criminal, for testimonies and / or reports that will, are, or he has given, unless the testimony or report is given in good intention.

In the article 10 (2), in the event that there are lawsuits against witnesses, victims, perpetrators, and / or reporters on testimonies and / or reports that will be, are being, or have gained, these lawsuits

should be delayed until the reported case or that had been established by a court and obtained permanent legal force.

Regulations relating to the Justice Collaborator are regulated in Point 9 regarding guidelines / conditions for determining someone as a witness to the collaborating actor (Justice collaborator) as follows:

- 1) The person concerned is one of the perpetrators of certain criminal acts as referred to in this SEMA, acknowledging the crime committed, not the main perpetrator in the crime and providing information as a witness in the trial process.
- 2) The public prosecutor in his claim states that the person concerned has very significant information and evidence so that the investigator and / or public prosecutor can effectively disclose the said criminal act, disclose other actors who have a greater role and / or return assets / proceeds of a crime.
- 3) For the assistance, the witness who cooperates as referred above, the judge can determine the criminal to be imposed and consider matters of criminal offense as follow; (1) impose special conditional probation penalties, (2) imprisonment in the form of the lightest imprisonment of the defendants among those who convicted in the case.

The arrangements relating to the Justice Collaborator are regulated in Article 1 as follows: Point (3) Witnesses in Collaborating Actions are witnesses who are also perpetrators of a criminal offense who are willing to assist law enforcement officials to uncover a criminal act or a criminal act to return assets or proceeds of a criminal offense to the state by providing information to law enforcement officials and giving testimony in the judicial process.

Meanwhile, the benefit gained from the Justice Collaborator is that no criminal or civil claim may be prosecuted for the testimony or report provided. However, does the provisions stipulated in this article guarantee that a Justice Collaborator will not be prosecuted, expressly contained in the Supreme Court Circular Letter Number 4 year 2011 about Treatment for Reporters of Criminal Actions and Witnesses of Actors Collaborating in Certain Crimes Cases have provided legal protection for Justice Collaborator, namely imposing a conditional trial sentence specifically for Justice Collaborator, imposing a criminal sentence in the form of the lightest imprisonment among other defendants who were proven guilty in the case in question.

To strengthen the role of the Justice Collaborator with regard to eradicate corruption, the role of law enforcement in criminal justice process is very important. Beginning with the investigation, prosecution and trial hearings the court must consider the rights of the Justice Collaborator as a witness. The large number of law enforcers who always follow up on reports of defamation by people revealed by the Justice Collaborator greatly disturb the psychological condition of the Justice Collaborators. With the disruption of the psychological condition of the Justice Collaborators influences the eradication of criminal acts. Many Justice Collaborators are disappointed with the existing law enforcement process. Good intentions want to expose cases that are high-class, they must be sued back only by article 310 of the Criminal Code about defamation. With the effort and enthusiasm to handle criminal crime in Indonesia, including improvement of the system within the scope of the court, we should not ignore the role of a Justice Collaborator. The role of the Justice Collaborator in the criminal role system is very important, because criminal law enforcement is not sufficient with the structure of law enforcement agencies

4. Conclusion

Justice collaborators have been legally protected. SEMA has provided legal protection for Justice Collaborators, namely imposing special conditional probation penalties for Justice Collaborators, imposing the lightest criminal sentences among the defendants the other is proven guilty in the case in question. The requirement to become a Justice Collaborator is first, the person concerned is one of the perpetrators of a particular crime. as referred to in SEMA, recognizes the crime committed, not the main perpetrator in the crime and provides information as a witness in the judicial process. Second, the Public Prosecutor in his claim stated that the person concerned had information and evidence that was very significant so that the investigator and / or public prosecutor could effectively disclose the criminal act, disclose other actors who had a greater role and / or restore assets / proceeds of a crime. Third, for this assistance, the judge is benefited in considering and determining the criminal sanction to be imposed.

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omertà among Mafia members, cannot be shaken, threatening the lives of anyone who violates and cooperates with the police. Important witnesses cannot be persuaded to testify and the key witnesses disappear due to the efforts of the leaders of the crime groups who are the target of the prosecution. This initial experience convinced the United States Law Department that a witness protection program needed to be instituted. Lilik Mulyadi, *Perlindungan Hukum Terhadap Whistleblower Dan Justice Collaborator Dalam Upaya Penanggulangan Organize Crime*, P.T. Alumni, Bandung, 2015, page 5

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Refugee Employment Prohibition in Indonesia

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Abstract: In Indonesia, the Immigration and the employment regulations prohibit the refugees from working. Meanwhile, the aids which are given to them are very limited. As a result, the refugees have difficulty to fulfill their needs. This condition makes the refugees work secretly and even commit criminal acts. This paper will examine the weaknesses of the rules prohibiting refugees from working and its solutions. The study was conducted in a normative legal research through library studies to obtain the secondary data which are analyzed with qualitative descriptive. Based on the results, this study found regulatory gaps in the field of the immigration and the employment that can be used by the refugees to work through informal employment schemes, apprenticeship and partnerships. The problem with these various schemes is very limited protections, both for the refugees and the employers. Therefore, the improvements and the arrangements need to be made by opening the employment opportunities for the refugees through a number of restrictions. These restrictions are related to the position and field of work that can be carried out by the refugees and the need for the local labor. The important restrictions are made to protect national interests, namely the availability of employment for the local workers.

Keywords: refugees, right to work, prohibition, ratification, the national interest

1. Introduction

Referring to Article 4 of the 1945 Constitution, one of Indonesia's goals as a country is creating world peace. To do so, Indonesia has actively participated in global cooperation, one of which is handling refugees. The Global Refugee Forum (GRF) is one of the international forums attended by Indonesia and initiated by the United Nations High Commissioner for Refugees (UNHCR). Here, various countries share their experiences in handling refugees. At the GRF meeting on December 17, 2019, for example, the Indonesian representative, Meutya Hafid (The Chairwoman of Commission 1 in the Indonesian House of Representatives) emphasized Indonesia's commitment to dealing with refugees and the significant role of parliament in promoting global refugee governance [1].

The world is witnessing the large number of refugees which keep growing year to year along with the increasing number of conflicts in different countries. In fact, the policy direction on resettlement countries reduces refugee numbers due to the rise of terrorism and domestic economic issues as it has happened in Australia and the United States. This condition causes international pressure on transit countries like Indonesia which consequently becomes a country party by ratifying the 1951 Refugee Convention and the 1967 Protocol concerning refugee status [2]. At different meeting forums, UNHCR has requested Indonesia to sign the convention and protocol. The country has repeatedly stated its commitment to remain as a transit country despite the pressure.

The Indonesian government responds to the international pressure on handling refugees by promulgating the Presidential Regulation No. 125/2016 on Handling Offshore Refugees (Presidential Regulation No. 125/2016). Refugees as mentioned in Article 1 Paragraph 1 of the Presidential Regulation are “foreigners who reside and seek asylum in Indonesia due to reasonable fears; grounds of persecution including race, religion, nationality, membership of certain social groups, different political opinions, and unwillingness to get protection from their home country and/or circumstance of gaining a status as asylum seekers or refugees from the United Nations (UN) through the High Commissioner for Refugees in Indonesia”. The regulation presents a broader meaning of refugees as it includes asylum seekers as refugees. This is in contrast to UNHCR’s opinion, refugees and asylum seekers are different. Such broader meaning, in turn, extends the scope of refugee protection.

Unfortunately, the Presidential Regulation is not supported with budgeting rules which consequently causes the refugee budget to be very limited and unable to support many refugees. The assistance provided by UNHCR is also limited and occasionally leads to an issue considering not all refugees get the same treatment, such as allowance. In the end, it brings a commotion; refugee protest at the UNHCR office and fights among refugee members, among others.

In the meantime, refugees also face some problems ranging from shelter, health services and education for children. Some even live on sidewalks, experiencing limited clean water and food. Some even beg for meals from the surrounding population. A number of retention houses also overlap due to the higher numbers of refugees to accommodate. In fact, the houses are not only used to accommodate them. Things get worsened by the policy that they are banned from having a job or working. Consequently, such conditions, particularly the employment prohibition and psychological issues due to the employment uncertainty in the country of asylum, cause a number of refugees to violate laws; prostitution, adultery, theft and narcotics, among others. 36 refugees in Makassar, for example, are detained in the Immigration Detention Center (Rumah Detensi Imigrasi/Rudenim) for they were involved in sexual harassment, fighting and theft [3].

The high international demand for Indonesia to ratify a convention and the rise of issues on refugees has the potential to disrupt the peaceful society. To that end, a study on refugee regulations, especially the rights of refugees to work in Indonesia, is an interesting topic. The study here is different from other studies that tend to deal with the rights of refugees in general. It will focus on the right of refugees to work. The scope of the refugees in this study refers to the meaning of refugees in the Presidential Regulation No. 125/2016, which includes asylum seekers.

2. Method

This study is a normative legal research, which is conducted based on library research by analyzing secondary data [4]. It uses three types of secondary data; primary legal materials (legislation), secondary legal materials (elucidating primary legal materials), and tertiary legal materials (supporting primary and secondary legal materials) [5]. The primary legal materials referred to in this study are the Civil Code, the Law No. 6/2011 on Immigration (Immigration Law), the Law No. 13/2003 on Manpower (Manpower Law), and the Presidential Regulation No. 125/2016. In the meantime, the secondary legal materials include books and journals, while the tertiary legal materials are dictionaries. The data, in turn, are analyzed using descriptive qualitative method by accurately describing a particular situation or phenomenon [6] and understanding it in depth [7].

3. Result and Discussion

3.1 Conditions of Refugees in Indonesia

According to UNHCR, refugees are any person due to reasonable fears; grounds of persecution including race, religion, nationality, and membership of certain social groups and political parties, outside their country of nationality and unwillingness to get protection from their home country. This definition refers to the 1951 Convention on the Status of Refugees. Here, UNHCR distinguishes refugees from asylum seekers. Asylum seekers are those who request to become refugees, but their request is being considered [8]. As a non-state party to the 1951 Refugee Convention, Indonesia has its own rules on the scope of refugees, including asylum seekers (The Presidential Regulation No. 125/2016, Article 1 Paragraph 1).

The data from UNHCR Indonesia mentions the number of refugees and asylum seekers in the country is about 13.657 people (December 2019); 13.900 people (December 2018); 13.840 people (December 2017); and 14.405 people (December 2016) respectively. On average, the number of Indonesian refugees ranged from 14,000 people in the last 4 years. If compared with some countries in Southeast Asia, such number is not too large. The number of refugees in Malaysia alone, for example, reaches 238.615 people and Thailand 114.896 people respectively [9]. More than half of the refugees are from Afghanistan, Somalia and Iraq (2016). In Indonesia, they are distributed in different places including Jakarta, Medan, Pekanbaru, Batam, Semarang, Surabaya, Pontianak, Balikpapan, Manado, Denpasar, Kupang, and Makassar. Their presence takes in 4 locations; Immigration Detention Center (Rumah Detensi Imigrasi/Rudenim), Immigration Office (Kantor Imigrasi/Kanin), community house and independent living (independent immigrant). Nevertheless, the smallest number of refugees does not reduce the international pressure on Indonesia to ratify the 1951 Refugee Convention.

The survey conducted by the Sandya Institute to 16% of refugees in Indonesia shows the level of refugee educational background is dominated by Junior High level with 41% (not passing), Junior High School Graduates with 8.3%, Undergraduate level with 7.3% and post graduate educational background with 4.6% respectively [10]. In other words, the majority of their educational background is Junior High School level. This case is similar with Indonesian workers who are mostly vocational and high school graduates and even below the level and dominate the number of unemployed in Indonesia per August 2019 [11]. Consequently, if the refugees are allowed to work, it is certainly a threat to the local workers. This is the reason why the government makes a policy on banning the refugees from working.

However, based on their professional background and education, the majority of the refugees have jobs in their home countries; community, social and personal services sector with 15.6%, retail and wholesale trade sector including restaurants and hotels with 11.4%, and construction and agriculture sectors 11% each respectively. The remaining sectors (transportation, storage, communication, mining, manufacturing, finance, insurance and real estate, electricity, gas and water) represent 12.2% of the remaining percentages [12]. Here, the refugees who do not work are students, about 25%, and other groups are unemployed. About 13.5% of the respondents do not mention certain employment sectors.

The survey says the majority of refugees have jobs in their country of origin. However, upon their arrival in Indonesia, their activities are very limited because they could not work like the locals. To meet their daily needs, they (excluding asylum seekers) depend on the assistance or allowance provided by the international organization for refugees (International Organization

for Migration/IOM) and a number of other donor organizations. They do not regularly receive such assistance considering various organizations provide it depending on the countries of the donor. In 2018, for example, IOM announced it was reducing assistance to refugees due to aid commitment from Australia.

In the meantime, the Indonesian government itself does not have a special budget for refugees, all assistance is voluntary. This happens because the Immigration Law, as the legal basis for foreigners in Indonesia, does not regulate refugee fund. Although the Presidential Regulation No. 125/2016 is issued, the handling of refugees is left to each local government.

The lack of assistance in a way most refugees are still in a condition capable of working certainly encourages them to find ways to meet their living needs, one of which is finding a job. The main purpose of working is to get income to meet basic needs. In addition, working offers a sense of security and satisfaction and becomes a means of self-actualization [13]. Most importantly, it can make a person realize his/her sense of humanity [14]. These purposes are very important for refugees as various restrictions imposed by the country will distance them from social life. Here, a condition without having a job is a threat to one's sense of humanity [15]. No wonder if social issues such as fights that have led to the deaths of a number of refugees are rife in refugee camps. It has happened in North Sumatra [16]. In February 2019, a number of refugees made suicide attempts, hunger strikes and self-immolation in the Menado detention center [17].

Conflicts with the surrounding communities also often occur due to the rejection to refugee camps in Kalideres for health and safety reasons [18]. The communities in Puncak area are reportedly uneasy with the refugees who work illegally; working as a barber and opening illegal businesses such as selling bread, among others [19]. In fact, the number of unemployed among the local population is still high in the area.

A number of refugees also commit some criminal acts such as prostitution, narcotics trafficking and human trafficking. In 2019, the Police arrested a number of child refugees involved in prostitution [20]. Concerning narcotics, the Indonesian National Narcotics Agency (BNN) has found a khat field in Bogor and Interpol has issued a detention warrant to one of the refugees named Said Mir Bahrami who was involved in buying and selling drugs and human smuggling [21].

3.2 The Right to Work for Refugees in Indonesia

The right to work for refugees is regulated in the 1951 Refugee Convention. However, Indonesia is not one of the countries signing and ratifying the convention. This means it does not have the obligation to follow all the regulations mentioned in the convention, including giving opportunities to refugees to work. To protect the national interests, Indonesia has banned refugees from working. The national interest here is the high unemployment rate in Indonesia.

In addition, the Immigration Law, in conjunction with the Manpower Law, does not allow foreigners to work without permission. Those who can work in Indonesia are foreign nationals holding a work visa or referred to as foreign workers (Article 1 Paragraph 13 of the Manpower Law). In another word, refugees are clearly not included as foreign workers as they do not hold visas.

The refugee employment prohibition is explicitly mentioned in the Director General of Immigration Regulation No. IM.0352.GR.02.07. on the Handling of Illegal Immigrant Claiming to be Asylum Seeker or Refugee on April 19, 2016. According to the Regulation, refugees are not allowed to find a job and carry out activities related to earning wages. Based on Article 1 Paragraph 3 of the Manpower Law which regulates the definition of workers or laborers, the compensation received by a worker is wages or other forms of compensation. This

means there is a loophole the refugees can use to be able to work; as long as they are not paid in the form of wages and the process of finding a job is not their initiative.

Besides wages, workers can get rewards in other forms such as salary, commission, honorarium and compensation. Salary, for instance, is a payment for services performed by employees who have a position such as a manager [22]. In the meantime, commissions are rewards paid for a given service [23], while honorarium is payment for services and development activities in the government. At last, compensation is anything received in physical or non-physical forms, money or goods, both directly and indirectly [24].

Another loophole is this Law is perceived to only set employment in formal sector. This implies a room for refugees to work in the informal sector. Employment in the informal sector is a type of work where responsibility is individual, not incorporated and only based on an agreement [25]. Becak drivers, street vendors, builders, carpenters, tailors, and shoeshiners are the examples. One of the advantages of this employment is that it is more flexible as it is not bound by rules and taxes. However, it does not have legal protection for both the employees and the employers.

The informal employment status with agreement is actually under protection considering it is based on the principle of freedom of contract (Article 1338 of the Civil Code). Although considered in the informal sector, it will always be protected as long as it meets the legal requirements (Article 1320 of the Civil Code). However, the employment agreement involving refugees violates one of the legal conditions, a permission granted by the statutory regulations. To that end, the regulations in the Civil Code cannot be used as a protection for informal employment agreements involving refugees.

The lack of legal protection for refugees working in the informal sector has taken its toll. In 2016, for example, a number of refugees who worked as barbers in a number of salons in the Puncak Area, Bogor, were arrested for violating work restrictions stipulated in the Director General of Immigration Regulation No. IM. 0352.GR.02.07. According to Article 185, paragraph 1 jo. Article 42, paragraph 1 of the Manpower Law, salon owners who have employed them may also be subject to imprisonment and/or fines.

Another thing the refugees can use as a loophole is apprenticeship regulation. Apprenticeship is a work training system organized in an integrated manner in training institutions by working directly under the guidance and supervision of instructors or more experienced workers, in the process of producing goods and/or services in companies, for example (Article 1 Paragraph 11 of the Manpower Law). Through the apprenticeship, besides improving their skills and expertise, the refugees can earn money. The apprenticeship program for refugees has been undertaken by a number of parties such as the Geutanyao Foundation (Aceh), which attempts to employ a number of refugees in a workshop [26]. However, due to the high unemployment rate of Vocational School graduates, such apprenticeship is prioritized for them. In fact, the absence of particular regulation for handling foreign nationals causes the Department of Manpower (*Dinas Tenaga Kerja/Disnaker*) to tend to use the foreign worker provisions for apprentices who have already got a permit. Therefore, if companies are willing to accept refugees for apprenticeship, they must run it informally, behind the Manpower Officer.

In addition, partnership can also be used by refugees to work. It is a cooperation built as partners or coworkers [27]. The concept of partnership with refugees has been applied by several parties. The locals, for example, initiate to lend their land to the refugees. In return, they need to give some of the yields to them [28].

Basically, the three concepts do not have clear legal protection for refugees, employers, and facilitating organizations. The government may ban them from using the existing

instruments or tools at any time. To this end, the regulation that clearly stipulates the rights to work for refugees is necessary.

3.3 Solution to Arranging the Right to Work for Refugees

At a number of national and international forums, representatives from the government and the Parliament have stated that they do not support the ratification of the 1951 Convention for various reasons; encouraging an increase in the number of refugees in Indonesia, reducing employment opportunities for the locals and the potential for conflict, among others. Hence, the future solution to deal with the refugee employment is to set a number of regulations. The regulations such as the Presidential and the Directorate General Regulations are inadequate considering they are in contrast to the Immigration Law and the Manpower Law which set criminal sanctions for any party that employs other people who live in Indonesia illegally or without permission. Here, the Immigration Law needs to be amended by adding a scheme of providing refugee employment. In addition, the lex specialists in employment sector, the Manpower Law in this case, needs to set regulations for refugees. The refugees are different from Foreign Workers as the Labor Law prohibits individuals from employing them, limit the types of work they can do and is obliged to repatriate them to their home countries. In the end, the regulations or provisions mentioned in the Immigration Law needs to synchronize with the ones set in the Manpower Law.

However, in granting the rights to work for refugees, some restrictions are also needed. They, for example, can only work in positions and fields that are still scarce in Indonesia. Additionally, the apprenticeship concept can also be applied as it basically provides education and training for them. Offering jobs for the locals is still a priority. At last, the partnership concept is also possible as it is more flexible and mutually beneficial.

4. Conclusion

Indonesia has not ratified the 1951 convention, in which one of its contents is requiring countries party to provide employment opportunities for refugees. In addition, refugees also do not meet the criteria of foreigners who can have a job as mentioned in the Immigration Law and the Manpower Law. Consequently, they are banned from working in Indonesia. The refugee employment prohibition causes their activities to be very limited. They also experience economic limitations due to lack of assistance. Such conditions encourage them to find loopholes in order to be able to work; with informal employment scheme, apprenticeship and partnership, among others. Basically, these loopholes are very risky for both refugees and employers due to the lack of legal protection. In addition, a number of refugees commit illegal work such as prostitution and drug dealing. The refugee employment prohibition, on one hand, aims at protecting national interests due to the lack of employment opportunities for the locals. However, on the other hand, this ban poses a threat to the national interest as some refugees commit illegal work. To this end, they should be given the opportunity to work, but with restrictions. They, for example, can only work in the sectors which are undesirable in Indonesia. This will not interfere with the employment opportunities for the locals. More importantly, the limited employment opportunities need to be regulated in the Immigration Law and the Manpower Law. Meanwhile the ratification seems very difficult to achieve due to the lack of support from lawmakers, the government and the parliament.

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Urgency of Strengthening the Role of Directorate of Special Crimes of Indonesian National Police in The Special Criminal Law Enforcement

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Abstract. The presence of ad hoc institutions in field of law enforcement such as Corruption Eradication Commission (KPK), Terrorism Prevention National Board (BNPT), and Narcotics National Board (BNN), within the last two decades has been unable to significantly reduce the number of special criminal actions that become the portion of the institutions. Optimal and surging simultaneous law enforcement strategies in all regions of Indonesia has to be immediately formulated and implemented as an anticipation from the increasing number of special criminal cases. The study used normative juridical method. The study reviewed that one of the resources that had an ability and network until district level (Sectoral Police) as the spearhead to prevent the increasing number of special criminal actions was the special criminal and detective range known as Special Crime under Crime and Detective Department of Indonesian National Police. The fact could not be denied in addition to the need of revision of laws related to special criminal actions reinforce Crime and Detective Department tactically and elegantly but effectively in prosecuting special criminal actions. The role reinforcement of Special Criminal Directorate of Indonesian National Police in Order of Criminal Law Enforcement in field of Special Criminal Actions to Maintain State Security and Sovereignty was by reformulation of its institutional and powers in order to maintain state security and sovereignty from Special Criminal Actions.

Keywords: Special Criminal Actions; Security; Sovereignty; Institutions

1. Introduction

The advent of ad hoc institutions in Indonesia, such as the Corruption Eradication Commission (KPK), the National Counter-Terrorism Agency (BNPT), the National Narcotics Board (BNN) in the law enforcement for the last two decades has proved incapable of significantly reducing the number of special crimes to which those institutions are specified [1]. Corruption crime with its transactional appearance is still massively committed and seems to be increasingly prevalent like a trivial exchange in a market; terrorism in many regions of Indonesia is increasing quantitatively and qualitatively. The last case, which took place in Jakarta on January 14, 2016, with a considerable number of victims, admittedly, is carved on the memories of many Indonesian People. Circulation of drug, its use, and the number of the couriers, continues to undergo a significant increase. The number of cases related to drugs from month to month continues to grow and involves various classes of society.

The birth of those ad hoc institutions mentioned above has not been able to guarantee that the number of special crimes significantly decreases. Therefore, a simultaneous and optimal law enforcement strategy throughout the territory of Indonesia must be immediately formulated and carried out in anticipation of the growing number of special criminal cases mentioned above. One of the Indonesian resources that have the ability and the network up to the district level (Sectoral Police) to cope with the growth of special crimes mentioned above is the Investigators Line for Special Crime (known as "Krimsus") under the Criminal Investigation Agency (Bareskrim) of the Indonesian National Police. This fact shows that revision is necessary for the laws relating to special crimes to produce legislation that can strengthen the Criminal Investigation Agency so that the agency can effectively and elegantly tackle the special crimes mentioned above.

In other words, to strengthen the role of the Directorate of the Special Crimes in terms of the Special Criminal Law Enforcement for maintaining public order and national sovereignty is to reformulate the institution and its authority to safeguard the security and sovereignty of the State from Special Crimes.

Current development in various fields has resulted in many competitions in searching for benefits and profits by using any measures, including those that are breaking the prevailing laws. Crimes committed in the new types and models rise as if they adjust themselves with the current developments, which has not accommodated yet by the Indonesian Criminal Code (KUHP) that was made during Dutch colonialism. Those types of crime are known as "Special Crime," or special criminal act.

2. Methods

This research used a juridical normative research method (legal research), which is descriptive and aims to describe the research qualitatively. The secondary data used in this research is collected from (a) primary legal materials in the forms of legislation related to the research theme, and (b) secondary legal materials in the forms of books and journals related to this research theme and further elaboration of the primary legal materials into theoretical contexts.

The use of the normative juridical method was designed to answer the urgency of strengthening the role of Directorate of Special Crimes of Indonesian National Police in the special criminal law enforcement for the sake of sustaining State Security and Sovereignty.

3. Result and Discussion

3.1. Directorate of Special Crimes Position.

The bureaucratic reform in the government demands the enhancement of the Indonesian National Police professionalism, so too with the Directorate of Special Crimes that are developed and coached by referring to the motto "Sidik Sakti Indra Waspada." The Directorate of Special Crimes was established in 2002 as a part of the Criminal Investigation Agency (Bareskrim) of Indonesia National Police (Polri). The formation of this agency is in response to the rise of special crimes that are far different from the types of general crimes known so far. In the special case, the perpetrators of the crimes are not uneducated people, but well-educated and intelligent people so that they can easily take advantage of internet technology to facilitate their criminal actions, which are commonly known as "White Collar Crimes." This crime has various types, ranging from economic and banking crimes, internet crimes, forestry and environmental crimes, corruption crimes, money laundering crimes, human trafficking crimes, to other types of crime that the Indonesian Criminal Code (KUHP) has not regulated yet.

In the Criminal Procedural Code (KUHP), one of the institutions authorized to conduct investigations and inquiry is the Indonesian National Police. In addition to the Criminal Procedure Code, the authority of the Indonesian National Police as investigators and inquirers to uncover criminal acts is also reaffirmed in Article 1 section 8 and 9, and Article 14, section (1) letter g of Law No. 2 of 2002 concerning the Indonesian National Police. The law states that one of the Indonesian National Police authorities is investigating and inquiring all criminal acts according to the criminal procedure code and other laws and regulations.

In dealing with special criminal cases, Directorate of Special Crimes was established by referring to the Regulation of the Indonesia National Police Chief number 22 of 2010 dated September 28, 2010, concerning the Organizational Structure and Work Procedure at the Regional Police. Specifically, it lies in article 10 letter g, which states that one of the elements implementing principal duties as referred to in Article 7 letter c is Directorate of Special Crimes. The authority of the police as investigators and inquirers is a manifestation of the primary duties of the police, as stated in Article 13 of Law No. 2 of 2002, namely to maintain security and public order; enforce the law, and provide protection and service to the community.

In dealing with special crimes, the investigator of the Directorate of Special Crimes must always synergize with other institutions that are related to the particular type of crimes they are handling [2]. For example, in the new Law of Prevention and Eradication of the Criminal Act of Money Laundering (UU PPTPPU), there is a fundamental change related to investigations, namely the granting of authority to investigators of the original criminal acts under the coordination of PPATK to conduct TPPU investigations related to the provenance of the criminal acts (for example, illegal logging) [3].

Strengthening the Role of the Directorate of Special Crimes of the Indonesian National Police in Terms of Special Criminal Law Enforcement

In light of the increasing special crimes, strengthening the existence of the Directorate of Special Crimes of the Indonesian National Police, covering the quality of the Investigators, must be continuously, comprehensively, and holistically held with the following approach:

- 1) Juridical Efforts:
 - Coordinating with the Indonesia National Police and institutions incorporated in the Criminal Justice System (CJS) [4];
 - Disclosing special criminal cases by taking advantage of advanced technology;
 - Strengthening the investigators of the Directorate of Special Crimes by giving material expertise to investigate the perpetrators and witnesses, assess the evidence, and reconstruct crime scenes for the sake of accelerating the disclosure of special criminal cases.
 - Organizing socialization to give the public an understanding of the types of special crime.
- 2) Technical Efforts
 - Coaching the mental attitude and courage of investigators in carrying out investigations of special crimes despite the vast challenge they should face in a case;
 - Optimizing the duties of investigators and encouraging motivation and discipline in handling special criminal investigations [5];
 - Participating in education and training on how to handle special criminal acts.
 - Improving and equipping the investigator's knowledge and ability in the field of information technology and other technologies needed to handle technological crimes.
 - Improving the quality of the facilities, infrastructure, and budget submissions as the investigators' performance supporter.

4. Conclusion

Strengthening the Directorate of Special Crimes of the Indonesian National Police must be continuously improved in terms of both the quality and quantity of the investigator. The institution also should be fully supported by the infrastructures supporting the investigators' performance in disclosing special criminal cases. Nowadays, the existence of the Directorate of Special Crimes of the Indonesian National Police is still necessary to answer the challenges of various special crimes that invariably evolve by following the rhythm of technological developments in this digital era.

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The Existence of Customary Law and Islamic Law in the Optics of the Indonesian Legal System in Indonesia

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Abstract. This article aims to describe the existence of Customary law and Islamic law in the legal system in Indonesia. The complexity of the law in Indonesia is colored by legal pluralism, which in addition to national law, also applies customary law and Islamic law. In its development, national law influenced by western law began to eliminate the existence of unwritten customary law. However, this is different from the existence of Islamic law, which gets space and influences the development of national law, especially in economic activities. Some of the laws and regulations influenced by Islamic law include Law on the Implementation of Hajj, management of zakat, waqf, Application of Privileges in Aceh, and Special Autonomy in Aceh, and religious courts. Thus, apart from customary law, the principle of sharia has become one of the sources for the formation of national law.

Keywords: Customary Law, Islamic Law, Legal System, Indonesia

1 Introduction

The legal system is a unity of legal regulations consisting of parts (law) that have a relationship (interaction) with each other, which is arranged in such a way according to its principles, which serves to achieve legal objectives. Each part does not stand alone, but is bound together. The importance of each part lies in the bonding of the system, in a unified and systematic relationship with other legal regulations. Therefore, in a good legal system there should be no conflict between the parts. If a conflict or construct occurs, the system itself resolves it. According to Peter de Cruz, the legal system is the operation of a set of legal institutions, procedures and regulations.[1] While in the broadest sense it is defined as the same Juristic philosophy and technique used by a number of countries which generally have a common legal system. This legal system in its broadest sense describes a parent legal family, such as the legal family of Civil law, Common law, Socialist law and Islamic law.

Thought about the legal system is not free from criticism and has been implemented in various ways even though there is no consensus among observers about whether this concept is purely heuristic, fundamental and scientific or less useful theoretically and descriptively. Even when the concept is used, there are no classification criteria. For example Zweigert and Kotz prefer only juristics, while Glasson and Sarfatti focus on the historical origin of a system as a distinguishing or identifying feature. Likewise, there is no agreement regarding the grouping of various legal systems. [2]

There are many criteria that have been proposed as a means to classify certain legal systems, ranging from taste and language (sauser-hall), culture (Schnitzer), substance (substantive content of law by

Arminjo, Nolde and Wolf), ideology, philosophy, conception of justice and legal techniques (David), historical origins (Glasson and Sarfatti) and juristic styles (Zweigert and Kotz). [3] However, of the many existing criteria, Peter de Cruz recommends reviewing the approach of Zweigert and Kotz on the condition that prominent principles must be applied. The Yuristic style created by Zweigert and Kotz is a crucial test tool that determines the classification of a legal system, which can be ascertained through; (a) the historical background and development of the system; (b) characteristics of the modes of thought; (c) different institutions; (d) the types of sources he acknowledges and the treatment of all of these; and (e) its ideology. Broadly speaking, known several legal systems adopted in the countries of the world include the legal system of Continental Europe, Common Law, Anglo Saxon and Islamic Law Systems, legal systems of eastern bloc countries (socialists) and Adat Law System.

1.1. *Civil Law System of Europe (civil law)*

Civil Law is a legal system that develops on mainland Europe and is interpreted in the same way as Roman law. Roman law is said because this legal system originated from the codification of the laws that prevailed in the Roman Empire during the reign of Emperor Justinian 5th century (527-565 AD). This codification of law is a collection of various legal norms that existed before Justinian's time called Corpus Juris Civilis (codified law). Corpus Juris Civilis was used as the basic principle in the formulation and codification of law in mainland European countries such as Germany, the Netherlands, France, Italy, Latin America, Asia (including Indonesia during the Dutch colonial period).[4]

This system must be codified every law as the basis for the enactment of law in a country. The main principle of this system is that the law obtains binding power because it is in the form of a law that is systematically arranged in codification. Legal certainty which is the purpose of law. Legal certainty can be realized if all human behavior in life association is regulated by written regulations, (for example the Law). Even in this system it is said "there are no laws other than laws", so the law is identified by law.

This legal system allows the settlement of all problems or cases easily because it is based on written laws/laws, and is more able to guarantee legal certainty. But what about the problems/cases that are not contained in the Law, according to the development of the community, this makes an obstacle in solving these cases. The judge is not free in creating a new law because the judge only has the role of establishing and interpreting existing regulations based on the authority he has.

1.2. *Anglo Saxon Law System*

Anglo Saxon legal system is a legal system based on *juriprudensi*, namely the decisions of previous judges which later became the basis of the decisions of subsequent judges. Anglo Saxon systems tend to prioritize customary law, laws that run dynamically in line with the dynamics of society.[5] The establishment of law through a judicial institution with a judicial system and is considered better so that the law is always in line with the sense of justice and benefit that is felt by the community in reality in this legal system the role given to a judge is very broad.

The judge functions not only as the party whose task is to set and interpret legal regulations but also as a party that plays a role in shaping the entire life system of the community. In addition, it can create a new law that is used by other judges to resolve similar cases.

This legal system developed and applies to the former British colonies but is still influenced by the social systems of these countries. This system is more likely to adjust to the development of the times and society, because the laws that are applied are unwritten laws, but for legal matters, they cannot be guaranteed.

1.3 *Adat Law System*

The Legal System for the first time used by Christian Snouck Hurgronje[6] as a term for Indonesian codified people's law. Adat law is a law that lives and develops in the community for a long time based on the values that live in the community both original values and or mixed from those that come from outside and only applies to the community. This adat law is applied to create a balance in the community itself, between individuals, between communities, also towards nature, then customary law is enforced. Generally, sources of customary law are from unwritten legal regulations that grow and develop and are maintained based on the legal awareness of the community. Traditional legal nature with the origin of the will of his ancestors. Adat law changes because of the changing effects of social events and circumstances. Because of its volatility and readiness to adapt to the development of social situations, its elastic adat law. Because the source is not written, adat law is not rigid and easy to adjust.

1.3 Islamic Law System

The Islamic legal system adheres to the beliefs and teachings of Islam with individualized inner faith. Countries that embrace the Islamic legal system in the state carry out its legal regulations in accordance with a sense of justice based on the laws derived from the Qur'an. From the description above it is clear that in countries adhering to the principles of Islamic law, Islam has a profound effect on the way of state formation and the way of state and community for citizens and rulers. So what legal system is used in Indonesia? Interestingly, Indonesia does not use one of the above systems but uses 3 (three) systems as well as developing and living in Indonesian society in harmony, namely the legal system of Continental Europe (civil law) reflected in public and private law, Adat law systems and Islamic legal systems.

2 Result and Discussion

2.1 The Complexity of the Legal System in Indonesia

The legal system in Indonesia is influenced by a legal system originating from mainland Europe (continental Europe) because of a Dutch colonial heritage. This is proven up to now and still influences the drafting of laws in Indonesia. *Burgerlijke Wetboek* (BW) or Civil Code, *Wetboek van Strafrechts* (WvS) or Criminal Law, *Wetboek Van Kopenhandel* (WvK) or the Commercial Code, and *Herzien Inlandsch Reglement* (HIR) or Law The events in the Civil and Criminal Trial are still some of the Dutch laws that still apply in Indonesia to this day.

In addition, adat law also applies as an original law that grows and develops from the habits of the community which greatly influences the process of law enforcement in Indonesia, and this customary law is very diverse in Indonesia, so that in general implementation it will face obstacles but is efficient enough to local people who enforce it. Even if calculated, more Adat law is still valid than state law. Cornelis van Vollenhoven was the first to launch the idea of sharing adat law. According to him the area in the archipelago according to customary law can be divided into the following 23 adat environments: Aceh, Gayo and Batak, Nias and its surroundings, Minangkabau, Mentawai, South Sumatra, Enggano, Melayu, Bangka and Belitung, Kalimantan (Dayak), Sangehe-Talaud, Gorontalo, Toraja, South Sulawesi (Bugis / Makassar), North Maluku, Maluku Ambon, Southeast Maluku, Papua, Nusa Tenggara and Timor, Bali and Lombok, Java and Madura (Coastal Java), Java Mataraman, and West Java (Sunda), while according to Gerzt Americans state that Indonesian society has 350 cultures, 250 languages and all beliefs and religions in the world are in Indonesia.[7]

Islamic law is a part that also affects law in Indonesia, because the majority of religions in Indonesia are Islam, which allows Islamic law to be an important and influential part of law in Indonesia. Proven regulations regarding the Hajj Law, Sharia Banking Law and Compilation of Islamic Law and this proves that the Indonesian state does not give up responsibility for religious affairs with state / government

affairs. So that it can be said that Indonesian law is influenced by the colors of contemporary law, customary law and Islamic law which in fact each has a large influence in the legal system in Indonesia.

The effect of the civil law legal system as a system that guarantees legal certainty because it is done based on written regulations, allows settlement to have a frame that points to certainty, but this is also not profitable because it tends to have problems when dealing with community development issues that are increasingly compound in various ways and quantity and quality of increasingly developing problems that may not yet be contained in a written regulation but do not open up space to be able to explore and find out more about how to solve a legal problem.

Adat law as the original law of the Indonesian people is also a very important part that influences the legal system in Indonesia, because it is proven, without written, from the habits that arise in the community, then forms a living law and the person manages to maintain balance among individuals in society but also maintain balance with nature, even if only for local people.

The majority of the followers of Islam in Indonesia also allows Islamic law to influence the legal system in Indonesia, therefore there are rules that are specifically related to Islamic law and this proves that Indonesia is not a country that tries to separate itself from state affairs with religious affairs.

All existing legal systems are very influential in the legal system in Indonesia, which is a problem, whether we are able to create and combine the overall advantages of each legal system to be implemented equitably in this country. Therefore, there needs to be synchronization between stakeholders in this case the law maker itself, law enforcement, service personnel, along with the community so that they can form an integrated regulation, which contains positive values of existing legal systems and will produce a system good law. If this synchronization can create a whole in the legal system in Indonesia, the most important concern is how the quality of stakeholders in the legal system itself, if carried out in accordance with functions and roles responsibly, will greatly support the process of the legal system. Indonesia.

2.1 The Position of Adat Law in Indonesia

The existence of Adat law as living law the Indonesian people are increasingly marginalized.[8] Adat law which was originally to be law that life and develop and be able to provide solutions in a variety of life-related problems Indonesian society, its existence is increasingly missing . At present, if we look at the empirical facts, we can find a variety of problems faced by indigenous peoples of Indonesia when adat law deals with positive law. For example, when the traditional rights of the community deal with the interests of investors through the means of state law.[9] Development of the Indonesian Legal System which tends to prefer the legal system western civil law and common law model Indonesian law and politics that led to the codification and unification of law, accelerating the loss of the existence of adat law institutions.

More further loss of adat law existence as one of the sources of law in Indonesia, one of which the cause is due to the assumption that adat law is very traditional and unable to reach the times. The implications of Indonesian legal politics can be seen also in solving problems in the community that often override the binding of adat law, even though it is actually more relevant. For example, the number of horizontal conflicts, between indigenous peoples in one area, should be resolved through the role of institutions for resolving indigenous peoples.[10] A crucial problem that arises in daily life is the difference in perception between land tenure by the community based on communal rights and public interests which is a burden and obligation of the state.[11] Another example is the idea that the basis is worthy of an action extended to the domain of customary law.[12]

Eventhough, the journey of the history of the rule of law in Indonesia has been noted that many experts actually learn that adat law as a law that living in Indonesia society. Van Vollenhoven for example, stated that if "someone wants to get knowledge and information about the law that lives on this earth, precisely because of the diversity of its forms in the past and present, then the whole rule of the Dutch East Indies (Indonesia) is a source that is never dry to learn. This statement contains the recognition

that legal pluralism in the indigenous environment is unique, interesting and characteristic of Indonesian society. Kusni Sulang (Member of the Palangka Raya Dayak Culture Institute) even emphasized that pluralism of customary law is a blessing. [13]

Pluralism of law able to be a unifier, a solution sump creates tranquility right in the association of community life. Until now, customary law pluralism in Indonesia that has grown dynamically follows the development of its society while remaining dependent on the characteristics of indigenous peoples and participatory coschmish mindsets attracted the interest of experts from around the world to become the object of research. Just a reminder, currently related to the settlement of disputes both civil and criminal developing methods or approaches known as restorative approaches (restorative approach) [14], which is similar to the participerend coschmish mindset adopted by indigenous peoples. Implementation of recovery of equilibrium based on participerend mindset coschmish , incarnated in several ceremonies, taboos or rites (rites de passage). [15]

This fact shows that the conceptions and patterns of thinking of adat are not only still relevant, but are an inspiration for other countries to develop laws to fulfill the sense of justice of the people. Indigenous peoples have the same pattern in resolving conflicts in society, namely controlling life in society and imposing sanctions if violated so that recovery becomes very effective.[16] Another example, Utrecht University seeks to encourage the use of a consensus agreement model of the Malay indigenous community in resolving the problems that occur. In Indigenous society, dispute resolution through deliberation is a law that lives and is known in almost every legal circle (rechtsskring). Dispute resolution through deliberation always involves the head of the people (adat leader), both in preventing legal violations (preventieve) rechtszorg) and restore law (rechtsherstel).[17] On the contrary, Indonesia enacted Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution as an out-of-court settlement option, which was clearly inspired by the development of dispute resolution in the country with a common law system.

Furthermore, it can be seen that in the context of the codification and unification of law in Indonesia, various laws and regulations refer to the common law, civil law and sharia legal systems. The full acceptance of other legal systems in the formation of legislation in Indonesia in its implementation sometimes creates clashes with a sense of justice in Indonesia. A concrete example, the field of economic law, especially the capital market, for example, develops many types of nameless agreements such as collective investment contracts, trustee agreements, brokerage agreements, and derivative transactions. Especially for the practice of derivative transactions, the court still classifies derivative transactions in the capital market as a chancy agreement based on Article 1774 of the Civil Code.

This erroneous view of derivative transactions can be seen from derivative cases that occurred in the banking world between Bank Niaga and Dharmala Agrifood, Bank Niaga and Suryamas Duta Makmur, Mayora Indah and Bankers Trust, Credit Lyonnais Indonesia and PT Nugrasentana. The court considers that deriva tif transactions are considered not to fulfill the halal causal as one of the legal conditions of the agreement as stipulated in Article 1320 of the Civil Code. The example of this case proves that the acceptance of a particular legal system is sometimes difficult to apply in certain societies.

Considering that Adat law is a law that reflects the personality and soul of the nation, it is believed that some of the adat law institutions are certainly still relevant as material in forming the Indonesian legal system.[18] Adat law that can no longer be maintained will be quiet over time, in accordance with the nature of adat law which is flexible and dynamic (not static). Savigny as quoted by Soepomo asserted that adat Law is a living law, because it is the manifestation of a real legal feeling from the people. As per its own nature, adat law continues to grow and develop like life itself. In line with Savigny, van Vollenhoven said that "adat law at a time when it has been somewhat different in content, adat law shows progress". Furthermore, he stressed that "adat law developed and progressed, adat decisions gave rise to adat law". Given the adat law as the crystallization of Indonesian culture, researchers believe that an effort is needed to revitalize Adat law, and make it part of the source of national law formation. Regarding the establishment of national law, Mochtar Kusumaatmadja added that the law must be sensitive to the development of society and that the law must be adjusted and adapted to the situation. Some of the

thoughts contained in the living law theory, including stating that in a process of forming legislation it is absolutely necessary to pay attention to legal values and norms that live and apply in society. If the enactment of a law contradicts the legal values and norms that live and apply in its society, certainly there will be rejection. In the context of Indonesia, living law of Indonesian society is Adat law. Adat law can also be used as a source of law by a judge if the law orders it.[19] Adat Law is a law that is not codified among foreign Indonesian and Eastern nations (including Chinese and Arabic).

2.3. The Ambiguity of Recognition of Adat Law in Indonesia

The Dutch Colonial Government recognized Adat law officially as Indonesian original law and Paralleled European law through Article 131 paragraph (6) IS which states "*Indonesian law is a positive law for the Indonesian people*". Definition of national law Indonesia in this article is adat law. Article 131 paragraph (6) of this is a legal basis for the recognition of the Dutch East Indies Government against adat law and at the same time recognition of customary law as positive law for the Indonesian people. With the recognition of adat law as positive law then during the Dutch East Indies Government there were two systems applicable law, namely the Dutch legal system for Europeans and for foreigners and Indonesians who are submitting themselves European law applies (Article 131 paragraph (2) IS) and customary law for the Indonesian people and foreigners who are foreign in Indonesia (Article 136 paragraph (6) IS). Post-Independence, the treatment of the first unwritten law is only explained or included in the General Explanation of the 1945 Constitution which states that I "... *The Constitution is a written basic law, currently in law beside it the Constitution also applies the basic law it is not written, the basic rules that arise and are maintained within practice of state administration even though it is not written*". In Article 18B Paragraph (2) of the 1945 Constitution Amendment states "*The State recognizes and respects the elders of the customary law and their traditional rights insofar as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia*". According to this article the recognized customary law is customary law that is still clearly alive, clearly the material and scope of the indigenous people.

The provisions of Article 18B paragraph (2) above can be understood that the 1945 Constitution prioritizes written laws rather than unwritten. The meaning is that the confession is against adat law that is still alive within the community in an area must be done with a law (written) and in line with the principle of the Unitary Republic of Indonesia. Furthermore, in providing an interpretation of these provisions, Jimly Asshiddiqie stated that it was necessary to pay attention to the following matters regarding the recognition of adat law:

1. To the existence of a customary law community with their traditional rights
2. The existence that is recognized is the existence of indigenous peoples' units. This means that recognition is given to one by one from these units and therefore the customary law community must be certain
3. The customary law community is indeed alive (still alive)
4. In certain environments too
5. Recognition and respect are given regardless of the feasibility measures for humanity in accordance with the level of development of the nation's existence
6. Such recognition must not reduce the meaning of the unity of the Republic of Indonesia

While to analyze the position customary law in the legal system should be considered one of the natural schools of law, namely, Sociological Jurisprudence delivered by Eugen Ehrlich. The basic concept of Ehrlich's thinking about law is what is called living law. Good and effective positive law is a law that is in accordance with the living law of the community that reflects the values that live in it.

Ehrlich's message to lawmakers in making the law should pay attention to what lives in society. It is a fact and it cannot be denied that the adat law that applies in Indonesia in general and the Province of

Aceh in particular is the law which is in accordance with the values that live in the community. Therefore, for customary law to be effective in the community, in the formation of laws and Qanun in Aceh, people's representatives who sit in the legislative body must be able to explore and must accommodate legal awareness that lives in the community. Community legal awareness that has been formalized in both the law and *qanun* will be used as a basis for maintaining order and harmony in the life of the community.

2.4. The Adat Legal Position in Jurisprudential Development

In adat law, jurisprudence law, besides being a decision court that has become permanent the field of customary law, is also a means fostering adat law, according to ideals law, as well as from jurisprudence from period of time can be tracked developments in adat law, both the still local or already applies nationally. The developments adat law through jurisprudence will give knowledge of shifting and the growth of adat law, weakening local customary law and the strengthening of adat law which then becomes and binding nationally. Development of adat law through jurisprudence can tracked in several ways including:

1. Principles of Adat Law.

Customary law, among others, rests on the principle: harmonious, appropriate, laras, this is confirmed in the Supreme Court-RI jurisprudence Number: 3328 / Pdt / 1984 dated 29 April 1986. In the Supreme Court Decision No. 2898 K / Pdt / 1989 dated 19 November 1989, based on customary disputes which were held at the Kefamenanu Court, East Nusa Tenggara, the Supreme Court asserted: *"In the face of civil claim cases the fundamentum petendi and petitum are based on violations of customary law and confirmation of customary sanctions; If in the trial the plaintiff can prove the argument of the claim, the judge must apply the customary law regarding the article which is still valid in the area concerned, after hearing the local customary Elder"*. The next legal method: *"Settlement of violations of adat law, besides through a civil suit above, it can also be taken through criminal prosecution ig article 5 (3) b of the Act No. 1 Drt / 1951"*.

2. Strengthening of Core Family Position (Gezin)

Indigenous people in Indonesia consist of groups of patrilineal communities, groups of matrilineal communities and groups of parental (bilateral). In its development it turned out to be stronger and he acknowledged a shift in the family system in matrilineal indigenous communities and matrilineal indigenous people towards the parental or bilateral system. Jurisprudence dated January 17, 1959b Number 320K / Sip / 1958 as follows:

- a) The wife can inherit the livelihood of the deceased husband;
- b) Children who are not yet mature are nurtured and are under the control of the mother;
- c) Because the child is under the mother's control, the child's wealth is controlled and managed by the mother.
- d) Position with men and women

Strengthening Protection for Women in Inheritance Law:

1) Position of Girls in Law of inheritance

Originally according to adat law in patrilineal society, girls were not heirs. But in its development recognized by jurisprudence stated that girls as the heir of his deceased parents.

2) Position of Widows in Law of Inheritance

The initial development of a widow is not an heir, in reality then the widow becomes suffering after the death of her husband, then the practice of giving a gift by a husband to his wife arises to protect and maintain a socio-economic life after the death of her husband, such practices are increasingly institutionalized. The next development of customary law is, widows as heirs together with the children of the deceased husband. Then the widow as the heir has the same position as the heir of the child. Further development is the widow as the heir of the primacy group, which closes other heirs.

Jurisprudence Decision MA No. 387K / Sip / 1956 dated October 29, 1958, Widows can continue to control the property until they die or remarry. The climax is the Supreme Court Jurisprudence No. 3190K / Pdt / '85, dated October 26, 1987, the widow has inheritance rights from her husband's inheritance, and her rights are equal to her biological child, if she does not have children, she becomes a barrier to her husband's heirs, against property and property.

3) Principles of Land Buying and Selling

Land buying and selling is legal if it meets bright conditions and cash, this has consistently been held in jurisprudence regarding the sale and purchase of land. Bright means that the transitional transaction of land rights must be witnessed by a General Officer. Cash means that the sale and purchase of land is only valid if there is a payment in full and the delivery of land at the same time.

4) Principles for the Release of Basic Rights

The arising or loss of rights is not expired Adat law does not recognize the expired institution, but recognizes what is called a 'release of rights', meaning that if a piece of land is left, then the rights will recede and the peak will be released, as the physical relationship between the owner and the land concerned and vice versa.

5) Law of Indigenous Crime.

In the adat lawsystem, in fact no legal separation criminal law with other laws as in the western legal system, criminal imposition is solely carried out to determine the law (*verklaring van recht*) in the form of adat sanctions (traditional customs), to restore the violated adat law. The adat criminal law has been referred to in Article 5 paragraph 3 of Law No. 1 / Drt / 1951.

Some important jurisprudences concerning customary criminal law are:

(a) Act against the law.

For example PN Luwuk No. 27 / Pid / 1983, adjudicating cases of non-marital sex relations, the judge decided that the defendant violated the law which was held in a proud region, Central Sulawesi, based on the criminal element in article 5 paragraph 3 sub-b of the Draft 1 / Drt / 1951, whose elements are: The first element, an act that violates a living law; The second element, the violation has no equal in the Criminal Code; The third element, the act of violation still applies to the subjects and persons concerned.

Decision of PT Palu No. 6 / Pid / 1984 dated April 9, 1984 upheld the decision of the Luwuk District Court, adding that, to fulfill the sense of justice of the people, who considered the act a criminal act, the judge satisfied the defendant had committed a crime of intercourse with a woman outside of marriage. Supreme Court, with decision No. 666K / Pid / 1984 dated February 23, 1985, actions carried out by the accused were categorized as adultery according to customary law. The Supreme Court in its decision Number 3898K / Pdt / 1989, November 19, 1992, concerning similar customary violations in the Kafemenanu area, was filed civilly with a lawsuit, the bottom line: If two adults engage in sexual relations on the basis of liking which results in pregnant women, and the man is not responsible for the pregnancy, a customary sanction must be established in the form of payment of *belis* (fees or dowry) from the male side to the woman (known as *Pualeu Manleu*).

(b) The act violates the customary law of Logic Sanggraha in Bali.

In case Number 854K / Pid / 1983 dated October 30, 1984, According to the Supreme Court, a man who slept with a woman in one room and on a bed, is evidence that the man had intercourse with the woman. Based on the testimony of the victim witnesses and evidence from the other witnesses, the defendant had intercourse with the victim witness as referred to in the subsidiary charges.

(c) Decision of Mataram District Court NO. 051 / Pid.Rin / 1988 dated March 23, 198854.

The court considered it to have referred to a violation of the adat law of the Nambarayang or Nagmpesake delicacy.

(d) MA-RI Number 481 K / Pid / 1986 dated August 31, 1989 from PN Ende Problatik women body organs 55, several times applied the provisions of article 378 of the Criminal Code, placing organs of Perebum as goods. The solution is applied in article 5 (3) b of Law Drt Number 1 of 1951 LN. Number 9 of 1950 dated January 13, 1951. In a similar case in the Medan District Court Number 571 / KS / 1980 dated March 5, 1980 the provisions of article 378 of the Criminal Code were implemented and strengthened by PT Number 144 / Pid / 1983 dated August 8, 1983. Goods were interpreted wide, so that the goods include services. Items inherent in one person (genitals) are also included in the understanding of goods, which in the Tapanuli language is known as "Bonda" which means "goods" which is nothing but "pubic". So when a girl surrenders her honor to a man, then it means that the girl handed over the items to the man. With this broad interpretation, the elements of goods in Article 378 of the Criminal Code have been fulfilled. In practice, many law enforcement officers (prosecutors) followed to ensnare a man who managed to fuck a girl who was going to be married, but eventually a man broke his promise, and the girl became a miserable victim for life.

2.5 The Position of Islamic Law in Indonesia

Related to economic activity, this time legal positive transformed toward the stem of Islamic law (sharia).[20]¹It can be said that in business activities such as corporate law, the financing law in banking, capital markets and insurance as well as contract law applies a dualism of the legal system, namely conventional and sharia. Related to the existence of Sharia principles in economic activity, the authors argue that it is precisely the institutions hu kum customary with respect to economic activity has much in common with the views of Islamic principles, such as prioritizing the principle of balance, the prohibition of exploitation without limit and sustainable development.[21]² Thus, at this time in addition to adat law, the principles of sharia became a source of formation of national law.

As an effort to foster and develop national law, Islamic law has provided a very large contribution, at least in terms of his soul. This statement is reinforced by several arguments. *First*, Law No. 1 of 1974 concerning Marriage. In Article 2 of this Law, it is written that marriage is legal if carried out according to the laws of each religion. While in article 63 states that, what is meant by the court in this Law is the Religious Court for those who are Muslim. *Second*, in in Law No.2 of 1989 concerning the National Education System , it is stated that in the framework of the whole human development is believing and fearing the Almighty God, noble character, having knowledge and skills, being spiritually healthy, having a solid and independent personality, having sense of community and national responsibility. *Third*, Law No. 7 of 1989 concerning the Religious Courts. Constitution This proves that the Religious Courts should be present, grow and develop on Indonesian soil. This matter prove the contribution of Muslims as a majority people.

Fourth, Compilation of Islamic Law (KHI), although no law was formed, but Presidential Instruction Number I of 1991. This compilation greatly helped the judges in deciding cases, especially in the Religious Courts. *Fifth*, PP No.28 of 1978 concerning the Representative Land Ownership, in addition to Law No.5 of 1960 as the principal arrangement of land issues in Indonesia. As the implementation was also issued Minister of Religion Regulation No. 1978 concerning Regulation No. PP. 28 of 1978. For the implementation, several regulations have been issued as follows: 1. Decree of the Minister of Religion No.73 of 1978 concerning Delegation of Authority to the Head of Regional Office of the Ministry of

¹Mehmet Asutay, 2009, *An Introduction to Islamic Moral Economy*, Durham University: School of Government and International Affairs, p. 32-41.

²Suparman Usman, *Hukum Islam, Asas-asas dan Pengantar Studi Hukum Islam dan Tata Hukum Indonesia*, Jakarta: Gaya Mediaprata, 2001, p. 18

Religion of the same level throughout Indonesia to appoint / dismiss the Head of KUA District as PAIW; 2. Instructions with the Minister of Religion and Minister of Home Affairs respectively 1 of 1978 concerning Implementation of Government Regulation No. 28 of 1978; 3. Minister of Religion Instruction No. 3 of 1979 concerning Implementation Guidelines for Minister of Religion Decree No. 73 of 1978 concerning Delegation of Authority to the Head of Regional Office of the Dep. Religion Province / equivalent to appoint / dismiss every Head of KUA Kec. as PPAIW; 4. Director General's Regulation on Islamic Military Affairs and Hajj Affairs No. D.II / 5 / Ed / 14/1980 concerning the Use of Stamp Duty with an attachment to the recording of the Letter of the Directorate General of Taxes No. S-629 / PJ.331 / 1080 concerning Provisions of the Minister of Finance concerning signs as referred to in Minister of Religion Regulation No. 1 Th. 1978 concerning PP No. 28 Th. 1977; 5. Minister of Religion Instruction No. 3 of 1979 concerning Implementation Guidelines for Minister of Religion Decree No. 73 of 1978 concerning Delegation of Authority to the Head of Regional Office of the Dep. Religion Province / equivalent to appoint / dismiss every Head of KUA Kec. as PPAIW; 4. Director General's Regulation on Islamic Military Affairs and Hajj Affairs No. D.II / 5 / Ed / 14/1980 concerning the Use of Stamp Duty with an attachment to the recording of the Letter of the Directorate General of Taxes No. S-629 / PJ.331 / 1080 concerning Provisions of the Minister of Finance concerning signs as referred to in Minister of Religion Regulation No. 1 Th. 1978 concerning PP No. 28 Th. 1977; 5. Minister of Religion Instruction No. 3 of 1979 concerning Implementation Guidelines for Minister of Religion Decree No. 73 of 1978 concerning Delegation of Authority to the Head of Regional Office of the Dep. Religion Province / equivalent to appoint / dismiss every Head of KUA Kec. as PPAIW; 4. Director General's Regulation on Islamic Military Affairs and Hajj Affairs No. D.II / 5 / Ed / 14/1980 concerning the Use of Stamp Duty with an attachment to the recording of the Letter of the Directorate General of Taxes No. S-629 / PJ.331 / 1080 concerning Provisions of the Minister of Finance concerning signs as referred to in Minister of Religion Regulation No. 1 Th. 1978 concerning PP No. 28 Th. 1977; 5. Religion Province / equivalent to appoint / dismiss every Head of KUA Kec. as PPAIW; 4. Director General's Regulation on Islamic Military Affairs and Hajj Affairs No. D.II / 5 / Ed / 14/1980 concerning the Use of Stamp Duty with an attachment to the recording of the Letter of the Directorate General of Taxes No. S-629 / PJ.331 / 1080 concerning Provisions of the Minister of Finance concerning signs as referred to in Minister of Religion Regulation No. 1 Th. 1978 concerning PP No. 28 Th. 1977; 5. Religion Province / equivalent to appoint / dismiss every Head of KUA Kec. as PPAIW; 4. Director General's Regulation on Islamic Military Affairs and Hajj Affairs No. D.II / 5 / Ed / 14/1980 concerning the Use of Stamp Duty with an attachment to the recording of the Letter of the Directorate General of Taxes No. S-629 / PJ.331 / 1080 concerning Provisions of the Minister of Finance concerning signs as referred to in Minister of Religion Regulation No. 1 Th. 1978 concerning PP No. 28 Th. 1977; 5. Minister of Home Affairs Regulation Number 6 of 1977 concerning Procedures for Land Registration concerning Property Representatives. 6. Letter of the Director General of Islamic Bimas and Hajj Affairs No. D.II / 5 / Ed / 07/1981 concerning Registration of Owned Land Representatives; 7. Letter of the Director General of Islamic Education and Hajj Affairs. D.II / 5 / Ed / 11 / 1981 concerning Guidelines for Filling in the numbers on the Perwakafan Land Ownership form.

Islamic law as a legal order that is guided and adhered to by the majority of the population and the people of Indonesia is a law that has lived in society, and is part of the teachings and beliefs of Islam that exist in the life of national law, and is an ingredient in its development.

The history of the journey of law in Indonesia, the presence of Islamic law in national law is a struggle for existence. Existence theory formulates the state of Indonesian national law, past, present, and future, asserting that Islamic law exists in Indonesia's national law, both written and unwritten. He is in various fields of legal life and legal practice. In the reform era a number of laws were born which could strengthen Islamic law, including:

(1) Law on the Implementation of Hajj.

To support the efforts to carry out the effective, efficient and successful Hajj pilgrimage, the government issued Law No. 17 of 1999 concerning the Implementation of Hajj. Then followed up with the Minister of Religion Decree Number 224 of 1999 concerning the Implementation of Hajj and Umrah Services. Before that, during the Dutch colonial period the law on the implementation of the Hajj had once been implemented, namely the Hajj Ordinance (Pelgrims Ordonantie Staatsblad) in 1922 Number 698 including its amendments and additions and the 1938 Pelgrims Verodening.[22]

(2) Zakat Management Law.

The state guarantees its citizens to carry out their religious teachings, protect the poor and to realize the welfare of the Indonesian people as stated in Article 5 paragraph (1), Article 20 paragraph (1), Article 29 and Article 34 of the 1945 Constitution. the effort. Then Law No. 38 of 1999 was born regarding the Management of Zakat. To implement the Law, a Presidential Decree Number 8 of 2001 concerning the National Amil Zakat Agency emerged, which included the need for three components to carry out zakat management, namely the Executing Agency, the Advisory Council and the Supervisory Commission. Before the enactment of the law above, since the Dutch colonial period there had been legislation relating to zakat, namely Bijblad Number 2 of 1893 dated August 4, 1893 and Bijblad Number 6200 dated February 28, 1905. [23] In the 1422 H Nuzulul Qur'an Commemoration, President of the Republic of Indonesia Megawati Soekarnoputri has socialized the Government Regulation on 2.5% tax drought for taxpayers who have paid zakat through a Bank Account designated by the National Amil Zakat Agency. In fact, this has been done in the Director General of Taxes.

(3) Waqf Law.

In this law, waqf property is not restricted to immovable objects but also movable objects such as money, precious metals, securities, vehicles, intellectual property rights, rental rights and other movable objects in accordance with Shari'ah provisions and statutory regulations applicable laws. Even in this law, money waqf is arranged in a separate section. In Article 28 of this Law it is stated that authority: a. guiding Nazhir in managing and developing waqf property; b. conduct management and development of waqf assets nationally and internationally; c. give approval and or permission for changes in the allocation and status of property of waqf; d. dismiss and replace Nazhir; e. give approval for the exchange of waqf property; f. provide advice and consideration to the government in policy formulation in the field of representation.

(4) Law on the Implementation of Privileges in Aceh and the Law on Special Autonomy in Aceh.

Law No. 18 of 2001 on Special Autonomy Special Province of Aceh as Nanggroe Aceh Darussalam passed and enacted in Jakarta on August 9, 2001 (State Gazette of the Republic of Indonesia Year 2001 Number 114, Tambahan Gazette of the Republic of Indonesia Number 4134). The Government System and respect for special or special Regional Government units stipulated in the Law. Along with the emergence of the reform era and the aspirations of the people of Aceh, the Government gave special autonomy. In connection with that it is stipulated Law Number 18 of 2001 concerning Special Autonomy of the Special Province of Aceh as the Unitary State of the Republic of Indonesia according to the 1945 Constitution recognizes the Province of Nanggroe Aceh Darussalam. Seeing the social character and society of Aceh with a strong Islamic culture, and have given high fighting spirit during the struggle for the independence of the Indonesian state. So along with the emergence of the reform era and the aspirations of the people of Aceh. Government give special autonomy. In connection with the set of Law No. 18 of 2001 on Autonomy Special Provincial Istimewa Aceh Darussalam.

(5) Sharia banking.

Although only in the Draft Sharia Banking Bill, but in Law Number 10 of 1998 concerning Banking strengthens the position of Islamic law as in articles 1, 6, 7, 8, 11 and 13. The article describes the dual banking system (conventional and sharia)

(6) Law No. 3 of 2006 concerning Amendment to Law No. 7 of 1989 concerning the Religious Courts.

Law number. 4 of 2004 explicitly regulates the transfer of organization, administration and finance from all judicial environments to the Supreme Court. Thus the organization, administration, finance of the judiciary in the Religious Courts which were previously under the Ministry of Religion based on Law No. 7 of 1989 adjusted to Law No. 3 of 2006. Law No. 4 of 2004 affirms the existence of a special court established in one of the judicial environments under the law. Therefore, the existence of a special court within the Religion Court is also regulated in Law No. 3 of 2006, namely the Islamic Sharia Courts in Nangroe Aceh Darussalam. The authority of the Religious Courts which was originally tasked with and authorized to examine, decide and settle first-degree cases between Muslim people in the fields of: a. Marriage, b. Inheritance, will and grant, c. Waqf and Sadaqah. Based on Law No. 3 of 2006 its authority was expanded in the field of shari'ah economics including: Syari'ah Bank, Syari'ah Insurance, Shari'ah Reinsurance and Shari'ah Intermediate Securities, Syari'ah Securities, Syari'ah Courts, Pension Funds Syari'ah Financial Institutions (DPLK), Sharia Business and Sharia Microfinance Institutions. Interestingly, in the old religious law, Law No. 7 of 1989 applies the principle of Choice of law (choice of law), namely in in the field of inheritance, parties who are Muslim before litigation may consider choosing what law is used in the distribution of inheritance. This provision in Law No. 3 of 2006 is no longer valid. So that Muslims who litigate their fellow Muslims in the field of inheritance are the authority of the Religious Courts.

3 Conclusions

Legal pluralism in Indonesia is the uniqueness of a legal system in the world. Whereas Adat law and Islamic law also have a significant influence on national law. During its development, the position of Adat law is under pressure from Islamic law due to national law, which is more accommodating to Islamic law because it has advantages in terms of the economy and the influence of the Indonesian population, predominantly Muslim. This condition is also due to the ambiguous position of customary law recognition in the national legal system. The current politics of law should give place to adat law because the national legal system also must absorb the living law not only in favor of the majority.

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Legal Protection for Buyers Who Have A Good Letter in Purchase of Object Guarantee Based on Horizontal Separation Principles

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Abstract. The principle of horizontal separation is a principle in the land law governed by customary law, regulated in Article 5 and Article 44 paragraph (1) of the Basic Agrarian Law. Based on this principle, the land is separated from all objects attached to it, such as buildings and trees. The problems discussed in this paper are first, how the existence of the principle of horizontal separation in the legal system in Indonesia. Second, how the government provides the concept of legal protection for buyers in good faith towards land objects in collateral. The results of the study note that the existence of the principle of horizontal separation in the legal system in Indonesia is not fully understood by the Indonesian people, especially rural communities.

Keywords: Legal protection, Buyer in good faith, principle of separation Horizontal.

1 Introduction

The principle of horizontal separation is the opposite of the principle of attachment which says buildings and plants are one unit with the land. In contrast, the principle of horizontal separation states that buildings and plants are not part of the land. The principle of horizontal separation is regulated in Article 44 paragraph 1 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA). The implementation is a lease right for a building that is a person or legal entity rents land for another person's vacant or non-existent building by paying a sum of money as rent which amount is determined by agreement, for a certain period of time, and the tenant is given the right to build the building used for a certain period of time agreed by both parties.[1]

One case of the principle of horizontal separation is that if after the secondary rights of the land tenant expire, the holders of land ownership (Primary Rights) want to control the land itself. While there is a building that stands tall on the ground. In the process of building construction, the surface of the ground had previously been dug out to be planted with piles and various concrete as building foundations. If the building is demolished as stated in Law Number 28 Year 2002 concerning Buildings, such actions as well as efforts to reclaim land will be costly, making it inefficient.[2]

The application of the principle of horizontal separation in Indonesian land law provides for the separation between land ownership and what is underneath and below it,

only those directly related to land use can be utilized. This limits the authority of the owner of the land rights in utilizing the land he owns, because the utilization of what is contained in the land and attached to it must be proven that it is and only related to the use of the land. One case in point is that after the expiry of leasing a piece of land, the landowner wishes that the land owned by him will be used alone, while on that land a building or building will stand firm and it is impossible to be demolished generalized with the land. Thus, in the example of this case, the owner of the building / building (buyer in good faith) certainly feels disadvantaged by the desire of the landowner to control his own land. From this side the author will raise and discuss it in an international level Business Journal of Law, bearing in mind that this civil land case is interesting and the need for legal protection for buyers in good faith.

Therefore, the problem that will be discussed in this paper is first, how existence is related to the principle of horizontal separation in the legal system in Indonesia. Second, how the government provides the concept of legal protection for buyers in good faith over land objects in collateral. The purpose of this study is to better understand and understand the problems associated with the principle of horizontal separation. In line with the losses that will arise for buyers in good faith, the government and related agencies need to formulate the best solution to provide legal protection for buyers in good faith.

2 Method

This research method is a Legal Sociology research method, with an empirical approach that is supported by interviews with various interviewees.

3 Results and Discussion

In the practice of sticking to two different rights such as this it can be agreed that the secondary rights holder will hand over the building to the owner of the property right when the validity period of the secondary rights ends. However, landowners still lack the choice of what can be done with the property. In addition, it reflects the injustice of the old building owner if he who has struggled and spent money, time and energy to build and maintain the building, in the end must lose this right. For some people this kind of thinking seems influenced by capitalism. Actually the writer only put himself in the position of the owner of the Secondary Rights. If not forced by the situation through land legislation, then no one is willing to simply give up his property to someone else just because the secondary rights expire. For example, the Hilton Hotel has changed its ownership to the Sultan Hotel because of the inefficiency of the national land law, the HGB cannot be extended.[3]

The legal status of a building that has expired a period of time Secondary rights must also be considered. The Supreme Court Jurisprudence said that the holders of the old secondary rights will be given priority over the extension of the secondary rights. However, a loophole to this renewal obligation can occur. If someone has a bad intention and then submit a request for extension of the secondary rights on their own behalf and given the lack of proper registration of the land registration system in Indonesia, the issuance of the certificate of secondary rights in the name of the person in bad faith is not unusual. Problems arise, if the building was intended as a flat / condominium or shops, which are then divided into apartment units or kiosks. Each apartment unit owner holds rights called strata title based on the law, the strength is the same as the ownership rights in ordinary houses. No one should revoke this right, unless it is proven that the right was obtained illegally or revocation was carried out for social purposes.

In this case, the regional government should decide not to extend the secondary rights (for example, the right to use, because state land can only be attached to use rights or management rights). Considering that the Regional Government intends to utilize the land and building itself or there are investors who can pay for the granting of secondary rights at a price higher than that offered by the manager. If this happens, the apartment or shop developer and the local government can be sued by the association of occupants or stall owners. The legal basis is that it has committed an act against the law because it has deceived consumers by selling stall / apartment units with strata title, even though the unit is located on the land use rights. At least this case example can show the principle of horizontal separation which has more disadvantages than benefits, because its existence can be used as a means of deceiving parties in good faith.

3.1 The existence of the principle of horizontal separation in the legal system in Indonesia

The principle of horizontal separation is the principle that is being enforced in the National Land Law, overriding the principle of attachment. In the principle of horizontal separation, buildings and plants on land are not part of the land so ownership of buildings and plants on a piece of land does not necessarily fall to the landowner. Legal action regarding land does not automatically include buildings and plants belonging to the landowner on it. If the legal action on the land is intended to cover the buildings and plants as well, then this matter must be explicitly stated in the deed that proves the legal action concerned.[4]

The panel of judges in their decision Number 337/Pdt/2014/PT.Smg, the judge decided not to accept the lawsuit against the Comparators on the grounds that the Appellants were not true contenders in the eyes of the law because even though there was a principle of horizontal separation that separated the land from the building above it, it has been stated in the previous decision that the comparators before the contenders are those who are not entitled to occupy the land of the object of execution and therefore the panel considers that the contenders are those who must vacate and hand over the land of the object of execution to the applicant for execution. Thus, when a person builds a building on a piece of land and has occupied the building for many years when the land is disputed at a later date and he loses in the land dispute, then he becomes the party who must carry out the decision by submitting the disputed land. Although there is a principle of horizontal separation that separates the disputed land from the buildings he has built which the building should be entitled to, he remains an unjustified party because he has erected a building on land to which he has no right to the land, so he must vacate and surrender the land to the rightful party.[5]

3.2. Government Legal Protection for Buyers in Good Will of Land Objects under Collateral

Legal protection for buyers in good faith is based on the Supreme Court Circular Letter Number 4 of 2016 concerning the Imposition of the Results of the 2016 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court, as follows:

- 1) Conducting sale and purchase of these land objects with procedures / procedures and valid documents as determined by the legislation, namely:
 - a) Land purchase through public auction or Purchase of land in the presence of a Land Deed Making Officer (in accordance with Government Regulation Number 24 of 1997 or Purchase of customary / unregistered land which is carried out according to the provisions of customary law.
 - b) Purchases are made at reasonable prices.

2) Exercise caution by examining matters relating to the promised land object, including:

- a) Seller is a person who has the right / has rights to the land which is the object of buying and selling, in accordance with proof of ownership, or
- b) The land / object being traded is not confiscated, or
- c) The object land being traded is not in security / mortgage status, or
- d) For land that is certified, has obtained information from the BPN and a history of the legal relationship between the land and the certificate holder.

The requirements for letters a and b above are cumulative, so both must be implemented, not just one. In other words, a person can be said to be a good-faith buyer if he buys land in accordance with procedures / laws and regulations and has previously examined carefully the material facts (physical data) and the validity of the transfer of rights (juridical data) on the land he bought, before and on during the process of transferring land rights. If the criteria of the buyer in good faith have been met, even though in the future it is known that the land was purchased from an unauthorized person (unauthorized seller), then land that has been bought by the buyer in good faith cannot be contested by anyone.

The original landowner can only file compensation claims to unauthorized sellers, not to buyers in good faith. This is stipulated in the Supreme Court Circular Letter (SEMA) Number 7 of 2012. In item IX it is stated that 1) Protection must be given to buyers in good faith even though it is known that the seller is an unauthorized person (object of buying and selling land); 2) The original owner can only file a claim for compensation to unauthorized Sellers.

4 Conclusion

The existence of the principle of horizontal separation is regulated in Article 44 paragraph (1) of the Basic Agrarian Law (UUPA). As a land law regulation in Indonesia, UUPA must be national in terms of both formal and material. From a formal point of view, national land laws must be established by Indonesian law makers, made in Indonesia, compiled in Indonesian, applicable to all regions in Indonesia and covering all land in Indonesia. Meanwhile, in material terms, the form of objectives, conceptions, principles, systems and contents of the Basic Agrarian Law must be of a national nature.

Legal protection for the buyer in good faith is basically legal protection given to the buyer, because he obtained material rights based on good faith. That is, he does not know the defects or flaws of the (acquisition process) of the goods, as regulated in Article 531 of the Civil Code. This protection is given, even if the seller is not the person entitled to transfer the property rights to the Buyer as stipulated in Article 551 of the Civil Code.

It is recommended that the implementation of the principle of horizontal separation be more optimal socialized to all levels of society, so that in the practice of buying and selling or leasing land, the public can know the existence of the principle of horizontal separation, with a clear legal basis namely Article 44 paragraph (1) of the Basic Agrarian Law.

Buyers in good faith should apply the Precautionary Principle before carrying out a sale and purchase or land lease transaction (either HGU, HGB, or Right to Use) so that in the future after the land lease period ends, and when the lease period is extended, the owner of the Primary Right to the land not arbitrary control of the land which is its primary right, of course this will harm the good faith of the buyer in good faith.

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Religion, State, and Law: Constitutional Limits of Islamic Law in National Law in Indonesia

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Abstract. Islamic law or Sharia law has universal values. The implementation of Islamic law is substantially open to the opportunity to apply universal values of Islam, however, the implementation of Islamic laws in the national legal system is still limited in a number of laws. This study reveals the construction and reality of Islamic legal products in the frame of national law in Indonesia. This research uses a qualitative paradigm, a religious law approach, and an interdisciplinary study. The results show that indirectly, universal teachings of Islam such as the protection of human rights have been listed in the Indonesian constitution, although they do not use religious language. Derivation of these human rights can be carried out at the level of legislation such as the Marriage Law and Religious Courts. While the desire to make Indonesia as an Islamic state does not receive recognition in the constitution, bearing in mind that the Indonesian state is not an Islamic state, but a law state based on Pancasila which always accommodates the diversity of cultural, racial and religious values systems for Indonesian people and society.

Keywords: Religion, Islamic law, Constitutional law, National law, Indonesia.

1 Introduction

According to the constitutional system, Indonesia is a nation that consists of geographical territories with diverse tribes, races, cultures, and religions, which requires certain basic rules to legally protect the mutual rights and interests of its citizens. These rules are extracted from the value system to accommodate the interests of citizens. It is a form of "mutual agreement," in accordance with the modern state administration known as the constitution, which has the ability to prevent power from being arbitrarily, thereby guaranteeing the rights of citizens [1].

Furthermore, a collective agreement is stipulated into five basic principles of the state, and this is referred to Pancasila. According to recorded history, Pancasila is the outcome of lengthy discussions and polemics that occurred between people from different religions. It needed to be acknowledged that the ethnic, cultural, and religious diversity of every citizen is inseparable from certain interests, such as practices or teachings of the various religions, as well as making it the basis of the state.

However, because the majority of the citizens are Muslims, they aspire to make Islam the basis of the states, however, this struggle tends to always experience "failure." Therefore, there are at least two important periods that mark these struggles. The first is associated with the emergence of the 1945 constitution. The Muslim community has not succeeded in making

Islam the general religion, instead it has received recognition of implementing its laws as stipulated in the Jakarta charter. This was formulated during the preamble of the constitution and was endorsed by the Investigating Committee for Preparatory Work for Indonesian Independence (BPUPKI). Many interests and considerations were made in accordance with the fact that Indonesia is not an Islamic state, rather it practices Pancasila. The existence of the Jakarta charter was abolished during the preamble of the 1945 constitution by the Preparatory Committee for Indonesian Independence (PPKI).

The second period that marked this struggle was the election victory from 1955-1959. Although the Muslim community fought again through the constituent assembly, it failed and this led to the creation of the Presidential Decree in July 5, 1959, and the dissolution of the constituents. Therefore, the 1945 constitution was reenacted [2].

The failure of Muslim community to make Indonesia an Islamic state, led to incorporation of the fundamental teachings into the constitution. However, the law was enacted in Pancasila practicing states with guaranteed protection according to the 1954 constitution, paragraph 1 of article 29. However, the practice of Islamic law is only limited to the legislative level and not practiced at the constitutional. Law Number 1 of 1974 on marriage, and the Presidential Instruction Number 1 of 1991 are in accordance with Islamic law. The public law associated with the interests of people has not been implemented in many provinces due to certain religious teachings. However, the Sharia court (Mahkamah Syar'iyah) expanded its jurisdiction and implemented the Islamic law in the Aceh Province [3, 4].

Here is some previous research relevant to this topic. Erwin Akhyerdiev and Alexander Ponomarev in their "Religion as Factor in Formation of Law: Current trends" consider the most prevalent religions in present-day society such as Hinduism, Christianity, Islam, and Buddhism and the way in which these religions influence legislation of India, Russia, Thailand, the United Kingdom and Muslim states. Furthermore, the author researches relationship between religion, law, and morality to reveal theoretical and practical links between religion and law. In conclusion, the authors note that the search for the rule we are looking for is not absolute, and many lawyers denied the very possibility of its existence. However, the authors come to the conclusion that complete denial of religious determinism of law restricts the range of possible tools for studying law formation [5].

John Witte in John Witte explained the American constitutional experiment on religious freedom in his book "Religion and the American Constitutional Experiment: Essential Rights and Liberties." According to the book, the First Amendment was a synthesis of two theological beliefs and political calculations of the eighteenth-century American founders that incorporated six interdependent principles: freedom of conscience, right to sport, religious equality, plurality of confessions, disestablishment of religion, as well as the separation of church and state. However, the nuances and balance of these six principles are often lost in the current interpreters of the First Amendment. Therefore, John supported the return of a principled approach to freedom of religion in the American founders' era and the modern international human rights movement. He used these principles to analyze the independence movement and legal freedom over the past two centuries. John further illustrated the importance of his principled approach by analyzing thorny contests on tax exemptions for religion, the role of religion in public schools, and others [6].

The Boisi Center Papers on Religion in the United States titled "Separation of Church and State" stated that religious beliefs and practices are animatedly existent in the United States despite the separation of church and state. This paper is associated with the history and current controversy regarding the disestablishment of religion. It also explains how the constitutional structure of the American government influences religious freedom. Furthermore, surveying

some of the most important Supreme Court cases relating to religion provided an overview of freedom of worship in the United States [7].

Meanwhile, Larry Catta Backer, in his book "The Crisis of Secular Liberalism and the Constitutional State in Comparative Perspective: Religion, Rule of Law, and Democratic Organizations of Religion Privileging States," examined the issue of "the return" of religion from a comparative constitutional perspective. The main premise is that institutional religion is protected and involved in politics through which it seeks to harmonize the institutional state. Furthermore, the resulting system tends to be more favorable to the associated religion than its political opponents. This book implies that the basic premise of liberal society is understood and applied in the rule of law, direct democracy, general freedom, protection of foreigners, and approaches to the interpretation of constitutional policies [8].

Supriyanto Abdi, in his work "Understanding Religion-State Relations in Muslim Societies: Beyond Essentialist and Secular-Liberal Narratives," stated that scholars had offered a different story in the debates on the religion-state of Muslims worldwide, which are determined by specific essential cultural, religious or civilized characteristics. Another main root of the conflicting analysis is the differing assumptions on the extent to which the discourse of religious-state relations needs to be limited to their secular-liberal character. Abdi reviewed the debate on religious-state relations in the Muslim world due to the two main roots of this dispute. He started with a critical examination of the cultural essentialist approach and its limited analytical value in the discussion of religious-state relations in the Muslim world. This was followed by examining the dominant secular-liberal narrative of the state-religion and their problematic projections. Finally, this book provides an overview of internal debates on the issue of religious-state relations, with a more specific focus on the extent to which secular liberal discourse is contested or critically adopted in the Muslim societies [9].

The urge to use Islamic as the basis of the constitution, by Muslims as stipulated in the 1945 constitution was restricted due to the practice of Pancasila, which means belief in God. Conversely, there was a gap in the limitations to implement Islamic teachings, and it is limited to the substantive value. This study analyzes some of the reasons associated with the inability of the constitution to utilize Islamic law and the limitation of its teachings. Therefore, in order to respond to the issue of its implementation in the country, this research is focused on the concept of the constitution, national legal sources, and the various forms of Islamic strategies in the bid to execute it within the framework of the national law. The purpose of this study furthermore was to describe the opportunities involved in the constitutionalisation of Islamic law into the national legal system in accordance with the concept of a state constitution based on the ideology of Pancasila. Further investigation was conducted by employing the descriptive-analysis-response in accordance with the central theme, which is the main focus of this study.

2 Discussion

2.1. Constitution: A Definition

The term constitution originated from the French word *constituer*, which means form, compile or declare a state. It is pronounced as *constitution* in English, and it is derived from two Latin words, *cume* (together) and *statuere* (standing, establishing something). The singular form of *constitution* simply means to establish things together, while its plural form *constitutions* are everything that has been determined. According to the Big Indonesian Dictionary (KBBI), it is defined as all the provisions and rules relating to the state

administration, such as the fundamental law which guides the nation in exercising its power. In addition, constitutional refers to acts or actions exhibited by all the citizens and rulers which are in accordance with the fundamental principles of the law. Constitutionalism is also defined as an understanding concerning the limitations of power and protection of the rights of the citizens through the constitution [10]. In a technical context, it is defined as a state ideology that emphasizes or guarantees the protection of human rights while limiting its power to national institutions that protects the rights of citizenship [11].

Constitutionalism consists of two main elements. The *first* is the protection of human rights in accordance with a detailed description of the various types in the constitution. *Secondly*, the system of government and state institutions that has the authority to protect human rights in accordance with the clear limits of the power and possess [12]. The meaning of the word constitution under the context of forming or compiling shows that the definition of the term is obtained from French which refers to a "process" of formation/recognition of a state or government organization. This definition seems easier because it emphasizes more on the process of formation, however, the individual or community that composed it is not known. Its Latin definition is more specific, focusing on efforts to draft law together and not just by a particular group of individuals. The two definitions seem simple and are still multi-interpreted. However, the meaning differs from the big Indonesian dictionary, which refers to it as a technical context, with rules relating to state administration stipulated in the Basic Law as guidelines or instructions in carrying out the government system. The constitutional criteria contained in the big Indonesian dictionary are all written rules. Therefore, it is stated that constitutional rules/laws need to fulfil the written requirements. The consequence is that all unwritten rules are not included in the constitutional criteria. This perception is acknowledged in research conducted by Sri Soemantri that equates the written rule with the basic law [13].

In the Netherlands, the term constitution is not similar to the basic law, however, in Dutch, it is referred to as *Gronwet* while in Indonesian, *grund* means basic, while *wet* means law. According to research conducted by L.J Van Apeldoorn, it was reported that the basic law is part of the written constitution. It was further stated that the constitution contains both written and unwritten regulations [13, 14]. This definition proposed by Van Apeldoorn accommodates the various forms of the constitution adopted in countries that regard unwritten laws such as Britain and Israel.

Nevertheless, the substance of the constitution is established by the practice of state administration. This is traced to the research conducted by Jimly Asshiddieqie, which stated that the British constitution is a building of rules, customs, and habits that determine the composition and power of state organs. It also regulates the relations between state organs and citizens [15]. Besides from the different forms of constitution (written or unwritten), Islamic law is the basic teachings acknowledged by the people to regulate their rights, and form a government that protect the interest of its citizens. This rule under the Indonesian context is contained in the 1945 constitution as the highest law enforcement in the country. Therefore, the constitutional criteria are guided by the written form. They are used in accordance with the state administrative system adopted by the nation.

2.3. Islamic Law as a National Legal Subsystem

The 1945 Constitution, guarantees the protection of the rights and interests of the citizens. This formulated law is constitutionally referred to as *Pancasila* [16]. It is derived from the

noble values of the country, which regulates the basic principles of citizens' lives without distinction of ethnicity, race, culture, and religion. These noble values were derived from the diversity of tribes, cultures, and religions to govern public interests, which are subsequently formulated in the national legal system. Islam is one of the numerous religions in Indonesia. It plays an important role in the development of the national legal system by ensuring that the teachings are part of the system. This effort does not make or include it in the constitution of the Pancasila because it is a modern nation, and it inherits fundamental philosophical values that are upheld on the basis of constitutional normative, contained in the 1945 constitution. The fundamental values consist of the philosophy of life (*Weltanschauung*) and the nation (Pancasila), which is based on the noble desire of the citizens to live freely in order to achieve prosperity [17].

These philosophical and constitutional mandates are imperative, binding, or forcing everything within the jurisdiction (sovereignty) of the law to be faithful, uphold peace, practice, inherit and preserve civilization as well as the obligation to defend the state. Therefore, there is no citizen, not even the state institutions and products, as well as government officials and leaders that are not bound to be loyal to these mandates since the inception of the nation's independence and to date.

Pancasila, acts as the main source of law for all Indonesians, it is oriented to provide a sense of justice and legal awareness in the community based on the philosophy of life and personality of the citizens. Generally, the rules that are made and formulated need to comply with the basic principles oriented towards the protection of people and guarantee social justice. In accordance with the above principles, the main source of the constitution creates methods or limits that need to be observed in developing national law [18].

Firstly, the law made is directed at the integration of the nation both territorially and ideologically. This method is derived from the formulation of the 1945 constitution, which is protecting the entire people and their homeland. *Secondly*, the formulated law needs to be in accordance with the principles of democracy and monarchy through procedures/mechanisms such as transparency and accountability in accordance with the basics of the legal philosophy. *Thirdly*, the formulated law needs to guarantee social justice by providing protection to the "weak" people in the face of a "powerful" society. *Fourthly*, guaranteeing religious freedom that upholds the values of religious tolerance. The state guarantees freedom of worship in the sense of protecting the various religious groups in every society. It is regulated in the legislation, which does not enact certain religious laws [12].

Freedom of worship in the Pancasila state has a positive meaning, which is the guarantee to carry out religious orders and protection of citizens that practice their religion. This freedom is not intended as that of America, that is permits atheism and anti-religious propaganda [19].

2.4. Islamic Law: From Religious Norms to Legal Norms

The teachings of Islam revealed to humanity by Allah are useful and intended to provide benefits to the entire human race. This is observed in the universal teachings of *rahmatan lil 'alamin* which is part of the main ideas of Islamic law known as the principle of *Malahat* oriented towards the benefits and interests of humanity in accordance with development [20].

The universal principles are the teachings on justice (QS an-Nisa': 135), deliberation (QS al-Syura: 38), recognition and protection of human rights (QS al-Isra': 70), equality before the law (QS al-Hujurat: 13), peace (QS al-Baqarah: 208), tolerance (QS al-Baqarah: 217),

mandate (QS an-Nisa': 58), and welfare (QS al-Ma'arij: 24-24) [21]. These principles are the basic teachings that need to exist in any government or constitution. They are still used as the standard of religious or moral norms. However, they are not positive legal norms that have sanctions. Therefore, it is necessary to convert religious norms to legal rules by redefining the general teachings in accordance with the theory and *fiqh* principles. The results of this formulation are referred to as middle norms (intermediate norms). They serve as a link for religious norms with concrete legal rules, for example, the principle of justice in Islamic inheritance [22].

The next step is to incorporate the intermediate laws into the concrete legal norms as contained in the legislation. In addition, changing religious standards to authorized laws are accompanied by constitutional sanctions contained in the positive legal norms. It is necessary for the rule of law that is made to bind all citizens together and also obtain firmness in legislation.

2.5. Political Negotiations: Strategies Towards the Constitutionalization of Islamic Law

The effort to implement Islam as a recognized legal norm in the constitution provides a new nuance to the struggle of the Muslims as they constitute most of the communities. The desire to make Islam the basis of the nation is impossible today because the debate concerning the state ideology was concluded in the early era of independence [23]. Pancasila is defined as the cultural, racial, and religious system. However, Muslim partisans decided to choose a different way. The consensus of the diversity is the enactment of three legal systems adopted by the people in accordance with their classification. The three legal systems are the Islamic, customary, and western laws. As a form of compromise these systems, A. Qodry Azizi offers to combine the Islamic, customary, and western laws [16, 24]. Conversely, Moh. Mahfud MD offered a legal, political approach that serves as an alternative solution for Muslims that want to implement the teachings of Islam in the country [16].

Moh. Mahfud MD stated the importance of Muslims to conveying ideas or aspirations through the political system in accordance with the teachings of Islam that teaches people to participate in politics. *Firstly*, they need to live in an organization or system of government in order to be able to convey their rights and beliefs as citizens. *Secondly*, Islam which is a religion that governs the lives of people, is not only limited to the problem of Mahdhah worship. However, it is also restricted to that of *Ghairu Mahdhah* worship (*muamalah* in a broad sense) that covers all aspects of life, including politics. *Thirdly*, it is a universal religion that urges Muslims to uphold the right and forbid the wrong (*amar ma'ruf* and *nahi munkar*) in order to benefit the entire nature (*rahmatan lil 'alamin*) [12].

The three arguments stated above by Moh. Mahfud MD provides a description that the desire to implement the practice of Islam through a political approach leads to the indigenous lization of its teachings. The forerunner of the political approach that commands Muslims to implement Islamic religion is *amar ma'ruf nahi munkar*. According to Fazlur Rahman, the ideology of *amar ma'ruf nahi munkar* is only to create a society. This command forms a moral obligation for the Muslims which serve as a binding of collective responsibilities [25]. Subsequently, there is a different view in understanding the substance of the command to uphold the *amar ma'ruf nahi munkar* among Muslims, particularly those in the country.

On the contrary, to uphold the *amar ma'ruf nahi munkar*, it is necessary to have the power to implement it and ensure it is carried out properly. The consequence of this view is that the presence of the state as a symbol of power is assumed to be needed as the formal foundation in upholding *religious orders*. Conversely, Muslims feel that the implementation of *amar ma'ruf nahi munkar* does not need state power which is identically formalistic, rather they believe in the spirit and values of the substance contained in it. These values emphasize universal teachings (*rahmatan lil 'alamin*) [12].

In practice, this effort presents two implementation models, formal and substantive models. *Firstly*, the political approach is structured formally. According to the book titled *Building Legal Politic, Upholding the Constitution* written by Moh. Mahfud MD stated that the struggle of Muslims through a formalistic-structural political approach is directed at efforts to uphold the Islamic state and the Basic Law as the official constitution of the nation. The existence of an Islamic state serves as a legitimacy which is a requirement for the implementation of *amar ma'ruf nahi munkar* [12]. *Secondly*, the political approach is culturally-substantive. Its effort is to internalize Islamic values into written legal norms in a number of statutory regulations in the nations' constitutional system. The Cultural aspects emphasize the inculcation and spread of substantive values of Islamic teachings without having to use the formal symbols of Islam [12].

During the Reformation era, the teachings of the substance into the nation's legal system are carried out through political, academic and religious organizations. Additionally, the cultural approach emphasizes the core values contained in the teachings of Islam, which provides broader opportunities to implement the values of both private and public Islamic teachings. The implementation of Islamic law through a cultural approach becomes more meaningful, assuming its legislation contains the values of the required teachings. The religious principles believed to be culturally normative and this reflects in the daily attitudes of the Muslim community. The values of these teachings include private (*diyani*) and public laws which are included in the national legal system (*qadha'i*) [26]. The Islamic law implemented in the national legal system has a broader scope and regulates issues associated with the society on freedom. For example, issues associated with worship such as prayers and fasting, rules for greeting in public, how to enter public places, visiting procedures, and belief.

The individual aspects of Islam tend to be regulated by the state when the problems of worship, character, and personal beliefs are related to the rights and obligations of others. For example, the problem of *zakat* and *hajj* needs to be regulated by law because they involve management, distribution (*zakat*) and use of public funds, in solving legal problems. Furthermore, it regulates public interests on banking, trade, endowment, health, relationship between citizens and other countries, as well as public issues that involve the authorities. Without the implementation of these legislative rules, difficulties tend to arise.

Conversely, in terms of authority, the Indonesian Ulema Council (MUI) have the right to carry out division of duties, without separating religious power from the state, with legal issues involving individuals (*diyani* laws). Additionally, issues relating to the public interest are the rights of the government, therefore, the judiciary decides on the applicable laws and regulations. These problems which are regarded as individual aspect (*diyani*) become a public issue that requires the intervention of the authorities (*qadha'i*).

3 Conclusion

The constitutionalisation of Islamic law into the national legal system is achieved through an informal political approach and open to opportunities consisting of various universal teachings. The universal Islamic teachings associated with the protection of human rights have long been listed in the constitution. Its derivation is carried out at the level of legislation such as marriage and religious court. However, the desire to convert Indonesia to an Islamic state is not recognized in the constitution, rather its laws are in accordance with the ability to accommodate diversified cultural, racial, and religion of all people. However, the opportunities to implement Islamic law as mandated in the 1945 constitution tend to be carried out only at the legislative level or presidential instructions. At this level, efforts to include the values of Islamic teachings seem more easily accepted than at the constitutional level.

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Optimizing the Role of Implementers to Increase Indonesian Sports Performance at the International Level

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Abstract. In accordance with Indonesian Act No. 3 of 2005 concerning the National Sports System, the scope of sport includes educational sports activities, recreational sports, and performance sports. Achievement sports are carried out through a process of coaching and developing in a planned, tiered, and sustainable manner with the support of sports science and technology. Achievement sports activities as the spearhead are carried out by their respective sports branches supported by the Government in accordance with the National Sports System law as a regulator, facilitator and implementer of these activities. The Government as the executive power holder should still limit its role as regulator and facilitator. While the role of executor should be carried out by an institution known as the Indonesian National Sports Committee (KONI), which carries out in the sense of organizing sports activities in accordance with the regulations outlined by the Government with all its support including its facilities. In order to achieve a proud achievement at the International level for this reason, it is necessary to revise the current National Sports System law.

Keywords: Law; Sports; International Achievement

1 Introduction

Concern for sporting achievements in Indonesia is an important element to improve performance at the international level. Currently seen by the non-optimal role of the implementers, where Act No. 3 of 2005 concerning the National Sports System exist at the time. It does not spell out the role of regulators and the roles that carry it out clearly, decisively, efficiently, and beneficially according to the needs of the current development of the sporting situation in Indonesia. It is time to take strategic steps to optimize their respective roles, where the Government must remain focused as a regulator and non-Government Organizations as implementers. Optimization of each role must be carried out immediately through corrective steps in the field of regulation namely revising Act No. 3 of 2005 concerning the National Sports System, to support the success of Indonesian sports at the international level. The rules of the game that are supportive and clear are the keys to the success of Indonesian sports achievements.

The revision of regulations that reflect clear assignment of duties, functions and authority is time to do and becomes important homework in order to unify determination and purpose. Eliminate counter productive regulations that cause disharmony. By making revisions to these regulations by stating clearly and decisively in the form of a description of the Government's role. As a regulator and the role of the Actor carrying out sports activities in turn through clear authority and support. So now it's time for Indonesia to focus on working quickly going forward to achieve proudly achievements in the international world. The Achievements made in the international world are a pride for a nation and furthermore have an impact on diplomatic recognition [1]. In other words providing political benefits at home and abroad. An international sport activities in the form of the highest multi-event is the Olympics is the dream of every athlete, to be able to participate and play a role through their participation in it. The country certainly has its own pride when it can send its athletes to compete and even win numbers that are contested. It is a matter of

pride when in the Olympics the national anthem can be played and the national flag can be hoisted. For this reason, it is necessary for the participation of all parties involved, both the Government and Non-Governmental Organizations, in realizing the optimization of the Implementer's role through the revision of Act No. 3/2005 concerning the National Sports System.

2 Method

In doing this article using a normative juridical approach method where the legal material used will be analyzed qualitatively and interpretatively, as primary legal material obtained from legislation such as Act No. 3 of 2005 concerning the National Sports System. Then secondary legal materials are obtained from law books, research results from literature and cases and seminars on law and sports. While tertiary legal material is obtained from the legal dictionary and an explanation of the laws and regulations. All materials in supporting the role of executors to improve Indonesian sporting achievements at the international level, through the revision of Act No. 3 of 2005 concerning the National Sports System.

3 Result and Discussion

In answering how to optimize the role of the executor to be able to improve Indonesia's sporting achievements at the international level through the revision of Act No. 3 of 2005 on the National Sports System. It is necessary to understand that it is a pride of a nation to have the opportunity to fly a national flag and sing the national anthem at the awards ceremony in the form of gold medals in international championships, both in the form of single events and multi-events obtained from sports achievements. The progress of a nation's sports achievements is obtained from a coaching system that starts from supporting regulations, the willingness, and harmony to do it consistently. In carrying out regulations with adequate facilities, the role of the executor is very important in creating a comprehensive and efficient guidance system. For this reason, the optimization of the role of the executor will greatly support the success of achievement through appropriate regulations in this case through reviewing and making revisions needed to create harmonization of the parties involved by improving the duties, functions and authorities that exist, especially in Government organizations namely the Ministry of Youth and Sports and 2 (two) sports organizations namely the Indonesian National Sports Committee (KONI) and the Indonesian Olympic Committee (KOI) currently in accordance with Act No. 3 of 2005 concerning the National Sports System.

3.1. The Executor Holds an Important Role

As one of the important organs in running the wheels of sports activities, it is necessary to pay close attention to the conditions that exist at this time. Where it is necessary to arrange the regulation of the sports system needed to support the process of good coaching and improving the achievements of athletes. Sports achievements in Indonesia in the last few decades tend to be stagnant, except when Indonesia is the host of regional sports in Southeast Asia and Asia. Then observing these achievements as well as following the development of increasingly advanced times. It is time Act No. 3 of 2005 about the National Sports System was revised to adjust to improve the performance of Indonesian sports in the International arena.

[2] Through Article 13 paragraph (1) of Act No. 3 of 2005 concerning the National Sports System, the Government has the authority to regulate, foster, develop, execute, and oversee the implementation of sports nationally. So with the word "execute", then [3] The Government issued Presidential Regulation (Perpres) No. 95 of 2017 concerning the Development of National Sports Achievement by Government. Practically ended the role of the executor carried out by the Indonesian National Sports Committee (KONI) in carrying out sports coaching, because that role has been taken over by The Ministry of Youth and Sports directly carries out training to the parent of the sports branch, without going through the Indonesian National Sports Committee (KONI). Then the role of the Indonesian National Sports Committee (KONI) now helps in the supervision and mentoring of potential athletes only. While the Government in this case the Ministry of Youth

and Sports, does not necessarily have sufficient resources to carry out, fostering achievement sports in the country.

Amid the great pandemic of COVID 19 the Indonesian National Sports Committee (KONI) with the limited role, it currently has under the leadership of Mr. Marciano Norman as President, continues to carry out its activities in promoting sports in Indonesia. Such as the inauguration of the Indonesian Archery Union Board (PERPANI) and opening a national working meeting of the Sports Union Center Equestrian Indonesia (PORDASI). Is truly a separate value in an atmosphere that does not support but remains highly committed to carrying out its activities for the development of Indonesian sports. The Indonesian National Sports Committee (KONI) also has a Strategic Plan prepared up to 2023 to make a maximum contribution to the achievement of Indonesian sports achievements on the international stage, which is now the time to train athletes at the train to win stage in each competition [4]. However there are still quite wide obstacles between repositioning the Indonesian National Sports Committee (KONI) as an executor with the conditions that are happening at the moment.

The National Sports System implemented by the House of Representatives of the Republic of Indonesia in 2020. The Government, which should be at the level of policy makers in the form of regulations, now with its role in entering into implementing in carrying out sporting activities, will become a separate obstacle, where as policy makers also act as institutions that carry out these policies. So that the functions of the originator and supervision of a regulation will be mixed with its functions which is also the executor, which in turn is questionable about its optimism in carrying out this role. As an institution the Indonesian National Sports Committee (KONI) is required in carrying out its activities as an executor having high dedication to achieve its aims and objectives.

3.2. The Need for Revision of the Law on the National Sports System

With the main role of the Government as the regulator, in charge of preparing the direction to balance the implementation of development through the issuance of regulations, as a regulator the Government provides a basic reference to the community as an instrument to regulate all activities in the implementation of empowerment. The concept of a modern state is the less authority of the government and the greater opportunities and opportunities given by the people and society. While in Act No 3 of 2005 concerning the National Sports System in article 36 paragraph (4) reads, that the national sports committee as referred to in paragraph (1) and paragraph (2) has the task: in letter c it states that it is carrying out management, guidance, and the development of performance sports based on their authority. And the authority to directly develop, develop and carry out de facto all this time has become the authority of the Indonesian National Sports Committee (KONI) with the parent organization of sports.

In reality, there are several obstacles that occur as follows [5]. 1st (First) Article 13 of Law No. 3/2005 concerning the National Sports System, which states that the role of coaching is in the hands of the Government. The Government has the authority to regulate, foster, develop, implement, and oversee the implementation of sports nationally so with the word "carry out", the government issued Presidential Regulation No. 95 of 2017 concerning Development of National Sports Achievement. With the issuance its regulation practically ended the role of KONI in carrying out sports coaching, because that role had been taken over by the Ministry of Youth and Sports, which directly carried out coaching to the Parent's Sports branch, without going through the Indonesian National Sports Committee KONI again and the role the Indonesian National Sports Committee (KONI) only helps in the supervision and mentoring of potential athletes.

2nd (second) Article 36 of Act No. 3/2005 concerning the National Sports System which states that the Parent Sports branch organizations as referred to in Article 35 form a national sports committee. Organizing national sports committees as referred to in paragraph (1) is determined by the relevant community in accordance with statutory regulations; the parent organization of sports branches and national sports committees as referred to in paragraph (1) is independent. The word "national sports committee", never meant as the name of an organization namely the Indonesian National Sports Committee (KONI). So it is very possible to form another committee that has the same task as the Indonesian National Sports Committee (KONI), which will lead to more

complicated problems and complicated in the development of sports achievement in the country, namely the split in the development of sports achievement. As an example of the case that occurred in DKI Jakarta as a rival provincial level national sports committee. The Jakarta Sports Branch Forum emerged which rivaled the Indonesian National Sports Committee DKI Jakarta and in the case in BAORI, the DKI Jakarta Sports Branch Forum actually won its claim over the Indonesian National Sports Committee DKI Jakarta. But finally, the Provincial Government of DKI Jakarta through the Department of Youth and Sports of the Province of DKI Jakarta took direct control of performance sports in the Province of DKI Jakarta.

3rd (third), Article 44 of Law No. 3 of 2005 concerning the National Sports System which states clearly the name of the Indonesian Olympic Committee (KOI), which is unlike the previous article 36 does not explicitly mention the name of the Indonesian National Sports Committee (KONI). It is only mentioned as the national sports committee word phrase "in lowercase", but in Article 44 it is stated explicitly the name of the Indonesian Olympic Committee (KOI) "in capital letters". Even though it is very clear the role of the Indonesian Olympic Committee (KOI) in paragraphs (1) and (2) tasked with organizing and including Indonesian contingents in multi-event international level championships, including: Sea Games, Asian Games and the Olympics and other multi-event international event activities. The Indonesian Olympic Committee (KOI) promotes and maintains Indonesia's interests, as well as gaining public support for participating in the Olympic Games, the Asian Games, the South East Asian Games, and other international sports weeks. The Indonesian Olympic Committee works in accordance with International Olympic should work according to the rules set by the international olympic committee by not conducting inauguration of several sports in Indonesia. The inauguration in accordance with Article 36 of Act No. 3 of 2005 states: coaching and coordination are carried out by the Indonesian National Sports Committee (KONI).

4th (forth), Article 69 of Act No. 3 of 2005 concerning the National Sports System states that funding of sports is a joint responsibility between the government, regional government and the community. The government and regional governments must allocate the sports budget, through the state revenue and expenditure budget, and the regional revenue and expenditure budget in accordance Article 71 of Act No. 3 of 2005. Its regulation states that the management of sports funds is based on the principles of justice, efficiency, transparency and accountability public, and sports funds allocated from the Government and regional governments can be provided in the form of grants in accordance with statutory regulations. Sports funding is a joint responsibility making the obligations of the government, regional government and the community unclear, resulting in mutual responsibility. With regard to this article, even though the budget for the development and provision of facilities and infrastructure is the government's obligation for the individual or people they protect. While sports activities are one of the basic rights, the rights of individuals, society and the people of Indonesia. Sports funds allocated by the government in the form of grants leave problems of abuse at the center and in the regions, so the allocation of sports funds needs to be budgeted in other forms and channeled directly to the Indonesian National Sports Committee (KONI).

5th (Fifth), Article 88 of Act No. 3 of 2005 concerning the National Sports System states that the resolution of sports disputes, is sought through deliberations and consensus conducted by the parent organization of sports branches. In this case deliberation and consensus as referred to in paragraph (1) is not reached, dispute resolution can be taken through arbitrase and alternative dispute resolution in accordance with statutory regulations. If the dispute resolution as referred to in paragraph (2) is not reached, the dispute resolution can be carried out through a court in accordance with its jurisdiction. In paragraph (2) Arbitration which is not explicitly mentioned results in several arbitrations, such as those under the Indonesian National Sports Committee (KONI), namely the Indonesian Sports Arbitration Board (BAORI) and under the Indonesian Olympic Committee (KOI), namely the Indonesian Sports Arbitration Board (BAKI). That will at least have an impact of dualism in the arbitration settlement which will not end in settlement. Furthermore, in paragraph (3) which states that the Arbitration decision cannot be reached, then it can be resolved in a court of law which will add to the lengthy resolution of a protracted problem, bearing in mind that there will be an appeal, cassation, and prolonged review, thus disrupting the fostering of sporting achievement.

3.3. Comparison of the Role of Implementers in Several Other Countries

Along with the rapid development and progress of the world of technology and transportation, this has been pioneered by developed countries, especially in the field of sports. It is necessary to quickly make comparisons by examining the sports system carried out by developed countries that can be considered for study or in transfer so that what is possible can be applied in Indonesia. A number of developed countries in the world of sports have different legal systems and different conditions of the people, but can change the pattern of society, so that there are things that can be learned [6] and which will be applied later to change attitude or behavior and coaching behavior for the development of our sports system [7].

Some foreign countries that will be included as a comparison in international multi-event sports activities that can serve as benchmarks for the advancement of Indonesian sports include: Australia, China and Singapore. Australia as a neighboring country of Indonesia but has a remarkable achievement with a relatively short time can build its sports system and skyrocketed as one of the countries with a gold medal contributor which has significant progress in the Olympics. China because of its very large population meanwhile while Indonesia is the largest country number 4 (four) in the world besides China noted a great progress and leap in medal acquisition as one of the most giant get a medal at the Olympics while Singapore because as a fellow country Asean and as the country closest to Indonesia.

The Grand National Sports Development Strategy 2014-2024 of the Indonesian National Sports Committee (KONI) states, that the following organizational sports systems are: 1) The State of Australia, the law adheres to Common Law / Anglo Saxon ideology. The organizational system in the Australian state has the Australian Sport Commission (ASC) which is responsible to the Minister of Sports and the Australian Parliament, financial sources supported by ASC, the legal basis is national sports policy. As stated in the National Sport and Active Recreation Policy Framework (NSARPF) implemented by The Committee of Australian Sport and Recreation Officials (CASRO). ASC itself provides specialized sports services such as: High Performance Coaching, Sport Science, Sport Management, Facility Management, Education and Resources, Participation Development, and Delivery of Funding Programs to the National Sporting Organization. While the Australian Institute of Sport (AIS) spearheaded the strategy in increasing the achievements of Australian sports on the world stage. Australia also has the Australian Olympic Committee (AOC), an organization whose job is to promote, protect and carry out Olympic activities in Australia. However, the Australian Sport Commission (ASC) is actively launching an improvement program.

In 1989, the ASC launched the "Going for Gold" program as the main focus of improving the achievements of leading athletes towards the Olympics. Only a handful of sports were made excellent at the 1980 Olympics in Moscow, Russia. Australia ranked 15th (fifteen) position with 2 gold medals. Australia participated in the 1984 Olympic Games in Los Angeles, United States with four gold medals and ranked 14th (fourteen). In 1988 when participating in the Olympic Games in Seoul, South Korea, Australia ranked 15th (fifteen) and 3 gold then again appearing, at the 1992 Olympics in Barcelona, Spain. Australia succeeded in returning to 10th position with 7 gold medals. After that, taking part in the 1996 Atlanta Olympic Games in the United States, Australia ranked 7th with 9 gold medals. In 2000 following the Olympics in Sydney, Australia recorded a progress achievement again after successfully ranked 4th with 16 achievements. In 2004 at the Olympic Games in Athens, Australia returned to the 4th place with four gold medals. Then in the Beijing Olympics in China in 2008 Australia ranked 6 (six) and won 14 medals, in 2012 at the olympiade in London, England Australia ranked 8th by winning 8 gold medals. Then the last in 2016 followed the olympiade at Rio De Janeiro Brazil ranks 10 (ten) with 8 gold medals.

Australia's achievements in the Olympics

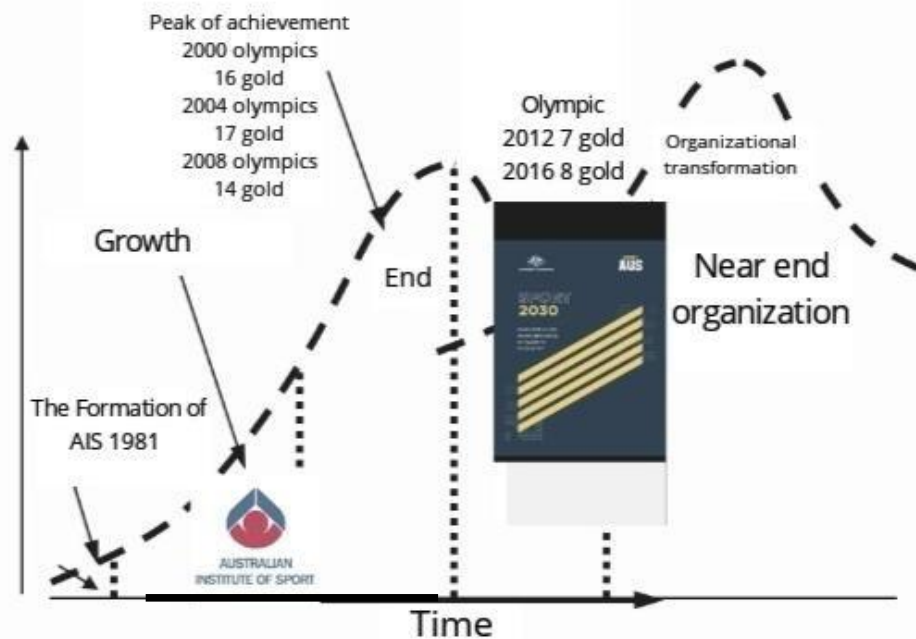


Figure 1. Graphic Australia's Achievements in the Olympics

2) The State of China, has its own legal system which gives much freedom to the autonomy of the area to play an important role, control is preferably politically lawless [8]. Barrie Houtlien and Mick Green in their book *Comparative Elite Sport Development System, Structure and Public Policy* [9] stated that the Chinese sports organization system under the Ministry of Sports and the Chinese Sports Committee. Chinese pretensions were obtained through the slogan "Juguo Tizhi" which is "the support of all elements of the nation for the sports system elite". It states that the central and regional governments must utilize their authority to channel financial and human resources throughout the country to support elite sports for the glory of the nation. A distinctive feature of Juguo Tizhi is its centralized administration and management system and it only serves to improve the success of the elite sport branches through a special training and voting system. The central government strongly supports the slogan financially owned by the Chinese government. In the beginning the training was carried out following the way of the people's army education namely rigorous training, discipline like in actual combat. In the course of the training method they became "not afraid of suffering, difficulty, and injury". Afterwards every athlete and official apply an attitude in his training to always be under pressure and even officials consider it as a threat to put a sword on their neck in trying to reach the medal target.

In the achievements at the Chinese Olympics again participated in the 1984 Olympic Games in Los Angeles, the United States with 15 gold medals and was ranked 4th after being inactive for 32 years. In 1988, when participating in the Olympic Games in Seoul, South Korea, China fell one place to number 5 (five). Then again appearing at the 1992 Olympics in Barcelona, Spain, China managed to return to position 4 (four) with 16 gold medals. After participating in the 1996 Atlanta Olympics in the United States, China maintained its position 4 (four) with 16 gold medals. In 2000 he joined the Olympic Games in Sydney, Australia. China recorded a progress achievement again after successfully ranked third (three) with 28 gold medals a proud achievement. In 2004 at the Olympic Games in Athens, Greece, China again made an achievement by ranking second (two) and winning 32 gold medals. A proud achievement and now makes China the fastest country to

achieve extraordinary achievements. Then in the Beijing Olympics in China in 2008 managed to occupy the top of the number 1 (one) and won 51 gold medals. In 2012 at the Olympic Games in London, England, he won 38 gold medals with rank 2. Then the last in 2016 took part in the Olympic Games in Rio De Janeiro, Brazil was ranked 3 (three) with 26 gold medals.

3) The State of Singapore with the Common Law / Anglo Saxon legal system. Singapore's organizational system has the Ministry of Sports Affairs or the so-called Singapore Sport Council (SSC) which is responsible for providing integrated sports facilities. That not only meet the needs of sports programs for all but also meet the standards of sporting achievement. Besides certainly supporting in terms of financial, especially for athletes who have been classified as getting financial support through credit card facilities, that show the government's great attention towards the athletes. Another support carried out by the Government is the program to culture sports for the people of Singapore. So that a Sports Culture Committee is formed to ensure the development of sports culture in Singapore and its athletes to be able to compete with world champions. This is done to change the paradigm in Singaporean society whose parents object to children the children pursue the field of sports. Government then Singapore also has the National Olympic Council of Singapore or what is called the Singapore National Olympic Council (SNOC) which helps and is side by side with the Government.

The Singapore Government's results were seen at the 2016 Olympics in Rio Janeiro Brazil, where their swimmer Josep Schooling won the gold medal in the 100m butterfly men's style with a time of 50.39 seconds. Breaking the previous record of 50.58 seconds on behalf of Michael of the United States, other world swimming champions making him as the first swimmer from the Southeast Asian country to win the gold medal for the number. While at the same time pocketing Rp. 9.8 billion as a gold medalist from his country. In addition, Singapore also prepares swimming athletes to train in the United States to face the 2021 Olympics later in Tokyo, Japan. The young athletes are also separated from their obligations to join the conscription program in their country. The young athletes are also separated from their obligations to join the conscription program in their country which accommodates and gives more attention to their athletes through their accommodative legal system. [10].

4) The State of Indonesia, the law of which embraces the concept of Civil Law / Continental Europe. Sports conditions in Indonesia when in general consist of training for athletes carried out by sports branches under the guidance of the Ministry of Youth and Sports (Kemenpora) for 2020, the coaching program carried out states that the Coaching and development of athletes is the responsibility of the Government together with the Regional Government, Society, and sports organizations.

The government through the policy of implementing Athletes Coaching conducts activities to increase National Sports Achievement (PPON) in accordance with Presidential Regulation Number 95 of 2017 concerning National Sports Achievement (PPON). The government carries out athletes through competitions is a strategic step so that parent organizations of sports branches that are given the authority to manage and foster athletes must be able to create athletes who excel in the national arena. Besides that the Ministry of Youth and Sports is currently preparing plans for developing sports achievements in a number of priority sport branches that have the potential to achieve medal at the Olympics. Through the construction of a training camp, with priority in the form of optimizing the construction of national sports centers in Cibubur and Hambalang [11]. Responsibility in the field of Sports Facilities and Infrastructure Development is carried out by the Government, regional government and the community responsible for planning, procurement, utilization, maintenance, and supervision of sports infrastructure.

The government and regional governments guarantee the availability of sports infrastructure in accordance with the standards and needs of the central government and regional governments. The amount and type of sports infrastructure that is built must pay attention to the sporting potential that develops in the local area. Sports infrastructure built in the regions must meet the minimum amount and standards set by the government. Business entities engaged in the construction of housing and settlements are required to provide sports infrastructure as public facilities with standards and needs set by the government, which are then handed over to the regional government as assets belonging to the local government. Everyone is prohibited from negating and / or converting sports infrastructure that has become an asset belonging to the

government or regional government without the recommendation of the Minister and without permission or approval from the authorities in accordance with statutory regulations. In reality there are still many facilities and infrastructure that are minimal in supporting sports performance and activities, especially at the regional level. This should be evaluated and as an input that sports programs should not be in the form of centralization but rather decentralization as an effort to equalize and better hone the leading branches and potential sports in certain areas.

In the case of implementing sports infrastructure and sports development in Indonesia, the National Development Planning Agency (Bappenas, 2020) also mentioned, among other things, that referring to the provisions of Article 67 of Act No. 3 of 2005, the provision of infrastructure and facilities becomes a joint responsibility between Government, Local Government, Sports and Community Organizations. The pattern of government cooperation with the business world in accordance with Presidential Regulation (Perpres) No. 38 of 2005 concerning Government Cooperation with Business Entities (KPBU) is alternative in overcoming funding limitations in the provision of sports infrastructure and facilities. The maintenance of infrastructure and facilities that have been available and meet standardization needs to be done regularly.

Conditions of Sports Coaching in Education Units through Sports Special Schools (SKO) and Public Schools Sports coaching at SKO organized by the Ministry of Education and Culture, is not in line with Indonesia's sporting achievement goals. Because that the sports branches are fostered too much and are not focused on the Olympic sport branches. Then the athletes who are fostered are not channeled to be fostered as elite athletes or their training has been interrupted, nor is there a special curriculum and comprehensive standardization covering recruitment, training, and Sports Special Schools (SKO) student competition. School Operational Assistance (BOS) funds for those who are still the same as public schools others. For sports competitions in public schools have not been implemented to support the achievement of sports goals. Such as the National Student Sports Olympic (O2SN) activities carried out in stages starting from the district / city but the sports that are contested are not in line with young age competitions at regional and international levels, such as Asean School Games, Youth Olympic Games. The schedule of the implementation of competitions in the education unit is still not well scheduled (has not adjusted the calendar of young sport events in regional and international).

Throughout the history of the Olympics, Indonesia only won medals at 3 sports are badminton, archery and weightlifting. Indonesia first followed the Olympics in Helsinki, Finland 1952. Since 1952 Indonesia has always participated in the Olympics except the 1964 Tokyo Olympics and the 1980 Moscow Olympics which only consistently won Olympic medals in badminton and weightlifting. Things that become homework in Indonesia include the procedures for sports activities, protection of sports players and sources of funding. The sports in Indonesia must become a culture so that the community in carrying out sports activities is a necessity and a part of life. Besides that the activists sports especially athletes who excel deserve to get appreciation so that when they finish fighting to defend the good name and dignity of the Indonesian people in the arena of international sporting events. The National Development Planning Agency (Bappenas) announced the Human Development (Sports) Indicators and Targets and Strategic Policy Directions (Bappenas, 2020), [12] among others about cultural development and improvement of sporting achievements at regional and international levels. Among others includes strengthening and structuring sports regulations, developing sports culture through families, educational units and the community, including recreational sports, traditional sports and special services as well as educational sports.

The structuring of a sport coaching system in stages and continuously, especially through the synergy of sports coaching in educational units, with achievement sports, based on Olympic sports. The regional potential supported by the application of sport science, sports statistics and remuneration systems and awards, structuring on sports institutions to improve sports performance. There is an increase in the availability of international standard sports personnel and an increase in international standard sports facilities and sports facilities that are disabled-friendly, in addition to developing the role of the business community in facilitation, financing, and the sports industry for 2024 by 40%. Indonesia's position in the 2018 Asian Games was ranked 4th which was upgraded in 2022 to rank 5. For the Asian Para Games which ranked 5th then in the last year for 2022 to become fifth or sixth at least, then the number of gold medals at the Olympic

Games; in Brazil 2016 get 1 gold, and the target for 2024 is 3 gold. And the number of gold medals at the Paralympic Games which is currently 0, the target for 2024 is 3 gold.

While the mechanism of financial assistance carried out by the Government in this case the Ministry of Finance of the Republic of Indonesia [13] provides assistance to sports players as follows (Ministry of Finance, 2020). Among others, that other aid disbursements that have the characteristics of Government Assistance determined by users of the Budget (Budget Users/PA) in the form of money can be done simultaneously or in stages. Then the determination of disbursements in a manner at the same time or gradually determined by the Budget User Authority (Budget Users/PA) by considering the amount of funds and time of implementation of activities. In disbursing other aid funds that have the characteristics of Government Assistance determined by the Budget User in the form of money given to individuals carried out simultaneously based on Decree. Then the disbursement of other aid funds that have the characteristics of Government Assistance determined by Budget Users given to Community Groups and Government Institutions or Non-Government Organizations can be done at once or in stages based on Decree and cooperation agreement between the beneficiary and the Committing Officer (Commitment Making Official/PPK).

Furthermore, the cooperation agreement carried out includes among other things that the rights and obligations of both parties. Amount of assistance provided, distribution procedures and conditions, a statement of the ability of recipients of Government Assistance to use assistance in accordance with the agreed plan. Statement of the ability of recipients of Government Assistance to deposit the remaining funds that are not used to the State Treasury, sanctions, periodic submission of reports on the use of funds to PPK. Then submission of accountability reports to PPK after work is completed or at the end of the fiscal year.

Descriptions of sporting achievements that were participated in and achieved by Indonesia in the Sea Games, Asian Games and the Olympics multi-event activities [14]:

Indonesia's achievements in the Olympics

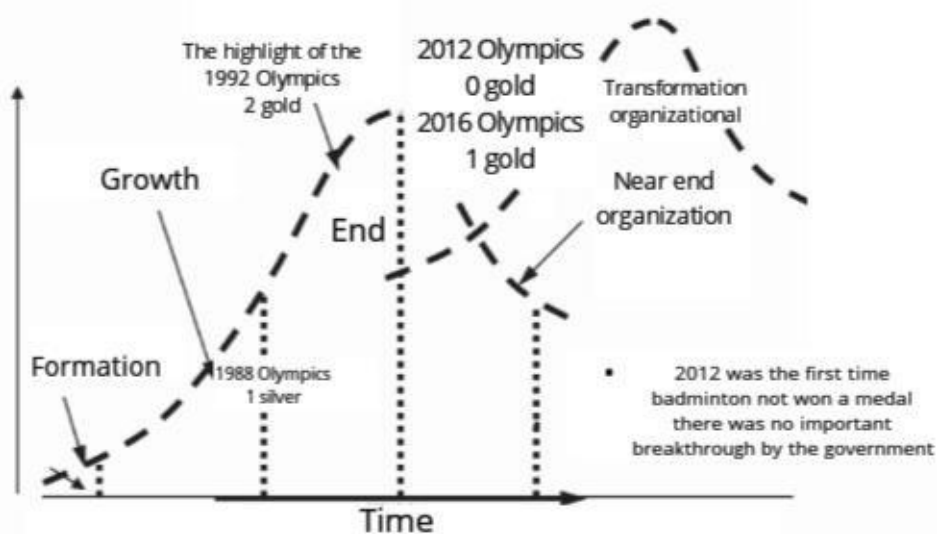


Figure 2. Graphic Indonesian Development Fluctuations at Olympics

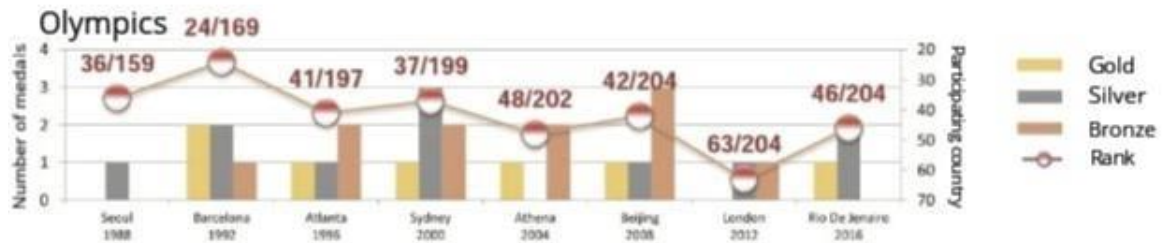


Figure 3. Graphic Indonesian Sports Achievement at Olympics

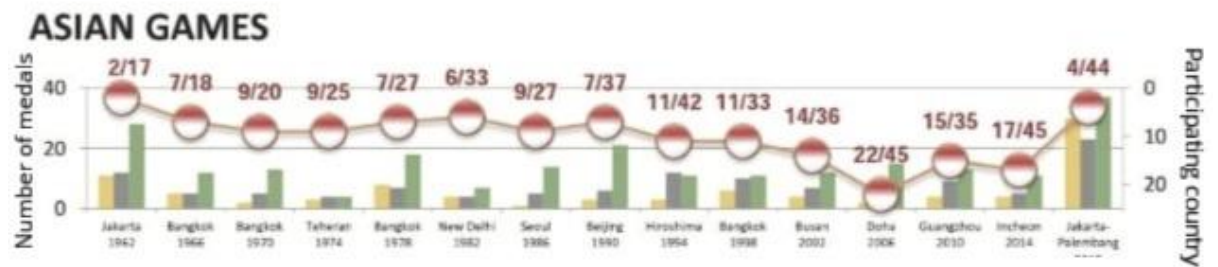


Figure 4. Graphic Indonesian Sports Achievement at ASIAN GAMES

Rank	NOC	Gold	Silver	Bronze
1	China	132	92	65
2	Japan	75	56	74
3	Republic of Korea	49	58	70
4	Indonesia	31	24	43
5	Uzbekistan	21	24	25
6	Iran	20	20	22
7	Chinese Taipei	17	19	31
8	India	15	24	30
9	Kazakhstan	15	17	44
10	DPR Korea	12	12	13
11	Bahrain	12	7	7
12	Thailand	11	16	46
13	Hongkong	8	18	20
14	Malaysia	7	13	16

Figure 5. Indonesian Sports Achievement at ASIAN GAMES

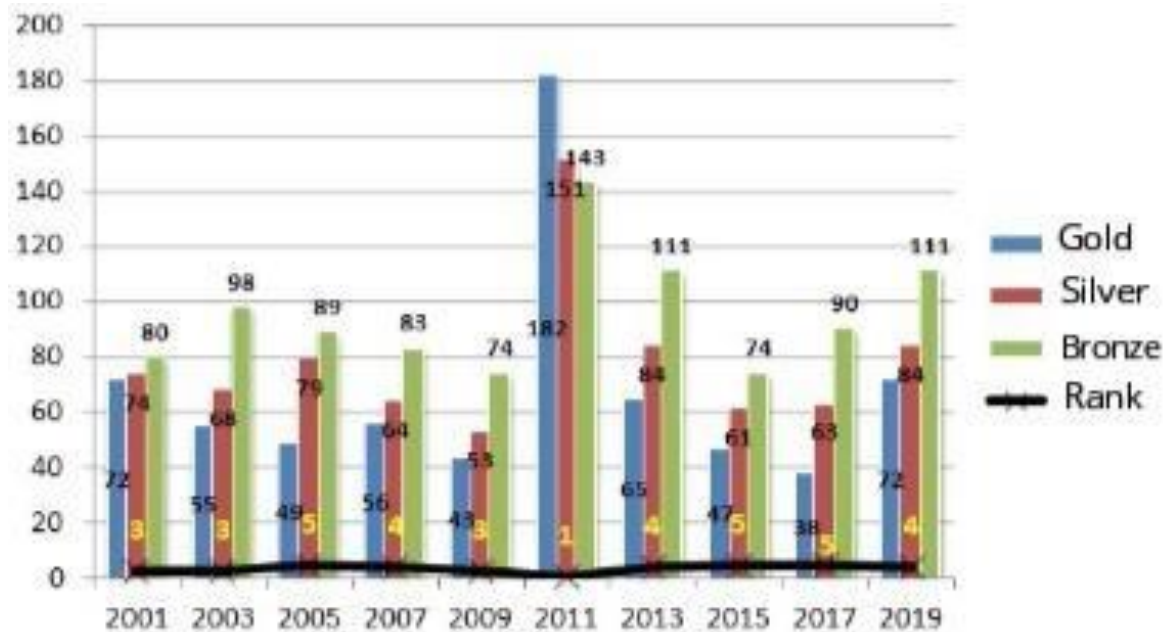


Figure 6. Graphic Indonesian Sports Achievement at SEA GAMES

The comparison obtained from Australia, China, Singapore and Indonesia is as follows:

1) The legal system of the countries influencing the development of their athletes, such as Indonesia, is a country that adopts the concept of Civil law, Australia and Singapore adheres to the common law conception, while China has its own legal system that focuses on the influence of regional autonomy by assuming politics as a controller stronger than law each country's legal system has advantages and disadvantages of each in accordance with the conditions of their country which certainly has an impact on the regulations made and their implementation;

2) The sports system in each country will determine success in supporting sports such as Indonesia currently governed by Government organizations, namely the Ministry of Sports and Youth, and Non-Government Organizations, namely the Indonesian National Sports Committee (KONI) and the Committee The Indonesian Olympics (KOI). While the sports system in China by the Chinese Ministry of Sports, the sports system in Australia has the Australian Sport Commission (ASC) which is responsible to the Minister of Sports and the Australian Parliament and Australian Olympic Committee (AOC), The sports system in Singapore is managed by the Government under the Ministry of Sports Affairs or who referred to as the Singapore Sport Council (SSC) and Non-Government Organization, the Singapore National Olympic Council or the so-called Singapore National Olympic Committee (SNOC). In general, sports organizations in the world are divided into 4 (four) forms. [15] ;

a) National Organizing Committee (NOC) as the only sports organization with the status of a Government Organization (GO) with the example of China through the Ministry of Sports of China ex officio President of the NOC - China / other Socialist;

b) There are 2 (two) Sports Organizations namely as the National Sport Council (NSC) as Government Organization (GO) in this case the Minister of Sports ex-officio President of the National Sport Committee (NSC) and the National Organizing Committee (NOC) as independent NGO's as in countries of Malaysia (National Sport Committee and Olympic Council of Malaysia), United Kingdom (Sport England and British Olympic Association), Australia (Australian Sport Commission and Australian Olympic Committee), Singapore (Singapore Sport Council and Singapore Olympic);

c) Countries that were originally are two separate NGOs National Sport Committee (NSC) and National Olympic Committee (NOC) which then finally rejoined a country, the Netherlands: the Nederlands Olympisch Committee (NOC) Nederlandse Sport Federatie (NSO), Germany: 2006

which was once composed of the Deutscher Sport Bund and the Nationales Olympischer Committee Deutschland united under the name Deutscher Olympischer Sport Bund, South Korean country with the Korean Olympic Committee and the Korea Sports Council joined in 2009 under the name Korea Olympic Committee;

d) National Organizing Committee (NOC) as the only sports organization with the status of Non-Government Organization (NGO) with the example of the United States of America with the United States Olympic Committee (USOC);

3) In terms of achievement, China has experienced rapid progress since re-participation in the United States in 1984 with 15 gold and 4th positions and had occupied the first position with 51 gold at the 2008 Olympics in Beijing, most recently at the 2016 Olympics in Rio de Janeiro Brazil occupying the third position with 26 golds. Australia experienced rapid progress in Moscow Uni Soviet in 1980 with 2 gold and 15th positions. Then 4th position with 16 gold in Sydney, Australia and last 2016 in Rio De Janeiro with 8th gold, 10th position. Singapore as a neighboring country despite having a small population but trying to get up with sources their support and try to perform optimally even though it was only in 2016 at the Olympics in Rio de Janeiro Brazil get their first gold medal.

4) Financial support, the Chinese state is fully supported by their country with a single sport system under Government control, in Australia getting full support from the Government through the Australian Sport Commission (ASC) and Singapore fully supported by their Government Singapore Sport Council (SSC), while Indonesia until now still relies on full support from the Government.

No	Article	Government	KOI	KONI	Requirement (Indonesia)
1.	Article 13 of Act No. 3/2005 (The Government has the authority to regulate, foster, develop, implement, and oversee)	Full authority	N/A	As advisor to Government	KONI has Authority as Implementer/Executor and report to Government
2.	Article 36 of Act No. 3/2005 (The word "national sports committee", never meant as the name of an organization)	N/A	N/A	Stated as "national sport committee"	KONI Clearly Stated "Indonesian National Sport Committee" (KONI)
3.	Article 44 of Act No. 3/2005 (stated explicitly the name of the Indonesian Olympic Committee (KOI))	N/A	Clearly Stated KOI	As a duplicate of KONI	To be one Organization (KONI)
4.	Article 69 of Act No. 3/2005 (Funding of Sports)	0.056% (APBN 2017)	N/A	N/A	(1-2) % from Government/ APBN
5.	Article 88 of Act No. 3/2005 (Resolution of Sport Dispute)	N/A	Has BAKI	Has BAORI	To be one Arbitration Institution

Figure 7. Article Revision Table

No	Description	CHINA	AUSTRALIA	SINGAPORE	INDONESIA	Requirement (INDONESIA)
1.	Legal System	Own Legal System with Political stronger than Law	Common Law	Common Law	Civil Law	Revise Act No 3/ 2005
2.	Sport Organization	GO/ Chinesse Ministry of Sport (GO Only)	GO/ASC & NGO/AOC (GO & 1 NGO)	GO/SSC & NGO/SNOC (GO & 1 NGO)	Government/GO & 2 NGO (KONI & KOI)	GO & 1 NGO
3.	International Achievement (Olympic)	Rank 1,2 ,3 in the last 3 sessions	Rank 6,8 and 10 in the last 3 sessions	1 GOLD in Olympic 2016	Always 1 Gold except in 1992, 2 Golds	3 Golds in the next Olympic (target Government)
4.	Financial Support	By Government	By Government	By Government	By Government	By Government

Figure 8. Policy Comparison Table

4 Conclusion

In order to optimize the role of Indonesian National Sports Committee KONI) as an Executor, it is necessary to take strategic steps to achieve optimal goals. The role of the executor needs to be optimized by clarifying his position in carrying out the duties. Functions and authority by appointing and returning the Indonesian National Sports Committee (KONI) as the only Non Government Organization (NGO) and function of the Government which acts as a regulator and facilitator only. Revise Act No. 3/2005 concerning the National Sports System by amending Articles 13, 36, 44, 69 and 88 of Act No. 3/2005 concerning the National Sports System mentioning the role of the executive in Non-Government Organizations namely the Indonesian National Sports Committee (KONI). Explicitly mentions the name of the Indonesian National Sports Committee (KONI). Uniting the Indonesian Olympic Committee (KOI) into the Indonesian National Sports Committee (KONI). Later its function could be in coaching and exiting for the Olympics. Funding by emphasizing the government allocates (1-2)% for the development of Indonesian sports achievements. Only 1 (one) sports dispute resolution agency in Indonesia. The need for the Government's role in improving the performance of Indonesian sports that adheres to the civil law system like improvements in supporting regulations, facilitations and funding. The right guidance by conducting comprehensive comparative studies to several countries that are progressing rapidly in their achievements, by taking the right benefits and can be applied in Indonesia.

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Analysis of Terrorism Criminal Act Case Handling In Indonesia

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Abstract. Terrorism funding criminal act case handling is an important effort in terrorism criminal act eradication. Currently the efforts only focus on terrorism criminal actor handling but they don't pay attention to funding from the terrorism criminal actors. The study used was normative juridical study. Normative legal study is literature study namely the study of legal books related to the analysis used in the study, which was qualitative analysis. The result of the study shows that criminal terrorism act handling was a legal consequence and a form of accountability that had to be upheld because criminal terrorism act was an extraordinary and certainly harmful crime so terrorism criminal act handling had to be done optimally in accordance with legal procedures. The obstacle faced in terrorism criminal act handling was the inconsistency of formulation of the criminal system on terrorism criminal act so legal renewal was required through improvement of criminal act formulation.

Keywords: Handling; Criminal Act; Terrorism.

1 Introduction

Terrorism is one of the crimes that has become a highlight of all countries around the world that are considered disturbing and frightening. Acts of terror cause a loss of security in the midst of society and reduce the authority of the government as a body that should provide protection and security [1]. Terrorism is a crime against humanity in an organized movement. Nowadays, terrorism has a broad and global network that threatens national and international peace and security.

In Indonesia, the Law No. 9/2013 on the Prevention and Eradication of Criminal Acts of Terrorism Funding, Article 1 paragraph 2 states "Terrorism Crimes are all acts that meet the elements of criminal offenses in accordance with the provisions in the Law governing the eradication of terrorist acts [2]." The government issued this law because of the critical conditions in Indonesia, i.e. terror attacks continue to occur.

Efforts to eradicate terrorism by the government are considered by various groups to still reap the pros and cons because the government's efforts so far have been limited to efforts to arrest and punish perpetrators but do not pay attention to other aspects, for example terrorism funding. Therefore, it is believed that efforts to tackle terrorism will not be optimal without the prevention and eradication of terrorism funding [3].

So far, the government has tried to tackle terrorism by enacting the Law No. 15/2003 on the Establishment of Government Regulations in lieu of the Law No. 1/2002 on the Eradication of Terrorism Criminal Acts into the Law No. 8/2010 on Money Laundering. Related to free and active foreign policy, the Government of the Republic of Indonesia has enacted the Law No. 37/1999 on

Foreign Relations, the Law No. 24/2000 on International Treaties, and the Law No. 9/2013 on the Prevention and Eradication of Criminal Acts on Terrorism Funding. The issuance of the aforementioned laws and regulations is directed to answer the people's anxiety over acts of terror that occur.

In principle, the law of ratification of a convention has not yet been fully implemented or requires further regulation so that the terrorism can be handled. Muladi states that terrorism is an extraordinary crime that requires treatment by utilizing extraordinary ways for some reasons. First, terrorism is an act that creates the greatest danger against human rights. Second, terrorism targets are random or indiscriminate which tend to sacrifice innocent people. Third, there is possibility of using weapons of mass destruction by utilizing modern technology. Fourth, it tends to be negative synergy between national and international terrorist organizations. Fifth, there is possibility of cooperation between terrorist organizations and organized crime both national and transnational which can jeopardize international peace and security [4].

In Indonesian law, there is *Nullum crimen sine poena*, which means that no crime should be allowed to pass without punishment. However, due to the fact that terrorism is no longer just an international crime and has become an international organized crime, it is very difficult to eradicate terrorism without cooperation in strict legal regulations. Therefore, terrorism offense can be properly addressed and cannot develop amidst the social life of the community [5].

Terrorism is a very troubling crime and has caused many casualties. Therefore, funding problems are the main element in every act of terrorism so that efforts to tackle terrorism crime are believed to be not as successful as expected without eradicating their funding. Efforts to eradicate terrorism carried out by the government do not seem to be maximal, and thus it needs special handling, especially in terms of funding.

Indonesia is one of the countries that often experience terrorism crimes, so the chain of terrorism offenses must be based on law in its application. It is expected that terrorist activities will not be able to proceed as they should and there will not be more acts of terror in the Republic of Indonesia in the future.

Therefore, the Government of the Republic of Indonesia made various efforts to refine and renew efforts to prevent and eradicate terrorism. Therefore, the author is interested in explaining this issue in a scientific study entitled "**Analysis of Terrorism Criminal Act Case Handling Referring to the Law No. 9/2013.**"

1. Research Methods

The method used in this research is Normative Juridical Approach. Normative legal research is a research with a statutory, conceptual, analytical, comparative, historical, philosophical approach, and case approach. By conducting library research, initial data were obtained to be analyzed and used as material in this paper. The sources of legal material consist of secondary data and primary data [6]. The data analysis used in this study is qualitative analysis.

2. Result and Discussion

2.1. Terrorism Criminal Case Handling Referring to the Law No. 9/2013.

The Law No. 9/2013 confirms that terrorism funding is any act in the context of providing, collecting, giving, or lending Funds, both directly and indirectly, with the intention to be used and/or known to be used to carry out terrorist activities, terrorist organizations, or terrorist [7].

Terrorism in Indonesia is included in the criminal sanctions section. Criminal sanctions are the imposition of suffering on a person found guilty of committing a crime or a criminal act through a series of judicial proceedings by a specific authority or law. With the imposition of criminal sanctions, it is expected that people will not commit criminal acts again. Criminal sanctions contain elements and characteristics as follows: first, the criminal is in essence an imposition of suffering or misery or other unpleasant effects. Second, the criminal is intentionally given by persons or entities that have the authority. Third, the crime is imposed on someone who has committed a crime according to the law. Fourth, the crime is a statement of self-deprecation by the state of a person for violating the law [8].

The purpose of criminal law is to fulfill a sense of justice for all levels of society. Criminal law also has control of a criminal act since, in criminal law, someone who commits a crime will be educated and sanctioned in accordance with the criminal act he has done. Therefore, someone who commits the crime can feel the deterrent effect so as not to repeat his actions again after undergoing the sanction. The current problem is the spread of terrorism cases, although it has been through several criminal efforts, but it is still not optimal.

Hikmahanto Juwana, an International Law expert from Universitas Indonesia, recognizes the difficulty of making restrictions on terrorism even though it can be felt factually and can be seen its characteristics, such as attacks with violence that are indiscriminate (blindly, carelessly), carried out in civil places or against people civilian [9].

Thus, the Law No. 9/2013 is considered an appropriate statutory regulation to break the terrorism funding link and must certainly be supported by law enforcement to be carried out properly and can also be justified legally. The element of funding is one of the main factors in every terrorist act. Thus, the efforts to tackle terrorism must be followed by efforts to prevent and eradicate funding. The Law No. 9/2013 on Terror Funding Criminal Acts is a regulation established by the Government of Indonesia in responding to acts of terrorism which focuses on preventing and eradicating acts of terrorism funding.

Article 2 of the Law No. 9/2013 on funding is applicable to:

- a. Any person who commits or intends to commit a criminal act of financing terrorism in the territory of the Unitary Republic of Indonesia and outside the territory of the Unitary State of the Republic of Indonesia; and/or
- b. Funds related to terrorism funding in the territory of the Unitary Republic of Indonesia and outside the territory of the Unitary Republic of Indonesia.

In addition, this law also applies to criminal acts of financing terrorism that occur outside the territory of the Unitary Republic of Indonesia if:

- a. conducted by Indonesian citizens;
- b. related to the Criminal Acts of Terrorism against Indonesian citizens;
- c. related to the terrorism act against Indonesian government facilities, including representatives of Indonesia or the residence of diplomatic or consular officials from Indonesia;
- d. related to the terrorism act carried out as an effort to force the Indonesian government to take or not take an action;
- e. related to the terrorism act against aircraft operated by the Indonesian state;
- f. related to the terrorism act on a ship having the flag of the Unitary State of the Republic of Indonesia or an aircraft registered under Indonesian law at the time the crime was committed; or
- g. carried out by every person who does not have citizenship and resides in the territory of the Unitary Republic of Indonesia.

Article 4 states that any person who intentionally provides, collects, gives, or lends funds, directly or indirectly, with the intention of being used wholly or in part to commit terrorism acts, terrorist organizations, or terrorists is convicted of a criminal offense financing terrorism with imprisonment a maximum of 15 (fifteen) years and a criminal fine of no more than Rp1,000,000,000.00 (one billion rupiah). Article 5 states that any person who commits an evil agreement, trial, or co-administration to

commit a crime of financing terrorism shall be convicted of committing a crime of financing terrorism with the same crime as referred to in Article 4.

Article 6 states that any person who intentionally plans, organizes or moves others to commit criminal acts as referred to in Article 4 shall be convicted of committing a criminal act of financing terrorism with life imprisonment or imprisonment for a maximum term of 20 (twenty) years. Article 7 states that in the event that the convicted person is unable to pay the criminal penalties as referred to in Article 4 and Article 5, the criminal penalties will be replaced with a maximum imprisonment of 1 (one) year 4 (four) months.

Handling of terrorism is a legal consequence and the form of responsibility that must be upheld because terrorism is an extraordinary crime and clearly very detrimental so that handling of terrorism crime must be carried out optimally in accordance with legal procedures. Thus, one of the ways to be able to encourage the prevention and eradication of terrorism in Indonesia is breaking the chain of terrorism violence. However, to do so, it is certainly not enough to use repressive measures alone, but there are also preventive measures in them. This will prevent or cut off terrorism networks themselves. One of them is to cut off or stop the flow of terrorist funds in order to maintain public order and security.

2.2. Terrorism Criminal Case Handling Referring to the Law No.9/2013.

The funding aspect is an important chain behind an act of terrorism. Terrorism activities require funds in a variety of needs such as recruitment, propaganda, training, logistical supplies, purchasing weapons and other supporting equipment as well as accommodation for execution. In general, the understanding of the element of funding is one of the main factors in every act of terrorism. Thus, the efforts to tackle terrorism should be followed by efforts to eradicate terrorism funding.

The criminal liability of the perpetrators in the law regarding the criminal act of financing terrorism is more focused on the imposition of serious crimes, especially against sponsors of funds such as corporations and corporate controlling personnel. It is also due to the possibility of criminal fines in lieu of fines from the sale of assets or assets of the corporation after the corporation or corporate control personnel do not pay or underpaid fines in the criminal decision [10].

Soerjono Soekanto [11] states that law enforcement is not merely the implementation of legislation, there are other factors that influence it, namely: First, the legal factor itself. Second, law enforcement factors, i.e. the parties who form or apply the law. Third, the factor of facilities that support law enforcement. Fourth, community factors, i.e. environmental factors where the law applies or is applied. Fifth, cultural factors, i.e. as the work, creation, and taste based on human initiative in the struggle of life.

Terrorism act is any act that fulfills an element of criminal offense in accordance with the provisions in the law concerning criminal acts of financing terrorism. One of the facts that based the issuance of the Law No. 9/2013 on the Criminal Acts of Terrorist Funding, is that the element of funding is one of the main factors in every terrorist act, so efforts to tackle terrorism must be followed by efforts to prevent and eradicate terrorism funding. However, in reality, law enforcement in terrorism often experiences obstacles such as:

- a. Statutory Factors (Legal substance). In tackling terrorism, inconsistencies in the formulation of the criminal system against terrorism often occur so that legal reform is needed through the improvement of the formulation of criminal acts.
- b. Law Enforcement Factors In short, it can be said that this structural component allows us to expect how a legal system should work. Law enforcers are key in upholding terrorism, however, there are usually many conflicts in the social life of the community.

- c. Facility Factors In the law enforcement of terrorism, facilities and infrastructure are deemed incomplete in terms of providing networks to detect perpetrators of funding to stop terrorism crimes.
- d. Every citizen or group of people must have legal awareness, which is high, medium or low legal compliance. This means that terrorism cases often face the pros and cons in society so that the impact on the slow resolution of terrorism cases on the one hand, upholding the law while on the other hand it is considered a violation of human rights.
- e. Cultural Factors Many cultural variations can lead to certain perceptions of law enforcement. Cultural variations are very difficult to be uniform, therefore law enforcement of terrorism should pay attention to aspects of culture that grow in the social life of the community.

Thus, the problem of law enforcement is an issue that is never ceased to be discussed. In this case, the law is no more than ideas or concepts that reflect in it what is called justice, order and legal certainty as outlined in the form of legislation aiming to achieve certain goals. However, it does not mean that the applicable legal regulations are interpreted to be complete and perfect, but rather a framework that still needs improvement. To realize the purpose of the law, the level of professionalism of the law enforcers is highly determined, which includes the ability and skills both in spelling out regulations and in applying them.

4 Conclusion

Handling of terrorism is a legal consequence and the form of responsibility that must be upheld because terrorism is an extraordinary crime and clearly very detrimental so that handling of terrorism crime must be carried out optimally in accordance with legal procedures. The barriers faced in handling the terrorism funding include inconsistencies in the formulation of the criminal system against criminal acts of terrorism. Thus, legal reform is needed through improving the formulation of criminal acts in its enforcement usually experiencing many conflicts in the social life of the community. Besides, the facilities and infrastructure are considered to be incomplete in terms of providing networks to detect perpetrators of funding in order to stop terrorism and cultural variations that can lead to certain perceptions of law enforcement. Cultural variations are very difficult to be uniform. Thus, law enforcement of terrorism should pay attention to aspects of culture that grow in the social life of society which often face the pros and cons in society. As a result, the impact on the slow resolution of terrorism cases on the one hand, upholding the law while on the other hand it is considered a violation of human rights.

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Indonesia's Inability in Removing Self from Colonial Law (Study of Employment Laws)

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Abstract. When a national law came into force, the previous law made in the colonial era was concrete that the Constitution should be repealed. For example, the enactment of Law No.5 / 1996 on the Basic Terms of the Agrarian repeal the provisions of land, water and natural resources contained in Book II of the Civil law, or the operation of Law No. 1/1974 on Marriage revokes the provisions on matters relating to marriage found in the Civil Law Book. However, this is not the case with the Employment Law where provisions of Chapter VIIA of Article 1601 of the Civil Code until 1617 of the Civil Code are still in effect, until the drafting of an omnibus draft law on Work Creation, also does not invalidate the provisions of the Employment in Code Civil Law. This study aims to examine historically and conceptually whether the terms of the employment in the Code Civil Law are right or not. Research method is normative. The results show that Indonesia must break free from colonial rule and gradually establish its national law that has the philosophical basis of Pancasila. To make it happen, the revisions to Law No. 13/2003 should be done in addition to the burden of: (a) employment agreement between husband and wife, b) provision of fines accompanying compensation, c) employers' obligation to pay wages on time, d) employers' obligation to provide employment certificates, 5) Responsibility and compensation for Outsourcing Contract.

Keywords: Colonial Law, Labor, Indonesia

1 Introduction

Indonesia's independence since 1945 has not made Indonesia free from colonial influence in the colonial era. A concrete example, for the rule of law in nature, to this day Indonesia still uses Colonial leave law as the Code of Civil Law [1]–[4], while the Netherlands itself has not used the Constitution we now use, since 1992 [5]. The use of this Dutch legal code is based on the principle of concordance [6] found in the transitional rules of the 1945 Constitution.

It should be understood, that the basic application of concordance should be temporary [7], given that the Netherlands differs from Indonesia in terms of culture, culture, customs, religion [8], and the geographical condition of the country. Therefore, a positive civil law that should prevail in Indonesia is a civil law that has philosophical foundations based on the views and personality of the

people of Indonesia by providing the basic principles of justice, justice and prosperity for the benefit of every citizen, always ethical, moral and spiritual [9], [10] and certainly not the current Code of Civil Law.

In fact, the attempt to break free from concrete colonial law has been around since Indonesia's independence, evidenced by the efforts of legislative drafting to date. However, the failure was due to differences in view of the development of the law, namely whether to use national law and to abolish the colonial remnant law altogether, on the other hand many still wanted to go along with the national law[5].

Currently the master rule regarding employment is set forth in Law No. 13/2003 on Employment. But strangely enough, the existence of Law No. 13/2003 does not automatically repeal the provisions of the provisions of Chapter VIIA of Article 1601 until 1617 the Code of Civil Law, although similar colonial relics laws have been repealed. If the purpose of law making in Indonesia was to break free from colonial legal rules, then the existing provisions of the Employment Code should be adopted only in the present Employment Law, so that one of the historical reasons for establishing the Employment Law could be fulfilled. Even if it is understood to be studied further, the Employment Law in Indonesia is currently undergoing 2 revisions and 2 changes, namely: 1) Law No. 13/2003 repealed Law No. 28 of 2000, repealed Law No.11 / 1998 and Law No. 25/1997. 2) Law No. 28/2000 revised Law No. 25/1997, 3) Law No.11 / 1998 revised Law No. 25/1997, 4) Law No.25 / 1997 repealed Law No.1 / 1951.

The repeal of the existing provisions of the Civil Code, coupled with the transitional provisions of Article 191 which read "All implementing rules governing employment shall prevail to the contrary and / or have not been replaced by the new regulations under this Act" matters relating to the working conditions of the Civil Code are still in use. Why is that? Because there are provisions of the work set out in the Civil Code, but not in the Employment Law.

Previous studies have shown that Indonesia should have withdrawn from the Code of Civil Law due to many provisions that are no longer relevant to the values and development of society [5]. Indonesia was already trying to break free from colonial law, but it was not possible because of the differing views of the legislators [5], influencing the flow of colonial governmental law especially during the new era of 1973-1997 [10].

However, to date no study has examined the concept of whether the terms of the employment agreement in the code of civil law are right or wrong. It is hoped that the results of this study will help Indonesian legislators and governments determine their attitude and formulate appropriate legislation in the field of employment, thus freeing them from the shadow of colonial law.

2 Method

The research method used in this study is the normative method [11]. The purpose of this study is to find the answer whether or not the provisions regarding employment contained in the law code of civil law are not revoked, even though national laws on employment in Law No.13 / 2003 on Labor have been applied. The data in this article is presented descriptively and qualitatively. To answer the formulation of research problems, a regulatory approach, historical approach and conceptual approach are used so that research objectives can be answered [12].

3 Discussion

3.1 History of Indonesian Labor Law.

3.1.1 Before Indonesian Independence

The period before independence could be said to be part of the dark Indonesian period, because the Indonesian people lived during colonial times and slavery [13], [14]. To overcome this, the Netherlands issued [15] *Staatblad* 1817 No. 42 which contained a ban on the importation of slaves into Java, then following Regelling Regulations 1818 Article 115 which abolished slavery.

It turns out that slavery is only changing terms, but the essence (worker excitation) is the same, namely Rodi. Rodi's work in Indonesia [16] began with the cooperation of certain villages or tribes, which gradually shifted into forced labor, to serve the interests of the Dutch Indian government and its dignitaries. Because of this, a series of other regulations were endorsed to be issued such as Registration of slave children: *Staatblad* 1833 Number 67 and exemption from slavery for seafarers who were made slaves *Staatblad* 1848 Number 49.

Codification of Indonesian Civil Code was announced on April 30 1847 through *Staatblad* No. 23 and entered into force in January 1946 [17]. Previously, Code of Civil Law was a codification compiled by the Law Commission for the Dutch East Indies in 1839 [2]. The existence of CODE OF CIVIL LAW is actually not for the son's earth but for European descent and the like. In the end, Indonesia adopted the law to cover the legal vacuum and help resolve legal issues in Indonesia [5]. At Code of Civil Law, labor provisions are regulated in Articles 1601a to 1617.sla

Apart from being regulated in the Civil Code, employment is also regulated in other provisions such as the Ordinance on the Mobilization of Indonesians to Work Outside Indonesia *Staatsblad* Year 1887 Number 8, Ordinance dated December 17, 1925 Regulations concerning Restrictions on Child Labor and Night Work for Women (*Staatsblad* Year 1925 Number 647); Ordinance of 1926 Regulations concerning the Work of Children and Young People on Ships (*Staatsblad* Year 1926 Number 87), Ordinance dated May 4, 1936 concerning Ordinance for Regulating Activities for Prospective Workers (*Staatsblad* Year 1936 Number 208), and Ordinance concerning Repatriation Workers Received Or Deployed from Outside Indonesia (*Staatsblad* Year 1939 Number 545), and Ordinance Number 9 Year 1949 concerning Restrictions on the Work of Children (*Staatsblad* Year 1949 Number 8).

3.1.2 After Indonesian Independence

The first draft law concerning employment after Indonesian independence was Law No. 12 of 1948 concerning Work. The background to the creation of this law as a preamble to the law is that to ensure decent work and livelihoods for workers, it is necessary to establish rules regarding labor work. Matters regulated in this work law include child and young workers, female workers, work and rest periods, workplace and labor housing, employer responsibilities, criminal provisions, investigation of violations, and additional rules. Uniquely, the birth of the work law does not necessarily regulate the repeal of legislation compiled by the colonial, which

has been in effect since before independence. In addition to this law, labor matters are also regulated separately in the following laws:

- 1) Law no. 33 of 1947 concerning work accidents
- 2) Law no. 23 of 1948 concerning labor inspection
- 3) Law no. 21 of 1954 concerning labor agreements between trade unions and employers
- 4) Law no. 22 of 1957 concerning the Settlement of Industrial Relations Disputes
- 5) Law no. 18 of 1956 concerning the Approval of the Convention on International Labor Organizations (ILO) No. 98 concerning the Basics of the Right to Organize and Collective Bargaining

All of these laws do not have any repeal of any labor regulations made during the colonial era. The making was gradual and not integrated in one law.

Efforts to escape from colonial law in the field of labor began to appear when entering the second millennium era, namely the issuance of Law Number 25 of 1997 concerning Labor. Based on the consideration, this Law was born in the context of national development to realize a prosperous, just, prosperous and equitable Indonesian society both material and immaterial. Another goal is to protect workers for the purpose of ensuring the basic rights of workers and ensuring equality of opportunity and treatment without discrimination to realize the welfare of workers and their families in the context of fair industrial relations. Matters regulated in this law are the Foundation, principles and objectives of its formation, equal opportunity and treatment, employment planning and information, employment relations, Pancasila industrial relations, protection, wages, welfare, service placement, foreign workers, criminal rules until the transitional regulations. The biggest portion of the regulation lies in the Pancasila industrial relations, which includes discussions on labor unions, organizing organizations, bipartite cooperation institutions, tripartite cooperation institutions, company regulations, joint labor agreements, termination of employment, termination of industrial disputes, contraction and correctional industrial relations of Pancasila.

The seriousness to break free from colonial legislation is seen in Article 198 of Law No. 25 of 1997, where the article revoked the following set of laws that were born before the independence of the Netherlands, which includes ordinances that were born since 1887, until post-independence, namely Law Number 14 of 1969 concerning Basic Provisions regarding Labor;

But because at the time of its birth reaped a lot of controversy and rejection from the workers[18], finally the following year was made changes to this law through Law No. 11/1998. The point is that the existence of Law No. 11 of 1998 delayed the enactment of Law No. 25/1997 to take effect on October 1, 2000 (even though it should have been October 1, 1998). Then, in September 2000, the enactment of Law No. 25/1997 was again postponed until October 1, 2002 through a government regulation in lieu of law number 3/2000.

Finally, labor provisions are currently regulated in Law No. 13/2003 on Employment. The existence of this law revokes a series of laws that were previously revoked in Law No. 28 of 2000, coupled with revoking Law No. 28 of 2000 itself. This law was born to avoid legal vacuum due to workers and employers' rejection of the PPK and PPHI Bill, the DPR and the Government agreed to revoke Law No. 25 of 1997 concerning Manpower, as well as perfecting the previous labor law.

3.2 Labor Regulations Regulated in the Civil Code but Not Regulated in Law No. 13/2003

Current labor law is a law that was born that marked the era of reform and the increase in its birth did not necessarily make Indonesia as a whole free from colonial laws. Matters regulated in Chapter VIIA Article 1601 to 1617 Code of Civil Law remain in force. Whereas based on the explanation of this law, the enactment of Law 13/2003 also accommodates the provisions in the old legislation, and to revoke the provisions that are no longer in accordance with the demands and developments of the times, is also intended to accommodate very basic changes in all aspects of life the Indonesian nation with the start of the reform era at that time. So why not just accommodate the provisions contained in Code of Civil Law as accommodating this Act to the old legislation in the field of labor?

But strangely, even though it has been amended 3 times, it does not necessarily make the legislators in this case the DPR and the president think about breaking away from colonial law. This is evident from the non-regulation of several matters related to employment contained in the Civil Code, in Law No.13 / 2003, among others: *first*, regarding employment agreements between husband and wife. In Article 1601i of the Civil Code, it is stated that the employment agreement between the husband and wife is null and void.

Second, the fine imposed by the employer on workers must not be accompanied by compensation. In Article 1601v it is stipulated that the employer must not submit a fine as well as compensation to the worker, and if the work agreement regulates it, then the consequence is the agreement is null and void.

Third, regarding the obligation of employers to pay labor wages. Article 1602 of the Civil Code explains that employers must pay workers' wages on time, while this is not explicitly regulated in Law No.13 / 2003. Article UU No. 13 of 2003 only stipulates that employers must carry out what has been agreed in the work agreement, but does not explicitly state that the employer is obliged to pay wages at the specified time.

Fourth, regarding the obligation of employers to provide employment certificates to labor workers who no longer have a working relationship with employers. Article 1602y states that the employer is obliged to provide a certificate regarding the way workers fulfill their obligations and the reasons for the employment relationship to end. The certificate made by the entrepreneur must be written honestly and without lies. If the entrepreneur refuses to make or declare that is not true in the statement, then the entrepreneur must bear the losses incurred as a result. Even if an agreement is made that can eliminate or limit the obligations of the employer, the agreement is null and void. Unfortunately, the rules regarding employers' obligations to provide this employment certificate are not regulated at all in Law No. 13/2003 concerning employment.

Fifth, regarding the division of labor which actually Act No. 13/2003 also regulates this matter, but there are crucial things that are not regulated there, namely regarding work responsibilities. CODE OF CIVIL LAW regulates work responsibilities in the chartering of work and compensation both in terms of the contractor and the assignor. This is arranged to avoid greater losses at one party.

3.3 Reasons Why Must Break Away from Colonial Law

As a colonial product, Code of Civil Law was not formed on the basis of the nation's philosophical and personality. Personality can be interpreted as an essential nature that is reflected

in the attitude of a person or a nation that distinguishes it from other people or nations. The nation can be interpreted as a society that together with its ancestry, customs, language and history, as well as self-government[19], [20]. The legal system of a nation cannot be separated from its human context because the law exists and is destined for human life [21]. Therefore, the law of a nation of its existence must be rooted in a socio-cultural community. It is hoped that the law that is formed based on the philosophical and personality of the nation can become a law that puts forward the basic principles of justice, truth and legal certainty. In addition, adoption of the values of the nation's philosophy can help a law and regulation be enforced more effectively and efficiently.

In addition, efforts to build a national legal system based on the philosophy of Pancasila[22] are certainly not in line with the existence and recognition of the working conditions contained in Code of Civil Law at present. Efforts to free themselves does not mean that all those contained in Code of Civil Law are not suitable for the Indonesian people. However, if it does not immediately break away from the colonial law, the national legal system based on Pancasila will not be fully formed, because there will always be the shadow of colonialism in it.

Especially from a historical point of view, Code of Civil Law is actually not for Indonesian citizens[23], because at the beginning of its implementation in Indonesia, Code of Civil Law was intended for the European group (or its equivalent) and Chinese people who submitted to Code of Civil Law. In the end Indonesia adopted the Code of Civil Law to fill the existing legal vacuum. But now, Indonesia has developed in such a way as to be far more advanced than before. Indonesia has been able to make its own rules, and slowly break away from colonial rules, as is done in the Agrarian Law and Marriage Law.

Basically Law No. 13/2003 on the elucidation section of the law [24], it has realized that labor regulations that have been in force so far, including some that are colonial products, place workers at a disadvantage in the employment services and system industrial relations that emphasizes differences in position and interests so that they are no longer in accordance with current needs and demands of the future. Reflecting on this spirit, it should be done not only partial revocation of labor regulations in the colonial era, but as a whole including the revocation of working conditions in Code of Civil Law.

If the relevant articles are found, the provisions in the article can be adopted in the existing Manpower Law. The advantage is that the Manpower Act can expressly revoke the work provisions contained in Code of Civil Law. This also helps to clarify the position of Code of Civil Law in Indonesia, so that it will gradually become pure literature.

4. Conclusion

Indonesia should free itself from colonial legislation and slowly develop its own national law, one of which is in the field of labor, because the best civil law is the philosophy of Pancasila, and has philosophical foundations based on the views and personality of the Indonesian people by promoting the principles - basic principles of justice, truth and legal certainty. For this to happen, Law No. 13/2003 should be revised, and the revision is certainly in the better direction, because it cannot be denied that there are things that are better regulated in the civil law books than Law No.13 / 2002. As for the addition of the contents that must be done are: a) the employment agreement between husband and wife, b) the provisions of the fine along with compensation, c) the obligation of the employer to pay wages on time, d) the obligation of the employer to provide a certificate of

employment to the worker and make it with without lies, and e) arrangements regarding responsibility and compensation in the chartering of work.

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Transgender in Indonesia According to The Legal, Health and Culture Perspective

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Abstract. Transgenders are part of a sexual minority group whose orientation differs from the majority of Indonesian society. They are considered to have abnormalities and violate nature, which is inappropriate in Indonesian culture. Yet, based on Ius Constitutum, transgenders have freedom in determining their life. They also have legal protection which are Article 1 (paragraph 3) of 1999 Law no.39 and Article (28) of the 1945 Constitution. However, this human right has limitations related to morals, religion, security and public order. This research aims to perceive transgender from Ius Constitutum, medical and Indonesian culture perspectives, along with its negative and positive impacts. As the result, negative impact experienced by transgender people. Those are isolation from society, activities limitation (namely hanging out, going to the toilet, having religion and socializing), potentially carrying diseases such as HIV-AIDS, and limiting mobility of others who feel uncomfortable about their existence.

Keywords: Transgender, Ius Constitutum, Health, Culture, Human Rights.

1 Introduction

In society, the environment we choose will influence our behavior later. In terms of personality, people develop through values, rules and norms that apply in the local community. Each community group has a variety of norms, rules and values that are used as role models and represent the development of cultural and religious values in society. When individuals dwell in a community group, they are required to adjust to the values, rules and norms that are already applied in that environment [1].

Society no longer sees transgender, as a new phenomenon. The transgender phenomenon has spread widely, and whether we realize it or not, it has contaminated the community. However, Indonesian still consider transgender behavior to be deviant and violate the norm due to eastern customs and lifestyle [2]. Some countries have started to legalize and recognize the existence of transgender people, such as Germany, India and others. Indonesia has the motto "Bhineka Tunggal Ika" means unity in diversity. Unfortunately these slogans cannot represent the existence of

lesbians, gays, bisexuals and transgenders or LGBT. This motto indeed aimed at differences in race and ethnicity, not deviant behaviors [3].

At the beginning, transgenders are born with male or female sexuality but then later experience discomfort with their body. They will think the gender is a mistake and claim themselves as different gender. Behaviour change to different gender roles will also occur. Thus, in other word transgender is a contrast feeling with their genitals [4]. Another literature mentioned transgender as a male body that claim their souls as a female and encourage same-sex attraction. Generally, deviant sexual behavior such as homosexual cannot only be seen from physical or behavioural point of views. Thus, when a homosexual male claim themselves has a gentle personality like a woman, that person are indeed a transgender [5].

The word “transgender” is often used to describe someone who feels, thinks and behaves differently from their predetermined sex. Therefore transgender is not only refer to sexual orientation because gender differences can be classified as homosexual, heterosexual, pansexual, bisexual or asexual. There is significant difference between transgender and transexual. A transgender is not always transexual because gender behavioural change does not always mean genital change. While transexual is part of transgender, because the behavioural and genital changes are completely change themselves due to discomfort [1]. Transexual itself is defined as deviant sexual behavior resulting in a gender disagreement in their mental state, commonly called psychosexual disorders. For example, a male physical body that have female nature and behavior. In some cases, they performing sex change operations to heal their soul. Unfortunately, that is not a proper solution but only for fulfilling an incorrect patient’s needs and lust [6].

To exactly define transgender, the terms are differentiated as gender difference. Thus, transgender divided into two categories namely:

- Transmen, a female born that identifies themselves a male.
- Transwomen, a male born that later identifies themselves a female [4].

Transgender is considered bring bad impact both to the old and young communities and generally defined as deviant behaviour. As a consequence, society feels uncomfortable with their existence and even does not want to live together with them due to bad stigma and influence. It is natural if the community tries to ban and restrict family members from interacting with transgenders [5]. Many transgenders that are experiencing identity search feel their body is not theirs. It causes them to perform genital surgery and be ready to accept nasty consequences and bad society stigma [4]. Indonesian who are not accepting them tend to denounce and discriminate transgender people. Article 1 paragraph 3 of Law No.39 of 1999 concerning Human Rights mentioned discrimination as restriction or exclusion directly or indirectly to human differences based on religion, race, ethnicity, group / class, social and economic status, language, politics, which have an impact on the storage, reduction, elimination of recognition, implementation of human rights with the existence of basic freedoms of life whether individual or whole in the political, economic, social, cultural, legal and other aspects of community life.

However, based on Law No.39/ 1999 concerning Human Rights, transgenders have limits on expressing and exploiting themselves in the public because in contrast with religious values, morals, security and public order. Article 70 of Law Number 39/1999 mentioned that every citizen who apply his rights and freedoms must comply with the limits set by law, with the aim of ensuring the recognition and respect for the rights and freedoms of others and also for the fulfillment of demands that are fair in accordance with moral considerations, security and public

order. Article 73 of Law Number 39 Year 1999 mentioned that the rights and freedoms set out in the law can only be limited by law as a guarantee in the recognition and respect for human rights, along with the basic freedoms of others, public order, decency and national certainty [7].

Difference sex cannot be a reason to being unfair to certain gender. Changes in people's culture so quickly lead to tolerance of all positive or negative actions, but not as a criminal law. People who have tolerance tend to easily accept new things and are able to encourage society socio-cultural change. For example, transvestites as minority groups often receive discrimination, harassment or verbal abuse. Society with humanity values should not perform that action because it is increasing their deterioration and it leads to self-blaming.

2 Transgender in Current Indonesian Legal Perspective

In Pure Theory of Law, Hans Kelsen mentioned that humans who live together are marked by an institution establishment that regulates life together named "order". Living together with the individual itself is a biological phenomenon. With regulations in place, it turns into a social phenomenon. Humans who live together have a social order that functions as carriers of certain behaviors collectively from individuals, then encourage them to react positively or negatively. This order arises from complex rules which determine how individuals must behave in accordance with existing norms.

Hans Kelsen points out the characteristic differences derived from all legal arrangements and places them in religious and moral contexts. In every era, society and law are reflections derived from high social concepts. Therefore, it is necessary to show specific techniques to the community. The desired social action from the community can be obtained by the existence of forced regulations applied to deviant behavior [5].

In Indonesian law, transgenders are protected by human rights, as mandated on Article 1 paragraph (3) of Law Number 39 Year 1999 that order society and the state to recognize transgender community's existence. Transgender groups have a basis and guidelines in determining their rights that are regulated in 1945 constitution article J, namely:

- Every citizen has an obligation to respect human rights both in the community, nation and state.
- In applying rights and freedoms, every citizen is obliged to obey restrictions in any form determined by law. Thus, recognition and respect for the rights and freedoms of others are guaranteed. Fair and appropriate demands on moral considerations, religious values, security and order in a democratic society are also fulfilled [7].

Indonesia is a country that recognizes, respects and protects the existence of human rights. Human rights are regulated in chapter XA of the 1945 Constitution. Hierarchically the 1945 Constitution is the highest law used as a reference in making laws and regulations, therefore not a single Indonesian law does not recognize human rights existence. Besides, the country also recognizes 1948 UDHR which was used as international human rights research materials that is known worldwide.

Republic of Indonesia 1945 Constitution Amendment II assertively states that the right to security in Articles 28A-28I and also regulated in Article 30 of Law No.39/ 1999 concerning Human Rights. As written, "Every Indonesian citizen has the right to the sense of security and

comfort, along with freedom protection in doing something and threats of doing or undoing something“. Article 35 of Law No. 39/1999 also stated that every individual has the right to live within society rules or order and being a citizen safely and peacefully which fully respects, implements, protects human rights and its basic obligations as stipulated in this law.

In legal viewpoint, normal sexual acts cannot be criminalized as long as not harming others. Indonesian criminal law does not involve the term LGBT due to its psychological and medical terms. This action can only be classified as criminal conviction once crime occurred, or there is a causal relationship between sexual deviations with those crimes. Homosexuals that become criminals are regulated on Book 2 of the Criminal Code Chapter XIV Article 292 concerning Chastity Crime: “whoever is considered an adult that commits obscene acts with an immature person of the same sex and acknowledge by them or that are appropriate to be suspected of being immature are threatened with a sentence of five years imprisonment” [8].

In sexuality orientation, the existence of gender identity, sexual expression and gender must be in a straight line. The Indonesian Constitution views that human rights have restrictions that must not conflict with religious, moral, security and public order values. Indonesia which is based on Pancasila clearly states in the first principle "Ketuhanan Yang Maha Esa" (God the Almighty). Therefore, religion became the constitution guardian in realizing Indonesia's democratic life. Confirmed by Article 70 that stated “when exercising their rights and freedoms, each person is obliged to obey the predetermined limitations by the Act to guarantee recognition and respect based on the rights and freedoms of others and to fulfill all demands as fairly as possible in accordance with morals, security, and public order in a democratic society”.

If LGBT marriage are legalized, it will cause various problems i.e. decreases the birth rate because same-sex marriage cannot produce offspring. Article 1 Law No. 1/1974 concerning Marriage also mentioned that marriage related to the inner bond between man and woman as a husband and wife, which aims to form a happy and eternal family based on the hope of the Almighty God [9]. The intended marriage couple is a heterosexual couple in accordance with article 14 which states "to have a marriage, a prospective husband, wife, marriage guardian, two witnesses and ijab qabul are required". Article 15 paragraph 1 also explains "to obtain the benefit of a family and household, then marriage is only permitted and carried out for prospective brides who are considered to have reached the age specified in article 7 of Law No. 1/2014, a minimum of 19 years as a prospective husband and a minimum of 16 years for prospective wives. Article 16 paragraph 2 states that the bride and groom's approval in the form of a firm and real statement by writing, oral or gesture and silent means there is no explicit rejection. While in article 29 paragraph 3 states that the prospective bride or guardian who objected to the bridegroom, then the marriage contract (akad nikah) can not be implemented. Both articles mentioned clearly stated that the marriage partner is the bride and groom or heterosexual [8].

3 Transgender in Health Law Perspective

In general, transgender is a gender dysphoria or can be called gender identity disorder. They assume that their gender identity does not suit their biological sex. The American Psychiatric Association recognizes gender dysphoria as an anxiety condition toward their predetermined gender [6].

It should be underlined that this case is not a psychiatric disease. In some cases, gender dysphoria requires medical therapy. Studies in News Medical indicate that this condition is not only due to brain disharmony, but also caused by biological factors related to gender identity before they were born. In the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) book is written that a person cannot be declared as suffering gender dysphoria disorders unless they have shown some symptoms of a differentiation between the gender they believe in and the gender perceived by others. This condition must also run for at least 6 months. This belief lets a person feel that he should not be in a place with a certain gender [10].

WHO has alluded these health conditions in 2018 ICD-11, a new version of the International Disease sections. WHO stated that transgender is no longer a part of mental disorders. Previously, WHO had removed homosexuality from the international classification list of diseases since 1990. As previously reported from the independent WHO completely removed ICD-11 which will take effect on January 1, 2022, so the term gender identity disorder is changed into "gender mismatch" and listed under the chapter related to sexual health and it is no longer classified as mental disorder [11].

In the highest urge level, transgender will change their genitals to obtain full satisfaction as well as adjusting sense and determination of their true identity, so that they can be recognized as normal humans in general. Changes in a person's sex or known as transgender have been known since the development of the Diagnostic and Statistical Manual of Mental Disorder (DSM) method. However, not everyone is able to perform genital change surgery. Based on professional medical opinion, if a person is willing to perform genital surgery they must follow the medical observational procedure in advance. Namely hormonal test, psychological test, personality test that must be done by an expert like psychiatrist, psychologist, genital surgeon, obstetrician and gynecologist. Once a person went through a genital surgery, that means the person already went through a procedural step determined by health experts.

DSM Method in medical science able to track some symptoms associated with discomfort and dissatisfaction in one body part, especially in the sexual anatomy. J. P. Chaplin also mentioned in his book, Dictionary of Psychology, that a person who experiences continuous mental shock for at least two years, has abnormal physical or genetic appearance and has mental disorders i.e. schizophrenia is experiencing psychotic symptoms. The characteristic features are including shut himself up, emotional and affective disorders and negativism behavior. Genital surgery is categorised under plastic surgery and regulated in law No.36 / 2009 concerning health [4].

There are three scopes of sexual orientation, including heterosexual, homosexual and bisexual. Sexual health is aimed at how individuals are able to build relationships and closeness to others and also how individuals are able to express themselves and enjoy love. The term heterosexual means channeling individual desires and emotions to other in reasonable way and considered normal. Transgender sexual orientation is appear because of their sexual orientation nature is different from the original gender and categorized as homosexual. Sometimes they are also called a transvestite, an individual who gains sexual, emotional and spiritual pleasure or satisfaction through gender attributes. Homosexuals and bisexuals are unhealthy sexual orientation that has a greater negative impact on physical and mental health i.e. drinking alcohol, drug abuse, depression and suicide attempts.

Lesbian and bisexual female are tend to experiencing complex life problems i.e. discrimination and abuse. Unfortunately they find difficulties in rearranging their life and solving their problems, so they easily feel stress and depression. Thus, they seek the solutions through smoking, drinking alcohol and using illegal drugs. Moreover, homosexuals and bisexuals are more vulnerable to contracting HIV or human immunodeficiency virus [12] and sexually transmitted infections or diseases [13]. Sexually transmitted diseases (STDs) is defined as diseases transmitted through one individual to another by sexual contact i.e. Gonorrhea, Syphilis, Herpes and HIV AIDS. Gonorrhea or *kencing nanah* is caused by *gonococcus* bacteria that infect reproductive organs and mucous membranes, eyes, anus and other organs. Syphilis or *raja singa* is caused by *treponema pallidum* microbe and infecting mucous membranes, anus, mouth, lips and tongue. This disease is transmitted through sexual contact as well as sharing goods with infected people such as towels, clothes, and syringes. The most dangerous STDs are HIV AIDS or *Acquired Immunodeficiency Syndrome*, started by a decreased human immune system [14].

4 Transgender in Indonesian Culture Perspective

In this research, it is assumed that secular and developed countries are more accepting LGBT community rather than developing one. Moreover in non-democratic countries, transgenders almost impossible to practice their rights. Nowadays transgender level is already in alarming number and already spread globally. Spreading of transgender started from pro-LGBT movements since long back. It gained support from the Universal Declaration of Human Rights in 1948. As a developing country, Indonesia also applied human rights on its state philosophy, Pancasila. In interpreting Pancasila, deeper and continuous explanation is still needed, so that human rights can be better applied.

Based on CIA surveys, LGBT community in Indonesia is the fifth largest in the world after China, India, Europe and America. 26 million Facebook users in America are part of LGBT community while Indonesian LGBT is as much as 3 percent of the population, around 7,5 millions people. The United Nations in 2011 estimated there are around 3 million LGBT population uncovered. In 2012 the Ministry of Health released male homosexual (LSL) number as much as 1.095.970 and 5 percent (66.180) of them are infected by HIV. Surprising news from Thailand reported triple gay marriage. Joke, Belle and Art held their marriage on the valentine day, 14 February 2015. Their marriage picture in wedding dress became a global trending topic in social media [15].

Political bureaucracy reform and democracy considered as liberal process, thus transgender are able to expressing themselves in the public sphere, more over after the Reformation Era. Based on Indonesian history, in 1968 there is more positive term to describe homosexual person called "Wadam (Wanita Adam)". Ali Sadikin as Governor of Jakarta facilitated this community by creating the first organization Himpunan Wadam Djakarta (HIWAD) in 1969. Then this term once again changed into "Waria (Wanita Pria)" in 1980 due to objections for the previous term in using the first Moslem Prophet name, Adam Alaihi Salam [2].

Waria's social identity is obtained through cultural group involvement beyond the search process and education. Social identity is formed by ethnicity, race, class, gender and sexuality. Cultural identity includes the acceptance of tradition and learning, the existence of innate traits, language, religion and the existence of cultural heritage in society. The effort to be beautiful,

speaking gently like a woman, graceful and motherly characteristics, those are transgender effort to express themselves and get recognition from the society. So that they can embrace true identity psychologically by changing themselves biologically and construct the society to accept their existence.

Identity is important in this multicultural world, so that it becomes a central theme in the globalization era. Identity creates new history to the society and brings up a sense of belonging. Identity is always inherent in individuals or communities, and can be a key element in interacting at all levels of society. Psychology theories are explaining gender identity like psychoanalytic theory, social-learning theory and cognitive development. Sigmund Freud (1856-1939) in psychoanalytic theory explained the concept of gender identity formation in each individual and behavior is related to biological factors such as genes, evolution and anatomy [1].

Social-learning theory is naturally explained that different gender roles are the result of environmental demands and expectations. Gender identity itself is the result of society's patriarchal structure. This theory emphasizes social components, as well as culture developed from gender behavior and differences in parenting between women and men. Therefore, by applying reinforcement and imitating concepts, the children will be directed and filled in their respective gender roles. This reinforcement model can be realized well if parents play their role in parenting by giving toys, certain color clothes according to their gender or by giving gifts if they show good behavior and the use of special words for girls and boys [1].

While cognitive development theory emphasizes that interaction between the organism's condition, its cognitive development, along with information on its cultural environment. The existence of a specific behavior towards one gender which behaves specifically is an interaction that exists between cognitive knowledge and information on the society's cultural environment.

Sudikno Mertokusumo believes that: "in society there are several principles, namely religious principles which include revelations from God so that humans become servants of God who are always obedient and devoted, the principles of decency and politeness so that humans behave well, civilized, moral, and virtuous" [4]. Most of Indonesian transgender activists are prefer to adapt well to the current situation rather than changing prior social structure. Culturally they tend to improve creative thinking in solving obstacles, so that society can treat transgenders equally. There are several factors influencing transgender spreading in Indonesia:

- Internal factors
- Family: lack of communication and interaction between family members may cause discomfort and push them to act deviant.
- Moral and behavior factors: transgender is formed from the deviation of society's decency norms as well as wane of social control. Namely sexual stimulation exposure, faded religious faith, lack of self-control and lust.
- Lack of religion understanding: this factor plays huge role since being transgender is violating God's concept of natural human creation and God only allow heterosexual partnership. Religion can be internal factor that influence homosexuality as an ideal defense to educate themselves about rights and wrongs.
- Financial needs: being transgender does not necessarily means limited job offer and cannot be a reason to do inappropriate job.
- External factors:
- Social factors

- Environment
- Education
- International movement

Puspitosari (2005) in Nurdelia, Jasruddin, and Daud 2015 mentioned factors influencing transgenders transformation, namely biological factors which influenced by sexual and genetic hormones, psychological and socio-cultural factors including parenting in their environment.

Some people in society may understand the reason behind transgenders choice, accepting them as part of society and being friendly with them. Usually those people have broad insight and are highly educated, so they are able to interact with transgender [16]. Unfortunately general society tends to reject them due to discomfort. That is why transgenders often experience scorn, ridicule, violence and exclusion from the community [17]. Particularly for Moslem transgenders that experience trouble in creating Identity Card, limitation in using public facilities and difficulties in finding a proper job.

5 Conclusion

Transgender is a behavior that is considered deviate and violate human nature that has been given by God. In law perspective, transgender is protected by human rights, written on Article 30, Article 1 paragraph (3) and Article 35 of Law No.39 of 1999. These Articles are related to the transgender rights to be recognized by the community. In addition, transgender people also have a legal protection basis based on 1999 Law Article J. However, that human rights law is also restricted in articles 70 and 73 of Law Number 39 of 1999.

Transgenders also claimed as homosexual or bisexual that has negative impacts on health. Relationships made by transgender or LGBT people are prone to cause illness among themselves. For example, sharing syringes, towels and clothes, as well as sexual relations with same sex which causing sexually transmitted diseases (STDs) and HIV-AIDS. STDs itself may cause various illnesses namely gonorrhea and syphilis.

Started from 2022 WHO will classify transgender as gender mismatches and removing current term which was previously referred to gender identity disorder. Nevertheless, gender identity disorder is a psychological and medical disease which is infecting people worldwide and in Indonesia particularly. Transgender percentage in Indonesia reach almost 3% of the total population and become the fifth largest in the world.

Indonesian society considers transgender as sexual deviant behavior and can have a negative impact on social, religious and norms. Therefore, the society tend to stay away from transgender to avoid contamination from their behaviour. Majority of Indonesian people assume transgender as a transsexual.

Although most people do not acknowledge their existence, transgender people are not discouraged and always try to make their existence recognized, even though they know that their nature is deviant and in terms of health it is also dangerous, but all of that is broken by the urge in themselves that they are human trapped in the genitals in their bodies. Because the different feelings in the reception of his genitals that are considered wrong causes him difficulties in various things.

Transgender problems begin with identity Card (KTP), limitation in using public facilities, difficulties in carrying out worship (especially Muslims) and often get scorn, ridicule, violence as well as discrimination from various groups.

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Case Management for Equitable and Excellent Hospital Services

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Abstract. Patient-centered care as one of the health services quality domains can be implemented effectively and efficiently through the case management service model. The importance of case management is further enhanced by the presence of these factors: increased accountability and transparency in public health services, and the important role in respecting patient rights. However, implementation of case management in the hospital is not yet clearly regulated in existing legal products. The aim of this study was to find the legal basis for case management practice in health facilities within Indonesian laws and regulations. This research used a normative juridical approach. This study found that based on laws and regulations, the hospital organizes plenary individual health services, including preventive, curative, rehabilitative, also promotive in hospital. This service is able to achieve through a coordinated and collaborated continuum of care in the case management process. As mentioned in legislation, respect for patient rights realized through a collaborative partnership approach. This client-centered approach is responsive to the patient's needs, preferences, culture and values. Case management is a health service that upholds health service rights. Namely, participation, accountability, non-discrimination, transparency, upholding human dignity, empowerment and based on legal regulations.

Keywords: case management, case managers, service management, patient-centered

1 Introduction

One of the basic directions of policies and strategies for national health development 2015-2019 is to improve public ability to reach excellent and equitable health services [1]. Law Number 36 Year 2009 concerning Health also provides strict regulations regarding: certainty in the implementation of qualified services for the public. Health services must be organized on the basis of humanity, equality, benefits, protection, respect for rights and obligations, justice, non-discriminating gender and religious norms, as well as guarantees that everyone has the right to obtain safe, excellent and affordable health services [2].

Institute of Healthcare Improvement (IHI) establishes three main health service goals (triple aims) namely improving individual care experience; improving population health; and reducing per capita maintenance costs [3], [4]. Later on it became quadruple aims by adding welfare and work life briefing for health care providers and practitioners [5]. On the other hand, Health care providers are required to provide care to patients effectively, while at the same time reducing health risks and health care costs [6].

Patient-centered service is one of the quality domains of health care [7]. Effective and efficient patient-centered services can be achieved through a case management (CM) service

model [8]. Meanwhile, safe care transitions require collaboration between service providers throughout the care chain [9]. It is in line with the case management definition, a collaborative process from the assessment, planning, facilities, care coordination, to evaluation and advocacy of options and services in order to fulfill individuals and families comprehensive health needs through communication and available resources, so that patient safety, quality of care, and cost effectiveness can be promoted [10]. CM definition shows that instead of being a single intervention, CM refers to a care package that includes a variety of activities that can vary greatly between programs and are non-duplicative [11].

Case management, also called service management, has two important goals and are often conflicted. Namely, improve the treatment quality for vulnerable populations and control its costs. [12]. While CM's focus is connecting patients to the services needed, this process also involves advocacy and social action as well as ensuring accountability of providers and service systems [12]. Generally CM is focused on one episode of disease and covers all treatment areas. Especially for the patient or patient population that requires intensive care, like people in the last life stage, often hospitalized, has risky socioeconomic factors and elderly [13]. Thus, Hudon et al., (2019) recommended that CM is offered to the patients who do not have insurance, have low income or considered in financial need by health care providers and have complex health care needs. The case findings must be combined with high-intensity interventions and/ or involve multidisciplinary/ interorganizational [14].

Effective CM requires the availability of appropriate and coordinated services and can be accessed in a realistic and appropriate time frame [12]. However, CM is not only liaison mechanisms or administrative tools that manage service access, but also a principle that guides provision of various services needed by patients [12]. Moreover, CM is one of the comprehensive care components, not a way to repair inadequate or incomplete maintenance systems [12].

Philosophically CM is based on the fact that when a person reaches optimal levels of health and functional abilities, benefits can be obtained by both individual clients served, the service provider system, the patient reimbursement system, the patient support system, and other parties involved such as entrepreneurs and consumer advocates [10]. Professionally done CM functioned as a tool for achieving client welfare and autonomy through advocacy, ongoing communication, health education, identification of service resources and facilitating services [10]. By implementing CM, client involvement and direct communication between service manager, patients and family or family caregiver and officers will be carried out to optimize health outcomes for all interested parties [10].

It is important to improve accountability and transparency in public health services and appreciate patient rights. The more patient-centered care, care coordination, care or case management and care transition strategies are emphasized, the more desired results are achieved [15]. However, clear legal arrangements for CM implementation in Indonesian hospitals is not yet available. Therefore, this study aims to find its legal and regulatory basis. The study results are expected to encourage excellent CM service model implementation in Indonesian hospitals. So that patient welfare and health services excellence can be achieved optimally.

2 Research Methods

This research uses a normative juridical approach that examines library materials and secondary data to compare with regulations and literature related to the problem studied. This study uses primary legal material derived from: Law Number 44 Year 2009 Regarding Hospitals, Law Number 29 Year 2004 Regarding Medical Practice, Minister of Health Regulation No. 4 of 2018 concerning Hospital Obligations and Patients Obligations, Minister of Health Regulation No. 2052 of 2011 concerning Practice License and Medical Practices Implementation and other library materials relevant to the research topic.

3 Result and Discussion

Hospital is a health service institution that conducts individual health services in a complete manner which provides inpatient, outpatient and emergency services to anyone who consults their health problems to obtain the necessary health services, both directly and indirectly [16], [17]. Hospitals must identify populations with modifiable risks by managing and coordinating care to achieve cost savings, quality improvement, and improved patient experience [6].

Case management (CM) model defined as a health service including promotive, preventive, curative, and rehabilitative in hospitals through coordinated and collaborative continuum of care [18] so that patient health is optimally achieved. Continuum of care enables care coordination by creating conditions and relationships that support unlimited interactions between care sectors [19]. Gaps between providers, care teams, settings and information that are important to the plan of care and the flow of patients during treatment will encourage care coordination. Therefore, CM is designed to help patients and work as a support system in managing their medical/ social/ mental health conditions efficiently and effectively [20].

Article 6 paragraph (1) of Minister of Health Regulation Number 4 of 2018 concerning Hospital Obligations and Patients Obligations (latter mentioned as Minister of Health Regulation Number 4/2018) regulated that patients are entitled to get effective and quality service that prioritizes their interest and safety. The service effectiveness will be achieved if the main objectives are met, namely the degree of patient health, individual care experience, population health and care cost per capita [3], [4]. Another equally important objective is the welfare and work life for health care providers and other practitioners [5]. CM has proven effective in decreasing the treatment cost, length of treatment and patient examination numbers [21].

Minister of Health Regulation Number 4/2018 also listed that health services must be implemented in line with hospital service standards as part of good clinical governance (Article 6 paragraph 3) by paying attention to the standard of professional, health worker service and operational procedures as well as professional and hospital ethics code (Article 6 paragraph 4). Institute of Medicine (IOM) specify six quality domains of health services, namely patient safety, effectiveness, efficiency, timely, patient-centered and equality/fair [7]. So that the policies and regulations related to case management in hospitals will support achievement of excellent, effective and patient-oriented hospital services (Article 11).

Change of service orientation from *provider-centered care* to *patient-centered care* (PCC) is an appreciation towards patients-rights in health services that are listed in Article 32 of Law 44/2009 and Article 17 of the Minister of Health Regulation 4/2018. Generally, both regulations mentioned that patients are entitled to get excellent, effective and efficient health services. PCC is health service that upholds its rights such as accountability, participation, transparency, non-discriminative, upholding human dignity, empowerment and legally regulated [22]. PCC notice shift of control and power from the caregiver to the patient, therefore it is a health care quality dimension to the patient's rights [23].

Santana et al., (2018) explain the PCC framework based on the Donabedian's Quality of Care Theory. Quality of PCC is divided into three domains, namely structure, process and outcome. Structure is domain related to the health service system or service context that becomes PCC background. Including required materials, health service resources and organizational characteristics. Process is a domain related to interactions between patients and health care providers. The outcome domain shows the PCC appliance value with other domains relating to interaction results between health care systems, service providers and patients. The framework illustrates practical PCC implementation in sequence, starting from the structural domain as a prerequisite for facilitating the process and influencing PCC outcomes [24].

In health services, patient rights appreciation is realized through a client-centered collaborative partnership approach responsive to the patient's needs, preferences, culture and believed values [10]. It is in line with the CM purpose which empowering patients in overcoming their own problems based on the rights they have, especially related to sensitive information relating to the conditions experienced [12].

The patient's rights mentioned in Article 17 the Minister of Health Regulation 4/2018 requires patient's empowerment and involvement during the service. Namely, the right to choose their doctor, treatment class desired, request illness consultation with other doctors, obtain complete information about their condition and submit proposals, suggestions, improvements about the hospital's current treatment. In the case management perspective, patient autonomy and rights become the service focus, as well as optimizing patient's life quality, independence and patient or family function [18].

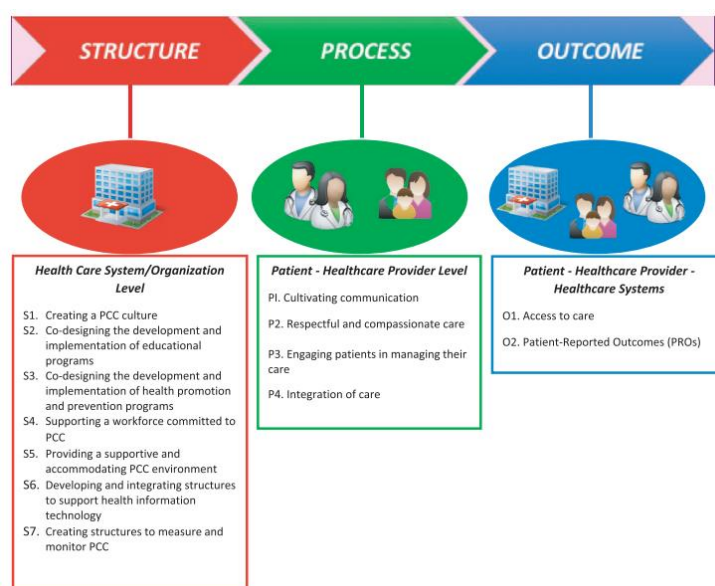


Fig. 1. Implementation framework of Donabedian's quality of patient-centered care (PCC) [24]

Article 21 the Minister of Health Regulation Number 2052/Menkes/PER/X/2011 Concerning the Practice License and Medical Practice Implementation and Article 39 of the Republic of Indonesia Law Number 29 Year 2004 Concerning Medical Practices listed that medical practice is carried out based on agreement and trust relationship between doctors and patients in order to maintain health, prevent disease, improve health, treat disease and restore health, through maximum healing and restoration effort in accordance with the standard of service, professional and operational procedure as well as patient's medical needs [25], [26].

Case management's principles, interventions and strategies targeting optimal health, function and autonomy of patients, their families and caregivers. This process is achieved through assessment, planning, communication, health education, advocacy, resource management, care coordination and collaboration, and facilitating services. Professional case managers apply these principles in their practice based on the client's needs and value, in order to ensure cooperation between interprofessional health care teams and service provision that is safe, client-centered, appropriate, effective, efficient, timely and fair in terms of care and service [10]. In clinical governance perspective, a case manager with their clinical, managerial and financial skills plays an important role in ensuring quality as a series of efficiency, effectiveness, safety, suitability, participation and equality aspects [13].

In the case management process, the manager has the duties to [18]:

- 1) Provide case management services to patients and their families.
- 2) Access and facilitate patient access to programs, services, financial and community resources
- 3) Provide rehabilitation services, facilitate health, function or optimal productivity and all detailed activities that need to be carried out, especially after serious illness or acute injury.

- 4) Manage the utilization of health services, health education, appropriate resources usage, health insurance concept and advocating interests for the benefit of patients and families.
- 5) Evaluate and measure quality and results. Including assessment, monitoring, data collection results and results evaluation related to patients, as well as emphasize the use of evidence-based practice guidelines in developing case management plans.
- 6) Comply with ethical, legal and practice standards. Includes compliance with legal, regulatory, ethical, professional and accreditation requirements relating to case management practices and client health education about the right of appeal, and the need for case managers to implement and adhere to standard case management practices.

In Indonesia, the case management service model still faces various challenges. Avia & Handiyani (2019) in their studies discovered that case manager competency guide is not yet available while laws and regulations require the services provided run by competent personnel [27]. Moreover, case managers involved in their research have not yet received adequate training, unclear performance appraisals, inappropriate job descriptions and have low self-efficacy. Lack of standard competencies and education of case managers will construct risks for hospitals and the health care system [28].

Case managers face several challenges, such as unclear scope of practice, diverse and complex care management activities. Case managers also have a complex relationships with other health care providers and clients due to their role as patient advocate [29]. Role as a case manager is also faced with ethical dilemmas. They have to manage their role as a patient advocate and as the “gatekeeper” of the institution they work for. Therefore, they often have difficulties in balancing both demands. On one side, patients need optimal care and services, on the other side hospitals require strict cost control and resource allocation [18]. As mandated in Article 49 paragraph (1) of Law 29/2004 that every medical service must carry out quality and cost control.

Therefore, development of clear case manager professional guidelines and standards are needed, by combining evidence-based practice and situational learning across health service settings and populations, ongoing case manager competency evaluation and improving system and practices, so that case management service objectives are achieved [30]. It is suggested to involve physical/ medical, behavioral/ cognitive and social determinants during the assessment, intervention and evaluation of case management process [31]. Case managers are required to equip themselves with knowledge related to concepts and strategies of case management, health care costs reimbursement, health care management and provision, concepts of rehabilitation and vocational, psychosocial systems and support [15], quality measurement, results evaluation as well as practice, legal and ethical standards [18]. Besides working along with patients, their families and hospital system, a case manager is also required to work holistically and efficiently, able to manage treatment plans in the most cost-effective manner and possess understanding that quality must not be compromised for financial purposes [32].

4 Conclusion

Based on laws and regulations in Indonesia, case management is an equitable and excellent hospital and medical service. Hospitals are obliged to offer this service model to patients who do not have insurance, are low income or considered in need of health services and have complex health care needs. Case management is a service model that encourages optimal health, function and autonomy for patients and their families. If professionally implemented, case management would create services that are safe, client-centered, appropriate, effective, efficient, timely and fair. However, guidelines development and clear case manager professional standards are still needed. As well as incorporating evidence-based practice and situational learning across health service settings and populations and evaluating case manager competencies sustainably. System improvements also need to be made in order to improve practice and achieve service objectives in case management.

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Non-Penal Policy in Crime Prevention Through Moral/Educational/Religious Approach

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Abstract. Crime is the oldest and most complex social problem, as it requires an integrated coping strategy/effort, between penal and non-penal means. It is because of the limited ability of the penal means in dealing with crime. On the other hand, crime prevention is essentially also part of efforts to protect society (social defense planning or protection of society) and an effort to achieve social welfare. Non-penal policy through moral/educational/religious approach in crime prevention in Indonesia occupies a very strategic position.

Keywords: Non-penal policy; moral/educational/religious approach.

1 Introduction

Crime is a form of deviant behavior [1], which is always present and attached to the community [2] and becomes a real or potential threat to the sustainability of social order. It has its form of human actions [3] from time to time to change according to the conditions of society. The society has a type/form of crime in accordance with its culture, morals, beliefs and social, economic, political, and existing structures and create/construct their own types/form of crime. [4] Thus, crime is a problem that is closely related to humanitarian and social aspects. [5]

Crime as “the oldest social problem” [6] requires prevention efforts through penal policy, rationally and comprehensively. Efforts to tackle crime are essentially an integral and inseparable part of efforts to protect society (social defense planning or protection of society) and an effort to achieve social welfare. [7]

Based on the foregoing, main goal/ultimate goal of criminal politics is protection of society to achieve social welfare. Such objectives are in line with the report of the 34th training course by UNAFEI in Tokyo in 1973 as follows: [8]

“Most of group members agreed some discussion that ‘protection of the society’ could be accepted as the final goal of criminal policy, although not the ultimate aim of society, which might perhaps be described by terms like ‘happiness of citizen’, a wholesome and cultural living, social welfare or equality”.

Based on the above report, it can be stated that criminal politic is essentially an integral part of social politics, which is a policy to achieve social welfare. Therefore, crime prevention policy (criminal politic) can cover a wide-ranging scope. According to Barda Nawai Arief, crime prevention can be done through: [9]

- a. *Criminal law application*
- b. *Prevention without punishment*
- c. *Influencing views of society on crime and punishment/mass media.*

Broadly speaking, crime prevention can be pursued through 2 (two) paths, which are “penal” (penal law) path and “non-penal” path (extra-/non-penal law). Crime prevention through the penal path is more focused on the repressive approach in the form of suppression, eradication and extermination, after the crime is committed. While the “non-penal” path puts more emphasis on the “preventive” nature of prevention, deterrence and control before the crime is committed/occurred. Thus, non-penal path is more directed or targeted at the conducive factors as

the cause of crime. It underlines social problems that can foster crime. Therefore, this non-penal path is regarded to be occupying a strategic position of the entire criminal political effort.

One of the “non-penal” paths to deal with social problems is through social policy, which G. P. Hoefnagels has included in the path of prevention without punishment. Social policy can include problems such as mental health, national mental health, and child welfare.

Prof. Sudarto stated that crime prevention through preventive measures was carried out without the use of penal law. For example, through the Youth Organization (Karang Taruna) activities, where the youths spend their free time outside the home and school in order to avoid deviant/malevolent behavior, in which Scouting and community mental health cultivation with religious education are non-penal efforts that can prevent and tackle crime. [10]

In this paper we will examine: How is non-penal policy through moral/educational/religious approach to crime prevention in Indonesia?

2 Result and Discussion

2.1. Urgency of Non-Penal Policy

Penal policy is part of law enforcement policy in the broadest sense [11] **Prof. Sudarto** as written by Prof. Pujiyono stated that crime prevention policies or commonly referred to as criminal politics (criminal policy) are essentially rational efforts of the community in tackling crime. [12]

In the context of tackling crime in the community, various forms of social reactions or responses are available, which can be pursued through 2 (two) means, which are penal means (penal law) and non-penal means (extra-/non-penal law). [13] Through the penal path, crime prevention is more focused on its repressive nature (suppression/eradication/extermination) after the crime is committed. Whereas through non-penal path, crime prevention put more focus on its preventive nature (prevention/deterrence/ control) before the crime is committed.

The results of the study indicates that law policies are generally sufficient and effective, but there are deficiencies in the limited liability schemes in Indonesia, as well as uncertainty about the types of violations in civil or criminal enforcement. [14] Therefore, it is necessary to make a draft bill with a careful and calculative basis and without being emotional in determining a criminal act/criminal offense. [15]

The crime of terrorism in China with the influence of religious extremism has used crime and violence as a means of creating terror and spreading panic to achieve their goals, which is to disunite the State of China. Meanwhile the use of penal law is an effective instrument to combat these crimes. The characteristics of terrorism in China require reconstruction of a penal law system related to the model of criminal punishment with intentional elements, by introducing terrorist motivation into constitutive elements of terrorism crimes. [16]

Prof. Barda Nawawi Arief stated that the integral policy in crime prevention includes “all rational efforts to deal with crime must be an integrated unity.” It means that policies to tackle crime by using criminal sanctions must also be integrated with other “non-penal” efforts in nature. [17] While Prof. Suharto related to integral policy issues clarified that the influence and ability of the penal law is limited, therefore the protection of the community needs to use other means besides penal law. [18]

Furthermore, Prof. Barda Nawawi Arief, in Kartono's article [19] identified several limited ability of penal law to deal with crime as follows:

- a. This type/form of crime is complex beyond the scope of penal law.
- b. Penal law is only a small part (sub-system) of social control means, which is unlikely to overcome the problem of crime as very complex human and social problem (as socio-psychological, socio-political, socio-economic, socio-cultural problems, etc.);
- c. The use of penal law in dealing with crime is only “*kurrien am symptom*,” therefore it is only “*symptomatic remedy*” and it is not “*causative remedy*”;
- d. Penal law sanctions are “remidium” which contain contradictory/ paradoxical nature and encompass negative elements and side effects;
- e. Punishment system is fragmentair and individual/personal, rather than

structural/functional;

- f. The limited types of criminal sanctions and the rigid and imperative formulation systems of criminal sanctions in nature;
- g. Operation/functioning of penal law requires a variety of supporting facilities that are more demanding “high costs”. Given these limitations, “the use of a means of penal in crime prevention should be done with careful consideration”.

In using the means of penal, Nigel Walker once reminded the existence of “limiting principles” that rightly needs more attention, including:

- a. Penal law shall not be solely used for the purpose of retaliation;
- b. Penal law shall not be used to convict an unharmed/non-threatening act;
- c. Penal law shall not be used to achieve a goal that can be achieved more effectively with easier means;
- d. Penal law shall not be used in the event that the damages/hazard arising from the crime is greater than the damages/hazard from the act/crime itself;
- e. Penal law prohibitions shall not carry more dangerous characteristics than acts that will be prevented;
- f. Penal law shall not contain restrictions that have no strong support from the public.[20]

By considering the various limited ability of penal law as the above-mentioned means of penal, it is necessary to take other means by using preventive non-penal means in tackling the increasingly complex and modern crimes. Both of these means, by the means of penal and non-penal, must be a balanced and proportional integration in the sense that they are adapted to the form and type of crime to be prevented so that they can achieve effective results.

According to Prof. Muladi, certain crime prevention strategies are often specific in nature, deviating from general penal law principles such as dealing with serious crimes such as criminal acts of corruption, terrorism, money laundering, serious human rights violations and others. [21] It has also been done by the Government of Rome (Italy), as there is a special regulatory model for crime prevention with victims and special actors (minorities).[22]

On another occasion Prof. Barda Nawawi Arief also emphasized the need for “reevaluation”, “review”, “reorientation”, “reform” and “reformulation” in all criminal policies, bearing in mind that the criminal legal system being charged by foreign countries is also a colonial legacy that it is the time to adjust with cultural values, as there is even discrepancy with people's aspirations.[23]

2.2. Non-Penal Policy through Moral/Educational/Religious Approach

The impact of the implementation of development that is not planned rationally or carried out in an unequal manner that does not take into account the balance of various aspects of social life will become a criminogen factor (unbalanced/inadequately planned). It includes overlooking cultural and moral values (disregarded cultural and moral values), and did not include integrated social defense strategies.[24]

In consideration of Resolution No. 3 of the 6th UN Congress of 1980 on the “Effective Measures to Prevent Crime”, among others, emphasized: [25]

1. Crime prevention is highly subject to the human personal himself (that crime prevention is dependent on man himself).
2. Crime prevention strategies must be based on efforts to raise people's spirits or souls and strengthen their confidence in their ability to do good. *(that crime prevention strategies should be based on exalting the spirit of man and reinforcing his faith in his ability to do good).*

On the basis of the above facts, then the UN focused its attention on efforts to strengthen human confidence in its ability to follow the path of truth/goodness.

If examined closely, it will be clearly seen that the UN resolution put an emphasis on how important the role of education, religious education and various forms of religious activities are, in order to strengthen the path of truth and goodness. Through effective forms of educational activities and religious counseling, it will give birth to human beings who are spiritually/mentally

healthy. Thus in turn it will be able to materialize the formation of a whole healthy family and produce a healthy social environment as well.

On the other hand, it is emphasized the need to explore, develop and utilize all the potential support and participation of the community to utilize and develop the “extra legal system” and “informal and traditional system” that exist in the society. As stated in the UN Congress on “The Prevention and Treatment of Offenders”. In the 4th UN Congress, regarding “Non-judicial forms of social control”, emphasized that: [26]

“It was important that traditional forms of primary social control should be revived and developed”.

In the “Guiding Principles” results of the 7th UN Congress, regarding the “traditional forms of social control” also confirmed that: [27]

“When new crime prevention are measure introduced, necessary precautions should be taken not to disrupt the smooth and effective functioning of traditional system, full attention being paid to the preservation of cultural identities and the protection of human rights”

Moral development theory classifies moral thinking including 3 (three) stages: *preconventional stage, conventional level and postconventional level*. [28] At the preconventional stage, children are inculcated with moral values at the command to commit or not to commit an act that violates the rules or the law in order to avoid punishment/sanctions. This stage is generally the education of parents carried out in the house by example from parents/family. Even parents are willing to serve the needs of children with various efforts. On the negative side, however, while parents are willing to commit deviant acts, *parents charged with a criminal offense had higher rates of having a Child Protective Services assessment/ investigation*. [29]

Getting into the conventional stage, a teenager or an individual has entered the stage of believing and adopting moral values and rules that exist in society. They go further to enforce these rules and think “stealing is illegal/breaking the law”, so they do not commit theft in any circumstances. Then in the final stage of postconventional level, individuals have been able to think critically to examine social habits or rules according to their feelings about universal human rights, moral principles and moral obligations. They have been able to think carefully that every individual in society should obey the rules and at the same time hold universal ethical and moral principles. They have been able to respect human rights and the dignity of human life.

Thus, it can be understood that the process of the stages of moral development as mentioned above is naturally holistically possible to be carried out starting from the process of life/education in the family (informal education), school (formal education) and education in society (non formal education).

In scouting education carried out in schools ranging from elementary, junior high, senior high school and even college, tri darma and dasa darma has been taught, which contains moral, religious and social life teachings. After participating in scouting education they are expectedly able to apply the values of goodness and truth teaching (moral values and religious values :red.) to be applied in daily life in the society.

Armed with the values that the scouting education has taught, they will be able to avoid committing despicable acts or other deviant acts such as those that occur with the use/consumption of very harmful drugs for the future of the children/adolescents themselves. [30]

In the modern/millennial era as it is today, it is marked by rapid growth of technological developments, especially telecommunications technology and computer technology with a multifunctional internet network, leading everyone to think in an unlimited direction (borderless way of thinking). [31] The era of globalization has presented the role of information technology in a very strategic position, capable to present a world without limits, distance, space, and time and can increase productivity and efficiency. The emergence of information technology has changed the pattern of people's lives globally and has caused significant changes in rapidly increasing socio-cultural, economic, and legal frameworks. The presence of information technology presents a dilemma as well. On the one hand, it contributes to the improvement of human welfare, progress and civilization, but on the other hand, it can be an effective means of committing crime.

One negative impact of the advancement of information technology with computerized systems and internet networks that is and continues to spread in the world community and

particularly the Indonesian Nation is *cyber crime* in the field of decency, which is more popular with the term of *cyber porn*. [32] As a result of the rampant spread of pornography among Indonesian people so that it has been very troubling, especially with the emergence of various other types of crime. Many young people are involved in promiscuity (free sex), cases of molestation, rape, the emergence of LGBT groups (Lesbian, Gay, Bisexual, Transgender), online prostitution and so forth.

Commercial sex workers under penal code (KUHP) are indeed problematic (lack of rules) that are charged with criminal sanction. Therefore, there is a need for new rules in the Penal Code to provide an effect deterrence (prevention) on the proliferation of prostitution practices. There is a balance between sex workers/perpetrators and service providers in their criminal regulation. [33] Unlike in Spain, new special regulations on street prostitution can be charged with criminal sanction. [34]

Certainly, the phenomenon of the flourishing crimes/deviant behavior as mentioned above is very contrary to the moral values of religious, ethics and culture of Indonesian society. Religious morality occupies very important position, as there is a close relation between religious institutions and crime. [35] Therefore, religion is a fundamental variable in determining the causes of crime.

Free sex (extra-marital sexual intercourse) is very contrary to the sacred and highly respected marriage institution according to the cultural values in Indonesian society. It is different in European countries or other ones as they have their cultures to live together without being married, so that they will pass down the culture of free sex and free love to their children. They no longer believe in what marriage is or most of them apply the culture of living together without being married. [36] Religious norms have forbidden the act of promiscuity (adultery), as stated in the *Qur'an Surah Al-Isra' verse 32*, which states:

“And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.”

Because the act of adultery is extra-marital intercourse between men and women that violates decency, damages offspring, causes sexually transmitted diseases, leading to disputes, family disharmony, and other disasters. [37]

In *Qur'an Surah An-Nur Verse 2*, firmly states that:

“The woman or man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment.”

Regarding the story of Punk kids [38], with tattoos all over their bodies, and red-colored hairs and pierced ears, they gather in front of Tebet Station with a guitar, not for busking, but for Qur'an recitation. They gathered on the command of *Tasawuf Underground*, a religious community targeting punk kids. By laying out makeshift mats, the religious community (*Tasawuf Underground*) gather to spread religious lectures on punk kids under the bridge. The concept of the presented Qu'ran is not as usual as in Islamic boarding schools/in Al-Qur'an Education Center, which merely learn to read the Qur'an, but also recite about life, imprinting them with a clean and true heart. It aims that punk kids will have the skills to survive and move away from street life, which by the view of the community is considered synonymous with children who commit crimes/other deviant acts. Some opinions even state that the solution for crime prevention is to provide children with the moral, love and discipline guidelines they need to grow into healthy adults. [39] Based on the above facts, learning through the moral/religious approach it turns out that it is able to be an effective means to change one's attitudes and behavior from patterns of deviant (malevolent) thought/way of life to migrate to the path of truth and goodness.

3. Conclusion

Based on the discussion and analysis above, it can be concluded as follows:

1. Crime prevention policies in Indonesia must be carried out integrally between the use of penal and non-penal means, given the limited use of penal means in increasingly complex crime prevention.
2. The use of non-penal means through moral/educational/ religious approach in crime prevention in Indonesia with its characteristics and complexity is an appropriate and effective approach to use by keeping in mind the strong moral, social and religious values in society.

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The Role Of Legislation In Improving Nutritional Status And Food Quality In Indonesia

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Abstract. The SDGs 02 criterion states their goals, namely ending hunger, achieving food security and better nutrition, as well as supporting sustainable agriculture. Stunting prevalence among Indonesian toddlers in 2005-2017 is 36.4%. As an agrarian country, ironically Indonesia is still experiencing malnutrition problems. Though the Government has several regulations related to nutrition and food, it is not yet optimally implemented. Legislation's role in improving nutritional status and food quality in Indonesia become the core problem in this paper. In addition, this paper also discusses how regulations are optimized in order to achieve SDGs standards related to health. As a normative juridical study, this research uses several approaches. As a result, nutritional status improvement begins with adequate secure and nutritious food. Collaboration between the government, the community and health facilities are necessary to obtain Indonesian quality according to SDG standards.

Keywords: Legislation, Nutrition, Food, Sustainable Development Goals.

1 Introduction

Nutrition problems in developing countries are very diverse. Nutrition and food issues are discussed in the Sustainable Development Goals (SDGs). The SDGs 02 standard states the goal of ending hunger, achieving better food and nutrition security and supporting sustainable agriculture [1]. Nutrition problems that have not been resolved are malnutrition and stunting. The prevalence of stunting in Indonesia in 2005-2017 is 36.4%. The prevalence of short toddlers has increased from 2016 which is 27.5% to 29.6% in 2017. The province with the highest prevalence of toddlers is very short and short at the age of 0-59 months in 2017 is East Nusa Tenggara, while the provinces with the lowest prevalence are Bali. Poverty is a cause of stunting. Poverty does not only affect family health but on a large scale poverty can disrupt the balance of economic and health in a country. Malnutrition and stunting also inhibit economic progress, education and health. Poverty is related to the availability of food to the family [2]. Nutrition problems are influenced by the availability of quality food.

Food quality and security in Indonesia have not yet reached the optimal state. The Indonesian Central Statistics Agency noted that the largest rice import was carried out in 2011 with a total import of 2,750,476.2 tons during 2000-2015. Whereas in 2015, Indonesia ranked third as the biggest rice producer after China and India. However, the high demand from the people causes this country to import rice [2]. Economic observers from IRRI (International Rice Research Institute) expressed pessimism about Indonesia's ability to meet rice needs. Indonesia will still depend on imported rice until 2025. The lowest import will be achieved in the scenario

of a high rate of increase in productivity [3]. Food security is influenced by many factors, namely humans, the environment, animals and climate. Food quality is influenced by the state of living things (humans, animals and plants) that are at risk of certain diseases [4]. Controlling food quality is not only about production and distribution, but it starts with regulation.

The Indonesian government has several regulations relating to nutrition and food. However, the implementation of these regulations is not optimal. Indonesia is an agrarian country, but ironically it still experiences problems of malnutrition. Various regulations on nutrition and food security have been made by the government. Food security and improvement in nutrition quality have not been realized, especially in regions that have low scores on development indicators, for example provinces in Eastern Indonesia. According to the World Food Program (2013) 13 percent of Indonesia's population of around 31 million people, still live below the national poverty line and almost half of the population or 42 percent live under purchasing power parity of US \$ 2 per day [5]. Existing regulations have not been implemented optimally because they are influenced by several factors. Therefore, this article has two problem formulations, namely (1) how is the legislation's role in improving nutritional status and food quality in Indonesia? (2) how to optimize these regulations in an effort to achieve SDGs standards related to health?

2 Methods

As a normative juridical study, this research uses several approaches. Namely statutory approach, concept approach, comparative approach and case approach. Secondary data are used in this study, with literature study as a data collection technique, then collected data were analyzed qualitatively.

3 Result and Discussion

3.1 Collaboration Efforts To Improve Nutritional And Food Quality

There are a lot of regulations in Indonesia which regulate nutrition quality and food security. The central government through the Ministry of Health, Ministry of Agriculture has made various regulations as the basis for implementing improved nutrition and food security. In Law Number 18 Year 2012 concerning Food, mentioned include:

1. The government and regional governments are obliged to increase the fulfillment of the quantity and quality of public food consumption through:
 - a) setting targets for achieving per capita food consumption figures per year in accordance with nutritional adequacy rates;
 - b) the supply of diverse, nutritionally balanced, safe food that is not contrary to the religion, beliefs and culture of the community; and
 - c). development of community knowledge and abilities in diverse, consumption-balanced, quality and safe food consumption patterns;
2. The government and regional governments are obliged to realize the diversification of food consumption to meet the nutritional needs of the community and support healthy, active and productive living;
3. Diversification of food consumption is directed to increase public awareness and to cultivate diverse, nutritionally balanced and safe food consumption patterns that are in accordance with local potential and wisdom;
4. Diversification of food consumption is done by:

- a) promote diversification of food consumption;
 - b) increase public knowledge and awareness to consume various foods with the principle of balanced nutrition;
 - c) improve skills in the development of local food preparations;
 - d) develop and disseminate appropriate technology for local food processing;
- 5. The government sets policies in the field of nutrition to improve the nutritional status of the community. Government policy as referred to in paragraph (1) shall be carried out through:
 - a) stipulation of requirements for the improvement or enrichment of certain food nutrients that are circulated in the event of a lack or decrease in the nutritional status of the community;
 - b) determination of special requirements regarding food composition to increase the nutritional content of certain processed foods traded;
 - c) meeting the nutritional needs of pregnant women, nursing mothers, infants, toddlers, and other nutrition prone groups;
 - d) increased consumption of food products from livestock, fish, vegetables, fruits, and local tubers;
- 6. The Government and regional governments prepare a Food and Nutrition Action Plan every 5 (five) years [6].

The issue of the gap between the policy and the implementation of the population's food security program is that there is no calculation of the nutritional deficiencies of each poor family that must be met based on the fact of the energy and protein deficit data (should the calculation of the nutritional deficiencies of each poor family that must be met is 500 kcal and 10 grams of protein / cap / day). In addition, there are many programs providing food aid or PMT from non-standard sources. Another thing that causes lack of optimization in preventing stunting and malnutrition is that there is no specific policy regarding the fulfillment of nutrition of pregnant women, nursing mothers, infants, toddlers and other nutrition prone groups [7]. Undang-Undang No. 36 Tahun 2009 regarding Health related to family level food security, it is written as follows :

- 1. Community Nutrition Improvement Efforts aimed at improving the nutritional quality of individuals and communities, through improving food consumption patterns and improving access and quality of nutrition services
- 2. The government is responsible for meeting the nutritional needs of poor families and in emergencies
- 3. The government is also responsible for education and correct information about nutrition to the community [8] .

The expected strategy is to develop programs specifically aimed at meeting the needs of poor families including targets including pregnant women, forms of food must meet nutritional standards, integrated with other health services. The next strategy is to establish food aid standards. This strategy is not only made but needs to be implemented. Therefore, it requires the cooperation of all parties, namely the government, the private sector and the community [9]. Stunting is a condition of toddlers who have less length or height when compared to age. This is measured by length or height that is more than minus two standard deviations from the median standard of child growth from WHO. Toddler stunting includes chronic nutritional problems caused by many factors such as socioeconomic conditions, maternal nutrition during pregnancy, morbidity in infants, and lack of nutrition in infants. Stunting toddlers in the future will experience difficulties in achieving optimal physical and cognitive development [10]. According to Regulation of the Minister of Health Indonesia No. 97 of 2014 concerning Pre-Pregnancy, Pregnancy, Childbirth, and Childbirth Services, Providing of Contraception

Services, and Sexual Health Services, factors that aggravate the condition of pregnant women are too young, too old, too old frequent childbirth, and too close the birth distance [11]. Pregnant mothers who are too young (under 20 years) are at risk of giving birth to babies with low birth weight (LBW). LBW infants affect about 20% of stunting. The condition of the mother before pregnancy both body posture (weight and height) and nutrition is one of the factors that influence the occurrence of stunting [12]. Adolescent girls as future mothers should have good nutritional status. In 2017, the percentage of young women with short and very short conditions increased from the previous year, which was 7.9% very short and 27.6% short. In terms of nutritional intake, 32% of girls in Indonesia in 2017 are at risk of having chronic energy shortages (KEK). Around 15 provinces have percentages above the national average. If the nutrition of adolescent girls is not improved, then in the future there will be more and more prospective pregnant women who have short posture and / or chronic energy shortages. This will have an impact on the increasing prevalence of stunting in Indonesia.

The impact of stunting is as follows:

1. Short-term Impact:
 - a. Increased morbidity and mortality;
 - b. Cognitive, motor, and verbal development in children is not optimal;
 - c. Increased health costs.
2. Long-term Impact:
 - a. Not optimal posture when mature (shorter than in general);
 - b. Increased risk of obesity and other diseases;
 - c. Decreased reproductive health;
 - d. Less than optimal learning capacity and performance during school term; and
 - e. Productivity and work capacity are not optimal [9].

Stunting is one of the targets of Sustainable Development Goals (SDGs) included in the second sustainable development goal of eliminating hunger and all forms of malnutrition by 2030 and achieving food security. The target set is to reduce the stunting rate by 40% by 2025 [9]. To realize this, the government set stunting as one of the priority programs. Based on the Minister of Health Regulation No. 39 of 2016 concerning Guidelines for the Implementation of the Healthy Indonesia Program with the Family Approach, the efforts made to reduce the prevalence of stunting include the following:

1. Pregnant and Maternity Women
 - a. Interventions in the first 1,000 days of life;
 - b. Strive for integrated antenatal care (ANC) quality assurance;
 - c. Increase childbirth in health facilities;
 - d. Carrying out high-calorie, protein and micronutrient (TKPM) feeding programs;
 - e. Early detection of diseases (infectious and non-communicable);
 - f. Eradicating helminthiasis;
 - g. Increasing the transformation of the Card to Health (KMS) into the MCH Handbook;
 - h. Conducting Early Breastfeeding Initiation (IMD) counseling and exclusive breastfeeding;
 - i. KB counseling and services.
2. Toddler
 - a. Toddler growth monitoring;
 - b. Organizing supplementary feeding activities (PMT) for toddlers;
 - c. Organizing early stimulation of child development

d. Providing optimal health services.

3. School-age Children

- a. Revitalizing School Health Enterprises (UKS);
- b. Strengthening the UKS Guidance Team's institutional;
- c. Organizing School Children Nutrition Program (PROGAS);
- d. Treats schools as smoke and drug free areas

4. Teenagers

- a. Increase counseling for clean and healthy living behaviors, balanced nutritional patterns, not smoking, and taking drugs
- b. Reproductive health education.

5. Young Adults

- a. Counseling and family planning services (KB);
- b. Early detection of diseases (infectious and non-communicable);
- c. Increase counseling for PHBS, balanced nutritional patterns, not smoking / taking drugs [13].

Stunting has a large impact on the child's growth and development in the future. The impact of stunting on children's health and development is very detrimental. Stunting can cause developmental disorders in children, especially in children under two years. Children who experience stunting in general will experience obstacles in cognitive and motor development that will affect their productivity as adults. In addition, stunting children also have a greater risk of suffering from non-communicable diseases such as diabetes, obesity, and heart disease in adulthood. The problem of malnutrition in children is closely related to the level of family income. Families with low income levels generally have problems in terms of access to food related to low purchasing power. In addition to income, food insecurity at the household level is also strongly influenced by food price inflation. Another important factor affecting the occurrence of malnutrition in children under five is poor parenting, especially giving exclusive breastfeeding due to low levels of parental knowledge, poor environmental conditions such as access to sanitation and clean water, low access to health services. Economically, this will certainly be a burden for the country mainly due to increased health financing. The potential economic losses caused by stunting are enormous. The World Bank report in 2016 explained that the potential economic losses due to stunting reached 2-3% of Gross Domestic Product (GDP). Seeing the factors that cause multidimensional stunting problems, the handling of nutritional problems must be done with an integrated multi-sector approach [14].

With the increase in population, the fulfillment of good food security based on Law no. 18 of 2012 and the aforementioned FAO will be more difficult to fulfill. Of the 251 million people of Indonesia, currently more than 32 million still live below the poverty line and around half of all households remain around the national poverty line which is set at Rp. 200,262 per month. Some of the reasons given for the continuous effort to self-sufficiency in rice are as follows: (1) Costs at all costs are very large, for example in the 2013 APBN, spending up to Rp. 200 trillion for the construction and rehabilitation of irrigation networks, fertilizer and seed subsidies, and others; (2) The expansion of the paddy field area is slow, while the existing ones continue to experience conversion to other uses; (3) Innovation of rice productivity so far has not been able to be increased beyond the national average. Still in the range of 5-7 tonnes of MPD / ha; (4) The mindset of various parties that meeting the principle of food security does not have to be fulfilled entirely from self-sufficiency. If food security in accordance with the aforementioned Food Law is carried out with self-sufficiency, then referring to FAO food security will also be difficult [13].

To meet the food needs of the Indonesian population, the acceleration of the development of self-sufficiency oriented food agriculture plays an important role. Based on BPS data (2013) it is known that the agricultural sector is the mainstay of providing food for the population of Indonesia, providing around 87% of raw materials for small and medium industries. In addition, the Agriculture Sector absorbs around 33% of the workforce and is the main source of income of around 70% of rural households. In the future, the agricultural sector should indeed remain a mainstay for self-sustaining food security. This is in line with the rate of growth and for increasing the welfare of the population [5].

Food security has not been met with food independence. This is evident that so far the government has anticipated the problem of scarcity or shortage of rice in the country by increasing rice stock and / or importing rice. Based on data from International Grains Council (www.igc.int) February 2014, the Indonesian rice supply & demand data in 2011/2012 showed that Indonesia's rice stock was 5.7 million tons, produced 36.4 million tons, imported 1.7 million tons and consumed 39.1 million tons. Furthermore, in 2012/2013 Indonesia's rice stock was 4.7 million tons, production was 36.8 million tons, imports were 0.6 million tons and 39.2 million tons were consumed. The International Grains Council predicts that for 2013/2014 Indonesia's rice stock is 3.0 million tons, production is 37.6 million tons, the national average is 3.1 tons of rice per hectare with an estimated rice production of 38.2 million tons; 38.5 million tons; 38.8 million tons; and 39.0 million tons (2014-2018) [5].

The policy direction and strategy towards food independence are as follows:

- a. Policies & Strategies That Refer to Microeconomics of Rice Production
- b. Policies & Strategies That Encourage Positive Significant Factors
- c. Policies & Strategies that Suppress the Eight Weaknesses of Agriculture: acceleration and escalation of agricultural research and development activities, including building a consortium of agricultural R&D and other forms of research. The concept of food estate that has been initiated by the government needs to be prioritized and accelerated.
- d. Policies & Strategies that Synergize with Reducing Poverty
- e. Policies & Strategies for Suboptimal Land Utilization (LSO): the development of food crops is prioritized on optimizing potential land use both in swamps and non-swamps. land expansion through the development of sub-optimal land must be prioritized on suboptimal land degraded and abandoned in cultivation areas, followed by selective use of abandoned land in forest areas [5].

Nutritional status is influenced by various factors, namely poverty, health service facilities, availability of health workers, especially nutritionists and midwives. Based on Laksono's research, poverty is a factor that has a major contribution to the high prevalence of stunting in Indonesia [2]. This is in line with the basic concept of growth and development which states that socio-economic factors are variables that have an influence on the quality of growth and development. Poverty affects family characteristics so that there are differences at each level of education and purchasing power. This will affect family access in finding health services, quality food and a clean and healthy environment [15].

3.2 Government Strategy In Improving Health Based On The Sustainable Development Goals

The standard written in Sustainable Development Goals is a basic guideline in fulfilling health. The SDGs contain 17 development goals and 169 goals that are expected to answer the underdeveloped development of countries around the world, both in developed and developing countries. The Government of Indonesia has implemented various guidelines to achieve the

SDGs standard. Local governments and related associations have taken a major step towards recognizing the transformative power of urbanization for development, and the role of regional leaders to drive global change bottom-up. All of the Sustainable Development Goals have targets that are related, both directly and indirectly, to the day-to-day local government. Local government is not just implementing the development agenda. Local governments are the most ideal policymakers, catalysts of change and levels of government to connect global goals with local communities [10].

The implementation of SDGs should be implemented based on three things, namely Universality SDGs (implemented by developed and developing countries), Integration-SDGs (carried out in an integrated and interrelated manner in all social, economic and environmental dimensions), No one Left Behind (must provide benefits for all especially for the vulnerable, and implementation involving all stakeholders). Based on the President's Direction in the Cabinet Meeting on December 23, 2016, the policy to achieve SDGs in Indonesia can be achieved as follows :

1. Optimizing the coordinating role of KemenPPN / Bappenas in development, because almost all Sustainable Development Goals (TPB / SDGs) have been accommodated in the RPJMN
2. Involving all parties (government, parliament, media, philanthropy & business, experts & academics) to work together in accordance with their roles, functions and abilities;
3. Existing institutions can immediately work, both strategically and operationally [16].

The management of natural resources by local governments in rural areas, especially land and water, supports food security for the regions surrounding poverty, and therefore requires coordinated responses. Local governments can support agricultural production and regional economic growth by strengthening markets and transportation infrastructure to advance the local food chain. The steps that must be taken to overcome this are that local governments can use schools and health services to identify and overcome malnutrition in children. Regional governments in rural areas can manage collective resources and improve land ownership to protect the rights of poor communities [7]. Targets to be achieved are :

1. In 2030, Ending Hungry and ensuring access to good food quality for all people, especially those who are poor and in vulnerable situations, throughout the year.
2. In 2030, Ending Malnutrition, including achieving internationally agreed targets on infant growth and outlining nutritional needs for adolescent girls, pregnant and lactating women, and seniors.
3. In 2030, doubling agricultural productivity and income of Micro-Scale Food Producers, especially women, indigenous peoples, family farming, breeders and fishermen, including through Guaranteed And Equal Access to land, other production resources, Knowledge, financial services, Market and opportunities for get added value and non-agricultural employment [14].

Food security in a country is assessed based on food and distribution gaps. The food gap is assessed between the projected domestic consumption of food (domestic production plus imports minus use for non-food production) with its consumption target. Based on the difference between the consumption target and the amount of food consumed, this gap assumes that there is a group of people who cannot access food. The projection resulting from this study is a baseline on the situation of food security in a country. The resulting projection depends on model specifications, assumptions and using historical data. Because the model is based on historical data, it is implicitly assumed that historical trends over key variables will continue in the future. Distribution gap, namely how each income group has access to food so that the

community can meet its nutritional targets. If the availability of food in a country is lower than the target nutrition of the people, then this proves the existence of a distribution gap in the country [5].

Indonesia is currently faced with a "double burden of malnutrition" or multiple nutritional problems where on the one hand it still has to work hard to overcome the problem of malnutrition, one of which is stunting, while on the other hand the problem of over nutrition starts creeping up which leads to an increase in cases of disease not infectious (PTM) in the adult group. Investing through the fulfillment of nutrition is absolutely necessary as part of the formulation of a country's development planning. Getting adequate nutrition is a human right that should be obtained by each individual. Adequate nutrition can support optimal growth and development from the fetus to the next life stage. In the long term meeting the nutritional needs can improve the quality of the next generation, which will indirectly increase significant economic benefits through improving the quality of human resources [17].

Nutritional interventions are very sensitive in agriculture, social welfare, early childhood development, and education in schools. This indirectly determines the nutritional status. A person's nutritional status is reflected in various determinants that influence each other in a certain period of time both acute in the short term and long term or chronic. Through improving nutritional status, quality human resources can be built followed by better economic growth. This impact can only occur if all sectors work together to overcome problems in their fields. Its activities are carried out by means of national and regional campaigns, cross-sector and cross-sector advocacy and outreach, dialogue to promote cooperation and contributions. Another way to do is training, discussion, intervention of direct (specific) nutrition activities, indirect (sensitive) nutrition interventions [16].

Stunting can not be done individually (scattered) because it will not have a significant impact. Efforts to prevent stunting must be carried out in an integrated and convergent manner with a multi-sector approach. To that end, the government must ensure that all ministries / institutions as well as development partners, academics, professional organizations, civil society organizations, private companies and the media can work together hand in hand in accelerating the prevention of stunting in Indonesia. Not only at the central level, integration and convergence of stunting prevention efforts must also occur at the local level up to the village level. Efforts to prevent stunting are a national priority of the Indonesian government. Priority programs in stunting prevention include accelerating poverty reduction, improving public health and nutrition services, equitable distribution of quality education services, increasing access to adequate housing and settlements, and improving basic services governance. Prevention of stunting is also an effort to be able to take advantage of demographic bonuses based on population projections in 2035. Currently there are still many Indonesian children under five who experience stunting then fifteen years from now, the Indonesian people will have unproductive human resources and demographic bonuses cannot be utilized optimally . Therefore, stunting prevention must be carried out seriously. Stunting prevention investments need to be made early to ensure that Indonesian human resources in the future are of high quality and highly competitive [18].

As explained earlier, several issues related to the still low IMD and exclusive breastfeeding include the issue of breastfeeding counselors who have not been evenly distributed throughout the Puskesmas. ASI counselor training has been conducted up to the district level, but counselor training to all Puskesmas has no information on what percentage of Puskesmas already has ASI counselors. If the Puskesmas has an ASI counselor, it is not known what percentage of the staff has succeeded in providing counseling to the mother to ensure that she has an exclusive IMD and breastfeeding. Another gap is the still weak monitoring of violations and law enforcement

against the use of formula milk and not all workplaces provide breastfeeding as required. After the baby is 6 months old, although the provisions still have to breastfeed until the age of 2 years, the baby needs complementary food so that the fulfillment of nutrition for growth can be fulfilled. WHO / UNICEF in its provisions require infants aged 6-23 months to have adequate MPASI with the provisions that they can receive a minimum of 4 or more than 7 types of food (cereals / tubers, nuts, dairy products, eggs, other protein sources, vegetables and fruits rich in vitamin A, vegetables and other fruits - Minimum Dietary Diversity (MMD) [19].

Achieving the target of reducing stunting in children and anemia in women, as well as increasing the scope of exclusive breastfeeding is known to be one of the most profitable forms of nutritional investment if carried out continuously over the next ten years. Investments can save 3.7 million children in the world, reduce 65 million stunting children, and 265 million anemic women (compared with 2015 world baseline data). The combination of health improvement and poverty alleviation efforts is considered capable of saving around 2.2 million people and reducing about 50 million cases of stunting by 2025. This is done with the help of each side. Commitments from all of them are needed regarding the objectives, planning, implementation, improvement of targets, timelines for the implementation of interventions and program implementation.

4 Conclusion

Nutrition and food issues are discussed in the Sustainable Development Goals (SDGs). The SDGs 02 criterion states their goals, namely ending hunger, achieving food security and better nutrition, as well as supporting sustainable agriculture. Adequate nutrition can support optimal growth and development from the fetus to the next life stage. Food quality and security in Indonesia have not reached the optimal state. The efforts to improve the quality of nutrition and food is by diversification of food consumption, development knowledge, setting targets for achieving per capita food consumption. This must be done by promotive, preventive, curative, rehabilitative from infant until elderly. Need collaboration between government, private and community to increase quality food and nutrition. Commitments from all of them are needed regarding the objectives, planning, implementation, improvement of targets, timelines for the implementation of interventions and program implementation.

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The Omnibus Law Employment Copyright's Affected Legal Certainty on The Status of Outsourcing Workers

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Abstract. This research aims to know about the paradigm shift from the traditional work view that workers serve the system to the modern work view that the system must serve workers. Workers in Indonesia often say that outsourcing is “Slavery in the Modern Age”. Every outsourced worker who has signed a certain agreement with an Outsourcing Labor Supply company, workers has automatically agreed to be placed in a company that needs their services and thoughts in accordance with the position required by the labor user company for a certain period. The methodology research in this study using empirical-normative legal research. The aim is to examines how people socialize to other in their community, this methodology can be considered as a sociological legal research. The government in terms of handling outsourced workers don't get legal certainty, when outsourced workers contract period has expires, they will be extended, and will continue for years, even decades.

Keywords: Workers, Outsourcings, Outsourced Company, Omnibus Law, Contract Workers

1 Introduction

In Indonesia, outsourcing is likened to slavery in modern times. This is influenced by many factors, one of which is related to the Law of Economic Development. Indonesian and foreign entrepreneurs who invest their capital in Indonesia learn from their experiences in the golden era of former President Soeharto (the late), which resulted in riots everywhere. As a consequence, many businessmen who invested their capital in Indonesia returned to their respective countries. The production did not run as it should, the sales were not optimal, or even the absence of incoming profits. It led to a massive work termination. The problem was that employers were unable to pay severance pay for workers who have been loyal to work for years. Those conditions have led employers to look for solutions to avoid facing the similar incidents. They collaborate with the Labor Supply Company/Agency, which is in charge of screening job seekers in accordance with the criteria desired by company or employment labor user company, conducting payroll systems, over time payment, and insurance. The contract signing is only done between the labor supply company and labor user company. Therefore, the entrepreneurs are able to minimize their output.

A lot of entrepreneurs are looking for outsourcing company or outsourcing agency. On the other hand, many workers rely on their expertise and educational level to find jobs that suits on their educational background. However, in reality, the large number of job seekers are not entirely comparable to the company who search for job seekers. Therefore, the job seekers

inevitably work not in accordance with their educational background and are willing to work under the auspices of outsourcing.

Indonesian workers consider that outsourcing is “Slavery in the Modern Age”. It is because every outsourcing worker who has signed a Specific Time Cooperation Agreement (PKWT) with an Outsourcing Labor Supply company automatically has to agree to be placed in a company that needs its workers, services, and thoughts in accordance with the position required by the labor user company for a certain period of time until this agreement expires.

The Labor Law Act 13 Of 2003 article 59 paragraph 3, it is explained that the PKWT can be extended. The longest working period of PKWT is 2 years. The process of contract extension must be submitted to the company maximum 7 (seven) days before the contract expires. When the contract period expires but the target has not been fulfilled, the working period can be extended once again for no longer than 1 (one) year. If the second party (user) may still want the outsourcing workers to continue the agreement after the agreement has expires, then the second party have to make another new agreement with the outsourcing company. The outsourcing company needs to transfer the agreement to their subsidiary company in order to renew the agreement for 1 (one) month or 3 (three) at the most on behalf of the outsourced workers. There is a grace period of 30 days to renew the contract, and after that the outsourcing workers cannot be re-extended. Outsourcing companies must dismiss or appoint as permanent workers, but this has been distorted by the outsourcing company itself. It can be said that almost 60% of outsourced workers have been extended more than once placed in companies in their core business. This is a labor crisis in Indonesia. Despite the Constitutional Court Decree No. 27/PUU-IX/2011, outsourcing is even veiled than before. Therefore, the Government of Indonesia is trying to issue an Omnibus Law which can meet the legal certainty for all workers. This decree gives fresh air to the outsourcing workers hoping that outsourcing is removed.

2 Method

The methodology research used in this paper is an empirical-normative legal research method, seeing the law in the real sense and examining how the law works in the community. Since this study examines people in living relationships in society, the empirical legal research method as a sociological legal research which is taken from facts in a community, legal entity or government agency. The legal regulations become the primary legal material in this study. The primary data in this study are collected from the people’s lives by means of interviews, observations, questionnaires, and samples.

3 Result and Discussion

Problems regarding outsourcing workers are quite varied. This is because the outsourcing in the business world in Indonesia is now increasingly widespread and has become a necessity that cannot be delayed by business actors. Meanwhile, the existing regulations are not yet sufficient to regulate this problem. In the outsourcing business, there are labor supply companies and labor user companies which are inseparable. They both provide benefits each other.

Labor Law must contain 3 (three) principles, namely: the principle of job security, job income, and social security. Some companies have certain businesses which contain high uncertainty. Thus, it is a big risk if the company directly appoints permanent employees.

However, sometimes labor supply agencies often disobey Article 59 Paragraph 3 of the Labor Law Act 13 Of 2003.

Outsourcing workers consider that outsourcing should not be implemented in the short term. By employing the outsourcing workers, companies will certainly spend more money as a management fee to the labor supply agency. Thus, the outsourcing workers emphasize that outsourcing should be seen in the long term starting from the career development of the outsourcing workforce itself, efficiency in the field of labor, organization, and welfare of the outsourced workforce. By doing so, the labor user companies can focus on their core competencies in business. The internal supporting matters in a company are transferred to other parties such as a more professional labor supply company.

In developed country, such as the United States, outsourcing has become so global that it has become a means for companies to concentrate more on its core business i.e. more focused on product service excellence. However, the United States has very strict regulations regarding outsourcing. Once the outsourcing workers have completed the contract period, the company must choose whether the workers are appointed as permanent or dismissed from the company. If the company ignores labor regulations in the United States, by re-extending the contract, the United States Government will not hesitate to put sanction by “shutting down” the company. This makes sure the outsourcing workers not to lose their rights protected by the constitution. To avoid workforce exploitation, the Constitutional Court offers two types of contract models.

1. First, the employment agreement between the worker and the company must use a non-specified time work agreement (“PKWTT”) instead of a specific time work agreement (“PKWT”).
2. Second, the company must apply transferring protection principle for the workers who work for companies with outsourcing system.

The Constitutional Court Decree allows two types of PKWT, namely conditional and unconditional PKWT. The conditional PKWT requires that outsourcing companies to transfer of protection of rights for workers if the work object remains in existence even though the contracting company or the company providing labor/labor services is replaced. Meanwhile, unconditional PKWT does not require the transfer of rights for workers. In the practice of outsourcing, there are workers who work dozens of years in a single work location even though the outsourcing company has changed. Sometimes, the owners of both companies are the same, only the company name is different.

The job seekers may said regarding outsourcing is a fact that is difficult to eliminate because not all companies in Indonesia are really ready to have permanent employees with all the consequences. Nowadays, the government has issued a series of economic policy packages to improve economic conditions that are currently slowing down. Basically, these packages provide legal certainty for investors who want to invest their capital in Indonesia, one of them is by increasing deregulation and de-bureaucratization of regulations to facilitate investment in both domestic investment and foreign investment such as providing facilities for 3-hour investment services, faster tax allowance and tax holidays, VAT exemptions for transportation equipment which are all contained in the Economic Policy Package starting from volume I to volume XVI. However, the power of the 16 volumes of the Economic Policy Package is inefficient. One of the causes of slowing investment is the inefficient Indonesian economy.¹ It is also marked by Indonesia’s Incremental Capital Output Ratio (ICOR) which also has not shown its role.²

ICOR of Indonesia is above the average of Asian countries which is in the range of 6 percent, and far enough compared to China which is above 8 percent. China's economic growth is high because the output produced is far lower than the input.

3.1. Knowledge and Skill of The Human Resources

In Indonesia, one of the fundamental factors that influence Incremental Capital Output Ratio (ICOR) is Human Resource (HR). The relatively low educational background and limited skills⁴ have affected the recruitment process of outsourcing workers. Almost every company has a quality standard of prospective workers that they will place in the company, surely the prospective workers must have criteria according to what they expect. The amount of labor force is large because demographics are still young, but are constrained by relatively low educational background and limited skills.

Every year, a lot of fresh graduates: bachelor, diploma, and even high school. Fresh graduates often do not have yet any expertise. They start the world of work really from the bottom. If the employers are not careful in recruiting, this will affected on the company. The higher the criteria of the entrepreneur, the more workers will not get a job. Those reasons have led the Government of Indonesia to issue Omnibus Law of Job Creation.

Omnibus Law is a change to a regulation at the same time in a short time, or a rule that is made based on the compilation of several rules that aim to combine, streamline, revoke the regulations so that it is right on target. The word omnibus is taken from Latin which means "for everything". Black Law Dictionary which is a reference to the definition of the term law in the West has also explained what omnibus law is. In essence, this concept is like the saying once paddling, two or three islands are exceeded. Omnibus law is simply understood as a method of drafting rules, which in one regulation contains several materials/substances (which are usually made separately in several rules). When this regulation is enacted, it will revoke the rules or materials in other regulations that have been arranged.

In Black Law Dictionary, Omnibus Bill is:⁵

1. *"a single bill containing various distinct matters. drafted in this way to force the executive either to accept all the unrelated minor provisions or to veto the major provisions"*
2. *"A law that contains a variety of materials formed to force the executive to accept all unrelated provisions or to veto the main provisions"*

Omnibus Law is associated with the Constitutional Court Decision No. 27/PUU/2011, which contains:

DECISION

Adjudicate,

State:

Grant the Petitioner's request for in part;

The phrase "... work agreement for a certain time" in Article 65 paragraph (7) and the phrase "... work agreement for a certain time" in Article 66 paragraph (2) letter b of Law No. 13/2003 on Manpower (State Gazette of the Republic of Indonesia No. 39/2003, Supplement to the State Gazette of the Republic of Indonesia Number 4279) contrary to the 1945 Constitution of the Republic of Indonesia as long as the 47 work agreements do not require the transfer of protection of rights for workers/laborers whose objects of work remain, despite the change companies that carry out part of the work of other jobs from other companies or companies providing workers/labor services;

The phrase “... work agreement for a certain time” in Article 65 paragraph (7) and the phrase “... work agreement for a certain time” in Article 66 paragraph (2) letter b of Law Number 13 of 2003 concerning Manpower (State Gazette of the Republic of Indonesia Year 2003 Number 39, Supplement to the State Gazette of the Republic of Indonesia Number 4279) does not have binding legal force insofar as such work agreement does not require the transfer of protection of rights for workers/laborers whose objects of work remain, despite the change of companies that carry out part of the work of part of the work other companies or companies providing workers/labor services;

Refuse the Petitioner’s request for other than the rest;

Order to include this decision in the Official Gazette of the Republic of Indonesia as appropriate.

In its consideration, the Constitutional Court emphasized that outsourcing is a reasonable business policy of a company in the context of business efficiency. However, workers who work in outsourcing companies must not lose their rights protected by the constitution, even if they are transferred to other companies. However, in the Omnibus Law is not in line with the expectations of the outsourced workers, because it removes Article 59 of the Law No. 13/2003 regulating the work contract. When the article is abolished, all types of work are permitted and legitimate to employ laborers with a contract system. Therefore, the draft of the Employment Bill potentially causes all jobs to use the outsourcing system.⁶

3.2. Omnibus Law as The Draft Of The Employment Bill

Omnibus Law has deviated from one of the 3 (three) principles in labor law contained in the International Labor Organization, namely the principle of job security. If the draft of the Employment Creation Bill is passed, employers can make work contracts to the workers who work directly under it, as well as to outsourced workers placed at these companies. As a consequence, modern-day slavery will continue without end. This weakness is exploited by companies that need it or the company where they work. Efforts to reform the labor agreement so far is going nowhere. There are many problems occurs repeatedly has been found in the company and should be systematically solved, however it turns out to be deadlocked, blundered, and almost no solution.

In Indonesia, employers are taking an advantage in this situation. When the outsourcing workforce has expired its contract with an outsourcing agency, then the user companies state that they will still use the “services” of the outsourced workforce. However, it is constrained by the contract period expiring for 2 (two) years. Then, the labor supply agency transfers the workforce temporarily for 1 (one) month to another company, or a subsidiary company. After 1 (one) month, the workforce is withdrawn and asked to re-apply and do a psychological test, or other tests that are merely formalities. After that, the workforce signs a new Specific Working Time (PKWT). This does not only occur in one outsourcing company, but this has happened quite a lot in other companies. Even, there are the outsourced workers who have worked for decades as outsourced workers in the same company. This has been much distorted by labor supply companies with respect to labor regulations. The legal basis or the legal umbrella for manpower is bypassed as if workers are in dire need of work due to the current conditions.

In terms of daily practice, outsourced workers are always placed in the core business, for example, customer service, which is not in accordance with Article 59 of Labor Law ACT 13 Of 2003, since customer service is the core business in Banking system, which is carried out continuously. In the reality, the outsourced workers are commonly working for the Bank, and

they have been placed as customer services. It can be seen from the employee ID card showing the logo of the company where they actually work for. This means that they are outsourced workers.

In 1997, Indonesia experienced a severe economic crisis and the boredom to the New Order government led by the Suharto which ran in unstable politics leading to step him down. The economic situation which was not getting better and the desire to implement a democracy became the reasons for the community to ask for a change of leader. Forms of outsourcing and contract labor relations are ways to realize a flexible labor market that will create production efficiency and maximize capital gains.

Labor market flexibility refers to the speed at which the labor market adjusts for fluctuations and changes in society, economy or production. This ability to adapt causes labor market institutions to achieve a sustainable balance.

The flexibility of the labor market is an idea in changing the labor system which has been considered rigid by employers. The flexibility of the labor market is one way to help the government reduce unemployment and expand employment opportunities. Changes to the labor system will always change to a more flexible direction when the existing work system has been considered a rigid and unprofitable system for employers.

According to the literature review on the application of labor market flexibility, there are three positive impacts on economic growth, namely:

- (1) There is competition;
- (2) a company that gets the convenience to recruit and lay off workers;
- (3) a work relationship based on a contract and outsourcing system as well as working hours and wage rates that can be adjusted to the business cycle.

When the Government of Indonesia wants to enact this Omnibus Law, it is easily actualized because Government of Indonesia Regulations, Presidential Regulations, and Ministerial Regulations are made by executive power (under the authority of the President). It is different from with laws made by the House of Representatives. The coordination flow is longer, even there is a process of political tugging.

Whereas in the United States of America, establishing the law is made through a package of policies, for example the law of investment does not only regulate the investment procedure, but also regulates the licensing process, labor, land transfer process, and so on. Therefore, the investors' rights and obligations can be found in one legal document, with a large number of articles. Meanwhile, in Indonesia, there are regulations overlapping each other.

4 Conclusion

The large number of job seekers (prospective workers) in Indonesia is not comparable with the number of companies seeking for employees. A lot of fresh graduates who explore the world of work and look for a job finally find a job which does not match their educational background. Thus, they have to accept the job with work experience from the very bottom level. On the other hand, a lot of companies make strict requirement for the position offered. It is related to the income of companies that are used to pay workers.

It is considered that the government is not serious to overcome the problem of outsourcing. This leads the workers do not have legal certainty. In this case, the Government cannot implement the 3 (three) labor principles as stipulated by the ILO. Thus, when the work contract ends, it will be extended for years, even decades. It can be said that the Government does not reduce contract labor which is basically not in accordance with the 1945 Constitution.

As a result, the outsourcing workers follow the “market flexibility” system meaning that they have no other choice to work in a particular company with an outsourcing system.

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Urgency of Transparency as A Means of Public Participation in Spatial Planning of a Region

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Abstract. Land is an inseparable part in planning and developing a region. Land management must be carried out carefully, effectively, and efficiently regarding the principles of spatial planning in order to achieve general prosperity and social justice based on the 1945 Constitution. Spatial planning cannot work alone. It requires active contribution from all parties to improve its quality. One of the significant foundations in achieving optimum and ideal spatial planning is the enforcement of transparency principle. Due to the importance of this principle, this study attempts to discuss: (1) how is the principle of transparency interpreted in spatial planning, and (2) how is the ideal application of transparency principle as a means of public participation in spatial planning? The principle of transparency is very important for the public as it gives information regarding spatial planning, including the planning, utilization, and management. The objective of spatial planning is creating spatial congruence and easy access to discover the functions of the land used as stated in the regional or urban spatial planning.

Keywords: transparency principle, spatial planning, public participation

1 Introduction

Land has a close relationship with Indonesia as stated in Article 1 section 1 of Law No. 5/1969 on Basic Agrarian Law (UUPA). It holds a very important role in human life, especially Indonesian people. The Indonesian people united and fought for their land to the bitter end until they eventually claimed the land by the proclamation of independence. The land is managed by the state and shared to all the people of Indonesia with the spirit of general prosperity. In using the land, the state has authority to control and carry out management, utilization, provision, and maintenance of the land as stated in Article 2 section 2 of Basic Agrarian Law. The general interpretation of Basic Agrarian Law states that “eventually in order to achieve the ideals of the nation in agrarian sector, planning regarding management, utilization, and provision of land, water, and space for interests of the people and state is required, involving national planning of all Indonesian territory and regional planning of each region (section 14). With this planning, land use can be realized orderly in a guided way so that it brings maximum benefits for the state and people. In section 14 of Basic Agrarian Law, it is mentioned that in order to achieve general prosperity widely the government make a general plan regarding management, utilization, and provision of land, water, space, as well as natural resources for all interests and needs of the state and people of Indonesia. In this case, the government refers to both the central and regional government.

Land is one of the parts planned by the government in addition to water, sea, and air, including all of the resources contained. In this view, land, water, sea, air, and all of the resources are regarded as space. The definition of space is also given in Article 1 section 1 of Law No. 26/2007 on spatial planning that space is an area including land, sea, air, and earth as a unified territory, where humans and other creatures live, do activities, and sustain their life. In the consideration of Spatial Planning

Law, it is stated that management of space needs to be improved carefully, effectively, and efficiently regarding the principles of spatial planning so that the quality of national space can be sustainable to achieve general prosperity and social justice based on the 1945 Constitution. In planning and developing a region, land is an inseparable part. Land management becomes increasingly important to achieve optimum, congruent, and balanced use of land in order to achieve sustainable development [1]. Spatial Planning Law also considers limited space and growing public perception; therefore, transparent, effective, and participatory realization of spatial organization is needed to create safe, comfortable, productive, and sustainable space. Development is continuously enhanced as a means of achieving prosperous life physically and mentally towards a just and prosperous society based on Pancasila.

Article 2 of Spatial Planning Law points out the principles used in realizing spatial planning, and one of those is the principle of transparency. In the explanation of Article 2 of Spatial Planning Law, transparency is defined that spatial planning is realized by giving unlimited access to the society to obtain information related to spatial planning. In order to give clear information regarding the physical condition of a region, development is carried out by the central and regional government in order to meet the needs of the region. In development planning, the regional government have very strategic authority and position related to their function as “public servant” in order to improve prosperity, safety, justice, and peace for the society [2] (Armando Soares, Ratih Nurpratiwi, 2015). In planning and developing a region, through the principle of transparency, the society have the right to know the condition of spatial planning in their region. To the same extent, the government have the obligation to inform the public about spatial planning in their region.

The principle of transparency, based on Article 16 of Government Regulation No. 15/2010, is realized by distributing information regarding spatial planning to the society through information media such as pamphlet/brochure, poster, banner, billboard, and/or exhibition. Besides, the information can be distributed through print media such as book of legislation, handbook of spatial organization, bulletin, and other print media.

The principle of transparency is very important for the society as it gives information regarding spatial planning of their region, including the planning, utilization, or management. Therefore, it creates congruence of spatial planning and easy access to discover the functions of the land used as stated in the regional or urban spatial planning. Furthermore, it also aims to minimize confrontation between the society and government regarding spatial organization stated in regional or urban spatial planning. Based on the description above, this study attempts to address the following problems: (1) how is the principle of transparency interpreted in spatial organization? (2) how is the ideal application of transparency principle as a means of public participation in spatial organization?

2 Research Method

This study used a juridical normative method which examined the implementation of provisions of positive law (legislation). Besides, this study was also considered as library research. Theoretical approach was used in which it examined concrete events with relevant theories [3]

3 Discussion

3.1 Interpretation of Transparency in Spatial Organization

With respect to Law No. 26/2006 on spatial planning, it can be showed that spatial planning is important in the Unitary State of the Republic of Indonesia as an archipelagic country where its area includes land, sea, air, and all resources [4] [5]. Thus, the management needs to be carried out carefully, effectively, and efficiently regarding the principles of spatial planning so that the quality of national space can be sustainable to achieve general prosperity and social justice based on the 1945 Constitution. Moreover, with limited space and growing public perception about the importance of spatial planning, the realization of spatial planning needs to be transparent, effective, and participatory in order to create safe, comfortable, productive, and sustainable space. This thing

underlies spatial planning, and spatial planning itself refers to a system of spatial planning process, using space, and controlling spatial use. The process of spatial planning requires activities including management, development, implementation, and supervision.

Spatial planning and realization, with its importance in planning, utilizing, and controlling space, is obviously enforced by principles of spatial planning that underlie its realization. In Law No. 26/2006 on spatial planning, the principles are stated in Article 2 consisting of:

- a) Integration principle,
- b) Harmony, congruence, and balance principle,
- c) Sustainability principle,
- d) Effectiveness and efficiency principle,
- e) Transparency principle,
- f) Mutual partnership principle,
- g) Public interest principle,
- h) Legal certainty and justice, and
- i) Accountability

All of those principles are very important in spatial planning. However, this paper specifically discusses transparency principle as it is closely related to public participation (involvement/concern) in terms of spatial planning and its realization. Transparency principle in spatial planning refers to the condition where spatial planning is realized by giving unlimited access to the society to obtain information regarding the planning.

If this transparency principle is viewed from human rights perspective, it can be regarded as the right to develop themselves [6] [7]. In the Great Dictionary of Indonesian Language (KBBI), the right to develop self means everyone has a right to be more advanced mentally and pedagogically. More specifically, this right includes the right to seek, obtain, have, save, proceed, and provide information through various facilities. This right is certainly related to the regulations in Law of Human Rights in Article 11 to 16 Law No. 49/1999 on human rights. If this right to obtain information is related to the context of rule of law, it corresponds to Law No. 14/2008 on transparency of public information. The society have the right to obtain information as the main interpretation of transparency principle in spatial planning. In this case, the term information implies that human as an individual is one of the public components that has the right to access information from the state and specifically from the government. Law No. 14/2008 on transparency of public information in Article 7 section (1) states that every public institution is required to provide, disclose, and/or publish public information, apart from the information excluded based on the conditions [8].

The life of the people and nation cannot be separated from the vital influence of information, which is closely related to public services. Therefore, transparency and accountability principles become the basic principles in running legal entities, especially public legal entities. If they do not include transparency with limited understanding and contradiction to these basic principles, they will potentially cause anxiety and lead to social conflict.

The legal entities that are required to give the access of information to the society are executive, legislature, and judiciary. They are the institutions running public services with several criteria including operational funds from the state budget (APBN), regional budget (APBD) and endowment from locals and foreigners. They are also in the form of public organizations whose obligations are regulated in Law No. 14/2008 on transparency of public information. One of them is the institution related to policy making on spatial planning and/or realization of spatial planning in a region (province/city/regency). On the contrary, the one requiring the information refers to the applicant of public information, and they are the citizens or legal entities that request information to the public institutions.

Besides, it is needed to make regulations in implementing the rights to seek, obtain, have, save, proceed, and provide information through available facilities that aim to: [9]

- a) guaranteeing citizens' rights to know the plans of public policy makers, programs of public policy, and process of decision making, and reasons of decision making;

- b) encouraging public participation in the process of policy making;
- c) improve active role of the society in policy making and management of well-organized public institution;
- d) realize good governance which is transparent, effective, efficient, and accountable;
- e) discover the reasons underlying public policy related to general interests;
- f) Develop knowledge and nation's intellectual life; and/or
- g) Improve the management and services of information in public institutions to generate quality information services

Transparency of public information becomes the obligation of the government to disclose the plan and what the government does. This transparency represents public rights, as well. If this is approached from the rights of obtaining information, several basic norms for the public institutions include: [10]:

- 1) Serving
Serving means that public institutions related to public services represent the implementation of human rights protection, especially the rights of self-development in terms of rights to information.
- 2) Reliable
The transparency of all information represents good attitudes of public institutions in satisfying information needs from the applicants.

3.2 Realization of Transparency Principle in Spatial Planning

Based on the explanation above, we know that the principle of transparency is closely related to the obligation of the government to provide public information, including close relation to the implementation of spatial planning. Therefore, spatial planning must consider the principles of integration, harmony, congruence, balance, sustainability, transparency, and accountability. The implementation of spatial planning considering transparency principle obviously gives the society access to know the present/future plan as well as opportunity to get involved in spatial planning as the realization of public participation that employs democratic, equal, and transparent approach. This approach underlies community driven planning which places the society as the key and the government as their facilitator. With respect to the interactive process of spatial planning, public participation needs to be involved in every process and responsive in following every dynamic and development in the society [11].

The role of regional government in planning regional development is a strategic authority in performing their function as "public servant" to improve public prosperity, safety, justice, and peace. Through the principle of transparency in regional planning and development, the community have a right to know the condition of spatial planning in their region. Similarly, the regional government have an obligation to inform the community about the spatial planning in their region. The implementation of transparency is stated in Law No. 26/2007 on spatial planning, Article 2 Letter E of Law No. 26/2007 on transparency principle in spatial planning. The realization of transparency principle, based on the explanation in Article 16 of the Government Regulation No. 15/2010 on the implementation of spatial planning, is disseminating information regarding spatial planning to the society through information media such as pamphlet/brochure, poster, banner, billboard, and/or exhibition. In addition to these media, the dissemination can be carried out through print media such as book of legislation and handbook of spatial planning, bulletin, and the other print media. Transparency principle is very important for the society to obtain information regarding spatial planning in their region. Thus, it will create congruence of spatial planning and easy access to discover the functions of the land used as stated in the regional/urban spatial plan.

It is important because basically the principle of transparency represents public participation in spatial planning. Realizing spatial planning by the government requires public participation through: 1) participation in making plan, which is a process of determining spatial structure and pattern including making and establishing spatial planning; 2) participation in using space, which is a means

of achieving structure and patterns of space based on the plan by making and implementing the program as well as its funding; 3) participation in controlling spatial use, which is a means of achieving well-organized space.

After all, the principle of public involvement in spatial planning has the following implications.

- 1) Positioning the society as the subject, not as the audience, especially in the spatial planning related to economic growth and public needs
- 2) Facilitating the society to be the subject of spatial planning in order to avoid marginalization of public rights and preserve local culture
- 3) Encouraging stakeholders' responsibilities and roles in transparency and professionalism in the process of spatial planning
- 4) Encouraging institution reinforcement which is able to represent various public elements in order to be able to convey aspirations.

3.3 Ideal Application of Transparency Principle as a Means of Public Participation in Spatial Planning

Transparency principle in spatial planning, based on Law No. 26/2007 is that spatial planning is carried out by giving the society unlimited access to obtain information regarding spatial planning. Article 17 of Local Government Regulation (Perda) No. 68/2010 on form and procedures of public participation in spatial planning states that the local government has obligations to:

- a) provide information and access of information to the public on spatial use through communication media;
- b) socialize spatial planning to the public;
- c) carry out spatial use based on its function as stated in spatial planning;
- d) give responses to the public feedback on spatial use according to legislation

Based on the contents of the Law, despite the fact that the local government does not specifically have a function to apply transparency principle in spatial organization, they still have obligations to give information and socialization to the society. The dissemination of information aims to make the society understand that there are regulations working in spatial planning so that the society do not violate the law.

With regard to the description above, the writer argues that ideal application of transparency principle as a means of public participation can be achieved through the following ways.

- 1) Disseminate of information regarding things/activities/present or future programs conducted by the government in spatial planning
- 2) Regulate the obligation to disseminate information as the implementation of transparency principle in the form of Local Government Regulation
- 3) Manifestate types/ways of dissemination of information in Local Leader Regulation (Perwali/Perbup) and disseminate the information flexibly in order to reach the public range
- 4) Continuously receive aspiration from the society through public hearing. This can be carried out by legislators within recess period. Public hearing refers to a method adopted by law makers, in this case Regional House of Representatives, to listen to opinion and feedback from the society or related parties in making law in order to create regulation representing public interests.

4 Conclusion

It is widely agreed that the main objective of sustainable spatial organization is to achieve public prosperity. One of the important principles in sustainable development is transparency of

information to the society given by the government regarding the means and/or policies related to spatial planning. Therefore, it allows the society to give aspirations (public participation) in spatial planning. These two elements obviously require clear planning and mechanism in order to achieve the objective because the higher the public participation is, the better the performance of spatial planning will be.

With regard to the transparency principle in spatial planning as the means of public participation, it is fair to argue that public participation is very crucial in spatial planning since the result is achieved for the sake of public interests. The society can get the benefits in terms of economy, social life, and environment. Besides, spatial planning aims to create safe, comfortable, productive, and sustainable national space based on Indonesian Archipelagic Vision and National Resilience.

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Judicial Review in Acts on Financial Information Access for Taxation Interest

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Abstract. This study discusses justice in the implementation of the Law No. 9/2017 on Financial Information Access for Taxation since there is limitation for the tax authority to strengthen the taxation database to meet the optimal tax revenues. The component of tax revenues requires the support from other stakeholders such as financial institutions. The study uses a normative juridical research methodology using primary legal materials, namely the issued laws and other laws relating to tax collection norms and Constitutional Court Decision No. 102/PUU-XV/2017 on the testing of the law on access to financial information; and secondary legal materials such as books, legal journals and other information published in the mass media. This study uses a statutory approach and a case approach. The results of this study are directed to achieve justice and welfare through the regulation of legal norms for the common interest.

Keywords: Tax Collection; Financial Information; Law System; Justice and Welfare.

1 Introduction

Levy collection is an absolute need for a country although the people do not fond of being charged by taxes. To give more proper understanding about taxes, a French legal expert stated: “Levy collection is a certain part of a property of every citizen set aside to save or to be able to savor the rest of the property normally. To determine the proper levy collection, there must be a consideration over the need of the state or the need of the citizens...”[1]

The above understanding did not emphasize the element of ‘forcing’ as firmly defined within the tax acts. The phrase ‘*consideration about the need of the state*’ mentioned by Montesquieu provided a deep meaning that it was not easy for a state to make an established consideration in arranging the norms of levy collection that could provide justice, without emphasizing the element of forcing.

When the need of the state keeps increasing every year with a real target mentioned in the Act of National Budget (UUAPBN) the fulfillment of the need of revenue from tax sector remains dominating the number of APBN stipulated. Facing such condition, a space for tax potency becomes a particular thought yet it has to remain based on justice, especially tax potency space in financial information access which is constrained by the existence of other Acts providing protection for the funds owners who keep their funds in various financial institution. It could be conducted by the state since it has the right to collect levy from their citizens. The right in legal concept is the right over other people’s deed, over the deed that according to law is an obligation of other people.[2]

The need of funds with trillion rupiah increase for the prosperity and the welfare of the people, takes a vast access for the tax authority to obtain financial information for tax interest as the tool to supervise the fulfillment of tax obligation based on self-assessment system.[3] the availability of financial information access provides expectation of the compliance over tax to

become more optimal, since the database of tax becomes stronger and at the same time narrow down the space to put illegal funds that are possible to be used by the parties who try to disobey tax. Moreover, with the current global economy, and inevitable international cooperation for such automatic financial information exchange with international standard, the need of financial information access is highly needed by the tax authority.

Even though the levy collection is carried out based on self-assessment system, the issue of justice including legal certainty has not fully manifested yet because it is not easy to establish tax legal norm that could be accepted by many parties.[4] To face this issue, an Act of Financial Information Access for Tax Interest No. 9 of 2017 (applied started from May 8, 2017) was issued, and it could be said that it did go very smooth since it would face some 'resistance' by judicial review to Constitutional Court (MK). Decree of MK. No. 102/PUU-XV/2017 (signed on 30-04-2018) denying the entire plea by the pleader, to give meaning how it is not easy to give justice in levy collection. MK decree has provided legal certainty that the norms in the Act of Financial Information Access for Tax Interest, was not against the constitution. Based on such background, the perspective of justice in levy collection context regarding with financial information access becomes interesting to analyze in this paper.

2 Methods

This research used normative judicial research method using primary legal material especially acts in the field of tax that has been issued or other acts related to the norm of levy collection. Besides, secondary legal materials in the form of publication about law such as textbooks, legal journals and decision of court related to levy collection issues and other information in the form of article published in mass media were also used. The research was carried out using legislation approach, case approach as well as philosophy approach i.e. about justice in levy collection system.

3 Result and Discussion

3.1. Tax Interest Through the Expansion of Information Access

Referring to the need of tax increase targeted within the UUAPBN every year, a step to expand the access to obtain financial information for tax authority is needed with an Act, since it is a means to achieve people's prosperity (*welvaarstaat principle*).¹ Such step becomes an inevitable part since one of the sources of tax potency is asset or taxpayer property saved in various financial institutions that the tax obligation have not been fulfilled. Such expansion stage is a continuation of tax amnesty policy which has been defined in letter b in the part of consideration of Act No. 9 of 2017.

Tax need for welfare purpose based on the constitution needs a concern from the stakeholders so that financial information access will not be constrained by the confidentiality norms of the owner's institution or financial saving institution. Since the tendency of interpreting funds saving confidentiality in financial institution has been seen as save since it is protected by the Law. Similarly, certain countries have policy to provide safe steps for money depositor in their countries.

¹ Purnadi Purbacaraka and Soerjono Soekanto, *Perundang-Undangan Dan Yurisprudensi*, Alumni, Bandung, 1979, p. 19.

Legal issue becomes very serious when the purpose of legal justice was demanded by many parties related to the tax charges over the funds they save in financial institution, the tax have not been paid. One of the purposes of the issuance of Act No. 9 of 2017 provides justice in levy collection system so that the taxpayers could contribute through tax payment to the country's development. Firmly, justice is created since the hidden financial information could be identified (inside or outside the country), so that taxpayers are obliged to pay the tax that should be paid based on the Act of tax.

In the context of tax, the meaning of justice could be said simple. If someone has property (money) and income but s/he has not paid the tax, then over the property mentioned must be charged by tax. On the contrary, if over the property or money obtained and saved in financial institutions have been charged with tax, no more tax should be charged. If Mr. Ali has some money in Bank ABC but over the money, tax has been charged, Mr. Ali does not need to worry if the existence of his money was identified by tax authority. A concern commonly occurs since the money saved has not been reported and the tax has not been paid. The Act of Financial Information Access for Tax Interest No. 9/2017 intends to target such condition. How much properties (money) saved in financial institutions (inside or outside the country), is not a problem. It becomes serious matter if the account owner is afraid because the tax has not been charged over the properties.

Justice in understanding financial information access for tax interest is in line with the justice principle in levy collection. It means that the tax weigh allocation on various group of people should reflect justice with two common criteria used to see if the allocation of tax weight has reflected the aspect of justice. The first criteria is ability to pay, i.e. if some has higher ability to pay is charged by higher tax weight proportion. Second criteria, benefit principle i.e. benefit is considered fair if someone who obtain bigger savor from the public services provided by the government is charged by bigger tax weight proportion.[5]

Taxpayers who save their money in financial institution currently feel safe since the institution on behalf of 'confidentiality' becomes an assurance for them, as regulated in the norm Article 40 and 41 of the Act of Banking No. 10 of 1998. However, if the issue of 'confidentiality' of the institution does not apply especially for tax interest based on the Act No. 9 of 2017, there would be public reaction for judicial review to Constitutional Court. The legal choice to do judicial review is very correct, to assess the judicial side of the implementation of Act. No. 9 of 2017.

In the analysis of the author, there are at least three reasons for the implementation of Act. No. 9 of 2017 to manifest justice for the success in levy collection, they are:

- 1) World globalization which is inevitable or terminated. Common explanation of Act No 9 of 2017 confirming the international world development to exchange financial information automatically based on international standard. If it was not carried out, then Indonesia would be categorized as the country that takes side to non-transparency (a country which is non-cooperative jurisdiction). Global forum on transparency and exchange of information for tax purpose (Global Forum) with the number of members of 139 countries shows inevitable globalization.
- 2) The need of justice in levy collection system. The implementation of tax amnesty program through Act No. 11 of 2016 implemented for nine months (since July 2016 to March 2017) and is expected to provide justice in tax paying compliance, incurs a debate over justice. Tax amnesty is seen only provide amnesty for tax evaders and it is seen not fair for obedient taxpayers. Tax amnesty has an impression to provide an expectation that the tax paid would increase revenue.[6] Even the tax amnesty policy is considered by the government as the most proper effort to increase tax revenue and withdraw the

funds of Indonesian citizens saved in abroad, even though it once was carried out in 1964 and 1984. Therefore, from the justice side, tax amnesty is a form of unfair treatment since there has been a special treatment for taxpayers who are not obedient get the amnesty not to pay the tax and its tax punishments are dismissed.[7]

- 3) Financial information access resistance for the existence of confidentiality norm in some Acts. At least there are ten norms from five Acts revoked on Article 8 of Act No. 9 of 2017 related to the implementation of financial information access for tax interest. Whereas there are at least two more Acts that should be synchronized so that the tax justice could be carried out, i.e. (i) Act No. 8 of 2010 about Prevention and the Eradication of Money Laundry (UUTPPU), and (ii) Act No 24 of 1999 about foreign exchange traffic and exchange rate system (UULLD). In UUTPPU, the report of financial service is only directed to the center of report and analysis of financial transaction (PPATK) while UULLD, the information and data providing are only given to Bank Indonesia.[4]

Those three reasons give a meaning that levy collection is the one that serves justice since it provides a common treatment for everyone who has not paid the tax yet. Such perspective is in line with Sindian who emphasizes state authority in levy collection must be shown for public welfare so that it serves justice.[8] Transparency in gaining financial information access is a legal step to create justice for common obligation in fulfilling taxes based on the legislation. The space of fairness of levy collection is the central point that is indisputable. Act No. 9/2017 is the central point of justice in global context. Because it does not give a common treatment for money owners (either domestic or foreign taxpayers) who save in Indonesian financial institutions. Exchange of information becomes a way to create justice in levy collection system.

3.2. Tax Justice Test Through Act Testing

The norm formulation of Article 1 of Act on Financial Information Access for Tax Interest No. 9/2017 stated: "Financial information access for tax interest including access for receiving and obtaining financial information in order to implement the provision of legal regulation in the field of tax and the implementation of international agreement on tax".

The norms above strictly stated that only tax interest addressed in the meaning which obtain financial information access, not other legal interest such as civil code or criminal code. Tax interest is justice interest so that the funds (money) owners who have not paid the tax, to pay the tax based on the Act of Tax. However, the meaning of the above norms by the pleader of testing is understood differently. The test pleader states the warranty, protection and legal certainty could be violated by banking/other financial service institution ruled in Article 28D, 28G, of 1945 Constitution.

According Decree of Constitutional Court No. 102/PUU-XV/2017 that the mistake of understanding the confidentiality then was defined by the government by stating that the confidentiality revealed in the norms of Act outside the tax is only implemented for tax interest. While confidentiality interest outside the tax interest remains applied. In other words, financial institution remains responsible for keeping the confidentiality of financial information from the customers outside tax interest. Legal argument is strengthened by Zainal Arifin Mochtar by quoting legal principle that the Act applied nowadays cancel the Acts applied previously (*lex posteriore derogat lex priori*).

In such context, the author suggests that when the tax justice becomes the demands of the country and the public welfare interest, the confidentiality in the Act of Banking, Act of stock market, and other Acts limiting the tax interest, should be said as contradictory Acts and does

not have philosophy foundation in the meaning of levy collection for the state interest (public welfare). The confidentiality of legislation outside the Act of tax should be harmonized and may not resist justice interest in levy collection. Therefore, the harmonization of legal norms is legal politic of norm establishment that must fully support the interest of the right of the state in levy collection.

About the non-applied confidentiality in ten norms of 5 Acts in Article 8 of Act No.9/2017 in relation to the Article 28j paragraph (2) of 1945 Constitution, in the context of justice, its legal argument is explained by the Judge of Constitution Court, the author quotes as follows:

First, ... data and information opening belong to someone or an entity related to the suspicion of being involved in tax evasion would directly be related to an effort to fulfil human rights, in this case the including in the group of the rights of economy, social and culture in which its fulfillment requires the government /state, as confirmed by Article 281 paragraph (4) of 1945 Constitution, saying that in this case through the implementation of development where tax is one of the main sources of the funds.

Second, the exception of data and information confidentiality related to the suspicion of tax evasion is clearly against the principle of fair demand fulfillment based on moral consideration, religious values, security or public order in a democratic society.

Two argument of justice become the keys in interpreting financial information access with confidentiality that becomes the pleader's legal reason. The decree of Constitutional Court provides the test of justice meaning in the interpretation of financial information access that should be able to be obtained by tax authority for the tax interest. Justice in levy collection is justice for the welfare interest as confirmed by the third paragraph of the preamble of 1945 Constitution that should be understood by all.

4 Conclusion

The current number of job seekers (prospective workers) in Indonesia is not comparable with the number of companies seeking for employees. A lot of fresh graduates who explore the world of work and look for a job finally find a job which does not match their educational background. Thus, they have to accept the job with work experience from the very bottom level. On the other hand, a lot of companies make strict requirement for the position offered. It is related to the income of companies that are used to pay workers.

It is considered that the government is not serious to overcome the problem of outsourcing. This leads the workers do not have legal certainty. In this case, the Government cannot implement the 3 (three) labor principles as stipulated by the ILO. Thus, when the work contract ends, it will be extended for years, even decades. It can be said that the Government does not reduce contract labor which is basically not in accordance with the 1945 Constitution. As a result, the outsourcing workers follow the "market flexibility" system meaning that they have no other choice to work in a particular company with an outsourcing system.

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Review of Termination of Post-Reformation President In Indonesia's State Systems

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Abstract. One aspect of the study in state administration law that is crucial is filling and dismissal of the position of President. This can be understood given the position of President in Indonesia not only as a representation of the head of government but at the same time the head of state. Before reforms, the state administrative law approach in dismissing the president tends to be approached from political aspects. As the President can be dismissed by the People's Consultative Assembly (MPR) through a Special Session if it violates the direction of the state. This provision is not stated on the torso but in the Explanation of the 1945 Constitution. Benchmarks violate the bow the country is very difficult to determine legally.

Keywords: Termination, Post-Reformation, Indonesia's State Systems

1 Introduction

The reformation of Indonesia in 1998 has implications for changing the institutionalization of democracy. This is the implication after so long the authoritarian regime of the New Order confined freedom (freedom) as the heart of freedom. Democracy itself is indeed a term that is not simple and sometimes has complications here and there. However, the strength of democracy, it can still correct the system it builds on the basis of authentic public aspirations.

The institutionalization of democracy also afflicts the position of President. The President is a strategic position in the form of a republican government which has a very important role in managing the country. The filling and termination of the President's position is important because it determines the sustainability of the country.

During this time before the reform, the dismissal of the president was often more political. This is related to the substance of violation of the state policy. Then, after the amendment to the 1945 Constitution the institutionalization of the termination of the president was far more democratic. Involving the Constitutional Court (MK) in the dismissal of the president so that it has a legal contribution therein.

The responsibility of the President is one reason that the President may be dismissed during his term of office. The 1945 Constitution (UUD 1945) prior to the amendment stated that the President was appointed by the People's Consultative Assembly (MPR), so he was subject and responsible to the MPR. The President is a mandate of the MPR, so he must carry out the course of the country according to the general guidelines set by the MPR². If the

President in exercising his power violates the provisions stipulated by the MPR, the House of Representatives (DPR) as the institution that oversees the running of the government can propose to the MPR to hold a Special Session to hold the President accountable.

In the history of state administration in Indonesia, the dismissal of the President in his term of office before the amendment to the 1945 Constitution has occurred in two government regimes namely during the days of President Soekarno and President Abdurrahman Wahid. President Soekarno was dismissed by MPRS based on MPRS Decree No. XXXIII / MPRS / 1967 concerning Revocation of State Government Power from President Soekarno. This was done by the MPRS after Soekarno delivered an accountability speech entitled Nawaksara which was referred to by Sukarno as voluntary accountability, because in fact the responsibility was given not at the request of MPRS. After the accountability speech was delivered, MPRS requested that the President complete his accountability speech which became known as the Nawaksara Complementary Speech. The things that the MPRS wants to ask the President to complete his accountability speech are for the President to explain the causes of the movement / PKI along with its epilogue and economic setbacks and morals, Accountability regarding moral actions committed by the people should not be part of the responsibility of a President.

In the Abdurrahman Wahid case, according to Saldi Isra there were at least five events which could be used as a reason for the MPR to hold a Special Session in order to hold accountable towards Abdurrahman Wahid namely, *First*, Abdurrahman Wahid once asked that MPRS Decree No. XXV / MPRS / 1966 concerning Prohibitions on the Spread of the Teachings of Marxism, Communism and Leninism was revoked. Even though when viewed from the standpoint of the constitutional proposal this is not right, because the President is bound to run the course of the country including the MPRS decree. This also contradicted the oaths and promises made before the MPR before he was appointed President. In modern democracies such violations constitute very principle violations in the administration of the state. *Second*, the President's statement which states that the DPR's interpellation right is an unconstitutional act. The right of interpellation is related to the President's actions to dismiss several ministers in his cabinet. Even before, the President also considered that the DPR was like a kindergarten. *Third*, the replacement of the National Police Chief from General S. Bimantoro to the General Commission. (Pol). Chaeruddin Ismail carried out unilaterally by the President was considered to have violated the MPR decree, because the replacement required the approval of the DPR, the action clearly violates the provisions set by the MPR. *Fourth*, there is a statement from the President stating that all the special committee in the DPR is illegal so that anything produced by the special committee is not legally valid. This is related to a number of cases such as an indication of the President's involvement in the bullogate and bruneigate scandal. *Fifth*, the President's rejection of two candidates for the chairman of the Supreme Court (MA) proposed by the DPR. This action prevented the President from implementing the provisions of Law No. 14 of 1985 concerning the Supreme Court which states that the Chief Justice is appointed by the President as the Head of State among the Supreme Judges proposed by the Parliament. This also indicates that the President is trying to intervene the Supreme Court as the highest judicial power and be free from interference from other powers that are extra judicial.

In the case of Abdurrahman Wahid, the process of delivering the memorandum had also been carried out. But this matter was not heeded by the President. He even issued a notice in

the early hours of July 23, 2001, this became the peak of the President's panic in the face of political pressure that wanted him to step down from power. One of the contents of the information was to freeze the MPR institution. The freezing of the MPR as an institution whose constitutional position is above the President clearly reflects panic rather than the rationality of institutionalizing democracy¹⁰. This was also sufficient reason for the MPR to accelerate the Special Session.

2 Method and Research Objectives

This paper will examine how the pattern of dismissal of the President based on reform 1945 Constitution. In addition, identifying various legal debates regarding norms benchmarks for dismissal of the President, such as the formulation of the meaning of "disgraceful deeds. Other than that, how does the procedural law of the Constitutional Court anticipate various dynamics in context dismissal of the President. These matters are examined in the perspective of constitutional law, and What is the mechanism for terminating the president before and after the amendment to the 1945 Constitution?

3 Result and Discussion

3.1. Pre-Reformation

During the New Order era, the position of President was an institution that experienced problems. First, in the constitutional norms (the 1945 Constitution) at the time it was stated that "the President and Vice President hold their office for five years and afterwards can be re-elected to the same office for only one term". This norm gives birth the interpretation that the same President can be nominated many times as long as he is elected. This legitimized the authoritarian New Order regime. Second, the benchmark of biased dismissal. Because, Article 8 and the Explanation of the 1945 Constitution (Pre-Amendment) use indicators as one of the benchmarks for the dismissal of the President is a violation of the state's direction (Pancasila of the Constitution and / or GBHN). This is reinforced by MPR Decree No.III / MPR / 1978 which regulates procedures ranging from giving memoranda (dissatisfied statements) to the President to holding a special session asking for the President's accountability. Two Presidents were dismissed (impeached) with this model, namely Soekarno because the accountability speech entitled Nawaksara along with his complement was rejected by the MPRS in the 1967 MPRS plenary session and President Abdurrahman Wahid was dismissed through MPR Decree No. II / MPR / 2001 without giving accountability speeches. Whereas Suharto used the "stop" mechanism in accordance with Article 8 of the 1945 Constitution (Pre-Amendment).

In the case of President Soekarno, he was dismissed because his accountability speech entitled Nawaksara and his complement was rejected by the MPRS at the 1967 MPRS plenary session. How can a president be assigned the responsibility of managing the nation's morals which is very heavy?

With regard to the dismissal of Sukarno, there are interesting things, especially the transition from Soekarno to Suharto. When studying the history of legal documents, the event

of the transfer of power of President Soekarno to Suharto began after the rebellion The 1966 Indonesian Communist Party, known as the G30SPKI. President Soekarno at that time issued a Presidential Order / Supreme Commander of the Armed Forces of the Republic of Indonesia / Great Leader of the Revolution / Mandatory of the MPRS on March 11, 1966 which instructed General Soeharto the Minister of the Army Commander to make special efforts to overcome the threat of danger to the safety of the running of the government and the course of the revolutionary authority of the leader great revolution and the integrity of the nation and state.

It became interesting because the Presidential Order above or well known as Supersemar was later legitimized by the Provisional People's Consultative Assembly Decree (MPRS) Number IX / MPRS / 1966 regarding Presidential Order / Supreme Commander in Chief of the Armed Forces of the Republic of Indonesia / Great Leader of the Revolution / Mandate of the MPRS. The MPRS decree is valid until the MPR results of the general election are formed (the second dictum). For the author, the issuance of MPRS Decree Number IX / MPRS / 1966 above is odd and anomalous in terms of statutory law. Because, how can the MPRS institution which has a higher position than the president legalize the products of his subordinates, namely the president (Supersemar). Then, MPRS Decree Number XXXIII / MPRS / 1967 was published on the Revocation of State Government Power from President Soekarno. In the dictum considering the MPRS provisions it is clear that this Decree was published because President Soekarno's Speech on June 22, 1966 entitled Nawaksara and Presidential Letter Number 01 / Pres / 1967 concerning Complementary Nawaksara did not meet the expectations of the people in general because it did not clearly contain the responsibility of President Soekarno's policies regarding G30SPKI and the epilogue, economic decline and moral decline.

There are two important matters in the stipulation of the MPRS as mentioned above, which are (a) stating that President Sukarno has been unable to fulfill constitutional responsibilities, as befits a Mandate's obligation to the People's Consultative Assembly (Provisional), as giving a mandate, which is regulated in The 1945 Constitution (Article 1) and Stipulation of the Provisions of the People's Consultative Assembly (Provisional) No. XV / MPRS / 1966, and (b) appoint General Suharto, MPRS Decree No. IX / MPRS / 1966 as Acting President based on Article 8 of the 1945 Constitution until the election of the President by the People's Consultative Assembly as a result of the General Election (Article 4).

In fact, Article 4 of the MPRS Decree Number XXXIII / MPRS / 1967 was violated by the MPRS itself by then issuing MPRS Decree Number XLIV / MPRS / 1968 concerning the Appointment of MPRS Decision Number IX / MPRS / 1966 as President of the Republic of Indonesia. Because, in the provisions of the previous MPRS Decree (MPRS Decree Number XXXIII / MPRS / 1967), General Soeharto was only an Acting President until he was elected by the MPR from the General Election. Not by the Provisional MPR (MPRS).

The reason for appointing General Soeharto as President --- one of them --- in considering the letter g of MPRS Decree No. XLIV / MPRS / 1968 was stated: "that the psychological stability of the people and foreign trust will increase, if the President's Official with all his power appointed as President of the Republic of Indonesia ". The reason, in the writer's opinion, is very pragmatic and political. There is no justification from the juridical aspect.

While in the case of the dismissal of President Abdurahman Wahid in 2001, he was dismissed by MPR Decree Number II / MPR / 2001 without giving an accountability speech. The dismissal was due to President Abdurahman Wahid refusing to attend the special session of the People's Consultative Assembly and instead issued a Presidential Decree on July 23, 2001, one of which contained a freeze on the DPR / MPR. This event was actually the end of the conflict with the DPR Special Committee's accusation against President Abdurahman Wahid who was accused of misusing the assistance of the Sultan of Brunei in the amount of two million US dollars. So limited to the alleged political argument as if the law.

3.2. Post Reformation

Now after the reformation, the 1945 Constitution has been changed. In Article 7A and Article 7B of the 1945 Constitution (Amendments) it is formulated that in principle the dismissal of the President no longer uses political benchmarks but is juridical. First, the President can be dismissed if he violates the law in the form of betrayal of a corrupt state, bribery of other serious crimes or disgraceful acts or is no longer eligible as President. Second, before the MPR dismissed the President, the procedure that must be taken is the DPR submitting an opinion regarding the alleged violation of law committed by the President at the Constitutional Court (MK). The Court then conducts an examination and if it is proven that the ruling of the Constitutional Court based on Article 83 paragraph (2) of Law No.24 of 2003 concerning the Constitutional Court is to state that it justifies the opinion of the DPR. Then, the DPR held a plenary session to continue the proposal to dismiss the President to the MPR. MPR must hold a hearing for decide on the DPR's proposal no later than thirty days after the MPR accepted the proposal. The decision of the MPR was taken at the MPR plenary meeting which was attended by 3/4 of the total number of members and was approved by at least 2/3 of the total number of members present, after the President was given the opportunity to submit an explanation in the MPR plenary meeting. The same thing applies to the dismissal of the Vice President.

The model of the termination of the President (impeachment / impeachment) of Indonesia after the amendment has similarities and influences from the President's dismissal system in the United States. In the United States, the President can only be dismissed if he commits a crime. Article 2 paragraph (4) of the Constitution of the United States states that: ". Only on the basis of betrayal, bribery and serious misconduct, the President, Vice-President and Civil officials can be dismissed or imposed impeachment. Whereas in the German Constitution (Basic Law), reasons for dismissing the President in addition to criminal offenses are also violations of all fields of law stipulated in the Federal Law.

The problem is, in the case of Indonesia, a wave of dissatisfaction with the government of President Susilo Bambang Yudhono (SBY) has strong symptoms. This is based on the disappointment with the rampant corruption in all trias politica elements and the handling of dissatisfaction regarding the welfare of the community. On the other hand, the state administration mechanism that is already clear in the constitution cannot always be used. Given the political dimension often becomes a dynamic process and interacts in social change relations that have strong conflicts of interest between elites.

For example, politically, is it possible to use the potential of impeachment procedures through a constitutional constitutional mechanism while a coalition of political parties under

the leadership of the Democratic Party as the dominant ruling party in parliament forms a political configuration that closes the gap? Not to mention the politics of mutual hostage between parties as the implication of the entanglement of corruption cases that hit the party elite.

From the juridical dimension itself some interesting things are studied in depth. First, does the Court have the competence to provide evidence, especially in the criminal context of violating the President's law. Bearing in mind, the characteristics of the Constitutional Court as a constitutional court are different in character from criminal justice.

Second, is the time given by the constitution in Article 7B paragraph (4) of the 1945 Constitution namely the Constitutional Court obliged to examine, try and decide as fairly as possible within ninety days regarding the impeachment of the President is a natural thing? Given the criminal evidence is not easy and requires in-depth investigation.

Third, can the president who has been impeached then be tried again in the general court from the criminal side? What about the application of the principle of ne bis in idem.

Fourth, what if the Constitutional Court is of the opinion that the President violates the law but the MPR decides differently. Does this have any meaning, legal decisions are defeated by political decisions?

In the end, no government system in a democratic context can satisfy. The United States experienced the same thing. Although for example President Obama's policies are very counter-productive and disliked by the public, this cannot be the basis of impeachment. President Obama's system, strategy, policy and method of governing will continue to take effect until his term ends. Except if President Obama commits a criminal offense

As written by Donny Gahril Adian, democracy is not a given. The history of democratic thought and activism is a history of continuous correction of freedom, equality and justice. At least through democracy, there is the potential to foster a dream to build a better constitutional system.

4. Conclusion

Amendments to the 1945 Constitution have fundamentally changed the provisions regarding the reasons, stages, and procedures for the dismissal of the President and / or Vice President in the middle of his tenure. Thus, it can be concluded that the main reason for the impeachment of the two presidents is because the president loses legitimacy because his actions and actions can be categorized as acts that violate the law both criminal law and constitutional law / violation of the constitution including violations of oath of office. Almost similar to the practice in the United States, but in fact that reason is still quite ambiguous. This confusion seems to underlie the publication of the third amendment to the 1945 Constitution. The 1945 Constitution apart from the third amendment seems to be trying to regulate firmly the reasons for the impeachment of the President. This is indeed different from the 1945 Constitution before the changes that did not explicitly regulate the dismissal of the president in his office including the reasons.

Other violations of law other than violations of criminal law such as violations of the Constitution and constitutional obligations as president and violations of religious, moral and

customary values can be used as a reason to dismiss the president in the middle of his term of office, provided the violation is such demeans the dignity and position of the President.

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Chemical Castration for Pedophile Perpetrators- Expectation and Implementation Reviewed from Medical-Juridical Aspects

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Abstract. Panel of judges in Mojokerto District Court handed down the verdict on Aris. He was sentenced to 12 years imprisonment, and chemical castration as additional sentence, a lively debate about chemical castration sentences emerged in between the pros and cons community. Government and the House of Representatives are supportive party, since they representing people who feel uneasy due to the increasing cases of pedophilia in every year. In their opinion, chemical castration provides a deterrent effect, thus no more victims were violated. On the other hand, human rights activists disagree on chemical castration since it violates human rights. Moreover, castration legal basis which regulated in Article 81 Paragraph (6) and Paragraph (7) of 2016 Law Number 17, concerning the Establishment of Government Regulations in Law Number 1 of 2016 replacement, concerning Child Protection, has drawn protests on its implementation. Doctor association also stated that the doctor who executes chemical castration is violating medical ethics code and the doctor's oath. This study is expected to open up insights on what penalties should be received by pedophiles.

Keywords: Castration, Pedophilia Preparators, Medical.

1 Introduction

There has been an increase in cases of sexual violence against children in recent years, even there are victims who were killed. From the several pedophile cases that occur, the perpetrators were from the victim's neighborhood. Including from the family, the environment around the child, their home, school, educational institution, or social environment [1]. Sexual violence often occurs in children because they are always positioned as a figure who is weak or helpless and have a high dependency with the adults around them. Threat makes children helpless, and they could not tell their experiences to others. Based on the evaluation of pedophile perpetrators and violence cases against children revealed, the perpetrator is someone who is close to the victim or people who have domination against the victim. There are no specific characteristics or personalities to identify sexual violence perpetrator against children or pedophilia. Sexual violence against children are including acts, showing media/pornographic objects, showing genitals to children's, touching, kissing sexual children organs, rape, and even persecution and murder [2].

The Law no. 23 year 2002 on Child Protection defines a child as a person who is still in the womb until an age under 18. Pedophilia perpetrators do sexual violence against children to get sexual pleasure or satisfaction from the victim [3].

Based on their identity, sexual perpetrators are divided into two, namely [4]:

- a. Familial Abuse
A blood relationship exists between the victim and the perpetrator and the perpetrator is part of the main family member. Including parents, stepfathers, caregivers or someone who is trusted to care for the children.
- b. Extra Familial Abuse
Sexual violence perpetrators are outside the victim's family. Usually, the offender is a person who has been known by the victim and has established relations with the child, then entices the child into a situation where the sexual harassment may commit. Often lured by giving certain rewards that are not obtained at home. Since the victim is afraid of being scolded by the parents, usually the child does not dare to report. So the parents must care for children's playmates and behavioral change.

Forensic psychologist Reza Indragiri Amriel divides pedophile into 2 types [5]:

1. Exclusive Pedophilia, which only has an interest in children.
2. Facultative Pedophilia, which has heterosexual orientation in adults, but prefers to choose children as substitution/impingement.

Actions that categorized as sexual violence against children are: touching the child's body, whether the child wears clothes or not; all forms of sex penetration, including penetration into the child's mouth using objects or limbs; make or force a child to engage in sexual activity; intentionally engaging in sexual activity in the presence of a child, or not protecting and preventing the child from witnessing sexual activity by another person; create, distribute, and display images or films containing scenes of children in indecent poses or actions; and showing children, pictures, photos or films that show sexual activity can be considered sexual abuse of children [6]. To uncover the existence of sexual violence against children is not easy, because sexual violence tends to have a traumatic impact on children. They feel pressured to not reporting sexual violence and find it difficult to trust other people to keep their sexual violence a secret. It is because they feel threatened and obtain worse consequences when reporting and feel ashamed. They also feel that the incidents occurred because of their mistakes. Sexual violence also makes feel that they are embarrassing the family name [7]. Some of the impacts arising from sexual violence against children including [8]:

1. Biological impact before puberty.
Children's vital organs are not prepared for intercourse. If forced, these actions will damage the organ's tissue.
2. Psychological/social impact.
Since the perpetrators do not want their actions known, they will intimidate the victims to keep it as a secret. The victims may experience psychological depression and withdrawal from their social relationships.

Basic punishments for pedophilia are imprisonment and fines. If the action is repeated, causing disability and death will charge several additional penalties. The names of the perpetrators would be announced in public or they will get castration chemical punishment. Generally, castration is distinguished into two categories. First, surgery castration involves cutting the sperm duct, so that sperm will be unable to flow. Second, chemical castration is done by injecting chemicals named anti-androgen drugs into a person's body. The substances contained in this drug are expected to reduce testosterone production. So that, the perpetrators will experience sexual drive loss. Drugs often used to suppress testosterone production are medroxyprogesterone acetate, cyproterone, and leuporelin [9]. For men, testosterone hormone may arouse libido. So if the hormone is reduced, then sex drive will be reduced, apart from

testosterone hormone sex drive can also be due to previous sexual experience, health conditions, psychological factors, and sexual organ function. Therefore, even if people are given anti-testosterone drugs, the desire for sexual relations will not necessarily disappear altogether [10]. Besides to suppress sexual desire, anti-testosterone drug injection may cause complex side effects, such as decreased muscle strength, osteoporosis, anemia, increased fat, decreased cognitive function, and triggering a heart attack. Men experience infertility because they do not have spermatozoa cells. The effects of anti-testosterone drugs are also temporary, so the sexual arousal can reappear if the drug is stopped [11].

The implementation of chemical castration as additional punishment on pedophilia is still in debate, due to viewpoints differences in addressing the problem. Groups who supported chemical castration argued that this action was needed to give a deterrent effect on pedophile perpetrators, so repeated actions will not happen. On the other side, groups that oppose the action assume that chemical castration violates human rights. Medical teams that will perform chemical castration also disagree with this punishment [12-15].

2 Core Problems

Proposed problem in this paper is:

1. How is the application of article 81 paragraph 7 of law number 17 of 2016 against pedophiles?

3 Research Method

This is normative research with legislation approach by examining the principles of law, legal norms, rules, and regulations from laws, documents, books, and other relevant official sources. The description result was discussed, analyzed using theories, opinions from the perspective of law and medical experts combined with the researcher's opinion. The purpose was conclude to answer the issues raised in the study.

The primary legal materials used in this research included castration legal basis which regulated in Article 81 Paragraph (6) and Paragraph (7) of 2016 Law Number 17, concerning the Establishment of Government Regulations in Law Number 1 of 2016 replacement, concerning the Second Amendment to Law Number 23 of 2002.

The secondary legal materials included: journals, papers, relevant studies, books, documents, and legal writings. The tertiary legal materials included law dictionary, English-Indonesian dictionary, encyclopedia, and related data.

4 Discussion

Pedophilia is a type of crime against children that has long been happening in society. The culprit is called a pedophile, adult humans who have deviant sexual behavior. Pedophilia as a mental disorder means making children as the object or target of the action sexually [16]. Pedophilia is not only a behavior but also a defiant attitude as the tendency of liking children for adult sexual satisfaction [17].

Some factors causing pedophilia including [18]:

1. History of traumatic events
A prior victim that experienced trauma has learned that sexual satisfaction can be obtained from children.

2. Lack of socialization
An introvert or closed person will have an inability to build relationships with children's environment.
3. Low Self-Esteem
People who feel that they don't have any strengths or failure compared to their partner or friends. They probably have mental disorders, depression, and anxiety that are very difficult to forget.

Sexual violence level that occurs to the children divided into several categories [19]:

1. Action related to sexual stimulation including sexual interaction, non-coitus, petting, fondling, exhibitionism, and voyeurism.
2. Rape or sexual assault, including oral or genital penetration, masturbation, oral stimulation of the penis (*fellatio*), and oral stimulation of the clitoris (*cunnilingus*).
3. The most fatal action is called forced rape. There are even several murder cases to the victims.

Some of the effects of sexual abuse on children are [20]:

1. Emotional
As a victim of sexual violence, children experience stress, depression, mental turmoil, feelings of guilt and self-blame, fear of others, memories of the incident, nightmares, insomnia, self-esteem problems, sexual dysfunction, addiction, and suicidal thoughts.
2. Physical
Children's bodies are still growing and physically not as strong as adults. Thus, the damage in their body could be worse than in an adult's body.

Based on the National Commission on Women's Protection and the Indonesian Child Protection Commission's report, in last decade there has been an increase in sexual violence against children. The government considers the increase of these incidents are due to ineffective punishment to the offenders, so that deterrent effect has not happened. As nation's successors, children must be protected by giving the pedophiles appropriate punishment thus they will not repeat their actions. Therefore, through the Parliament Law No. 17 of 2016, in Article 81 paragraph 7, the government agreed to perform chemical castration as additional punishment toward pedophilia perpetrators. Due to debate and several rejections on the law, the implementation was not that easy. The medical team who expected to perform chemical castration also refused the idea, as well as human rights activists [21].

Chemical castration is defined as injection of anti-testosterone substances to a man's body, through injection or oral to decreasing testosterone hormones level to reduce sexual desire. This hormone is mostly produced by Leydig cells in the testicles and has a huge role in man's sexual function, namely sexual arousal and erection. By injecting anti-testosterone drugs, the offender is expected to lose their sexual drive [22]. Another side effect from this medicine is decreased muscle strength, bone loss, anemia, increased blood lipid levels, decreased cognitive function, affect the heart and blood vessels has the potential to cause infertility because it may block spermatozoa cells production [23]. Unfortunately, anti-testosterone drugs neutralizers could be easily found in the market. The drug effects are also temporary, so sexual arousal can reappear if the drug is stopped [24].

Another problem faced is the Indonesian Doctors Association (IDI) clearly refusing to perform chemical castration due to the contrary to the doctor's oath and medical ethics violation. "Based on the scientific evidence, chemical castration does not guarantee the sexual desire disappearance or decreasing preparator's potential sexual violence behavior." said IDI Chairperson of the Medical Professional Development Council (MPPK), Pudjo Hartono. He

officially stated that appointing the doctor as chemical castration executor was against the Honorary Council and Medical Ethics (MKEK) Number 1 of 2016 concerning Chemical Castration as well as Indonesian Medical Ethics Code [25,26]. Even though medically chemical castration may decrease sex drive, the social, and psychological impact on the castrated person must be studied deeply. Thus, during and after serving his sentence, the preparators can get psychological and social assistance [27].

Chemical castration as a punishment is violating human rights. Thus, human rights organizations reject it under several reasons, namely [28]:

1. Castration as a punishment is not justified by the national criminal law system or criminal purpose followed by Indonesian legal system.
2. Castration punishment violates human rights as stated in various international conventions that have been ratified in our national law. Including the Covenant on Civil and Political Rights (ICCPR), Convention Against Torture (CAT), and also the Convention on Rights of the Child (CRC). In any form, corporal punishment is interpreted as torture and acts that degrading human dignity, especially if it is intended as retaliation.

Even though the main reason is scientific doubt on the deterrent effect.

3. Every form of violence against children, including sexual violence, is basically a desire manifestation to control and dominate children. The castration law does not place violence against children as the main problem. Therefore, human rights organizations are asking the government's consideration to focus on children's interests comprehensively.

Based on the arguments above, it is clear that there are pros and cons in implementing castration chemical punishment with pedophile preparator's approval. It is necessary to find the best punishment which gives deterrent effect to them so that sexual violence against children will not reoccur.

5 Conclusion

The implementation of Act 81 Paragraph 7 of Law Number 17 Year 2016 concerning pedophile perpetrators has several drawbacks. Namely, the drug's negative effect is unequal with the impact. In addition, due to breaking doctor oaths and medical ethics, Indonesian Doctor's Association rejected becoming a chemical castration executor. Chemical castration also does not obtain legal certainty yet in Indonesian Law.

Suggestion

It is suggested that the perpetrators are given a choice between chemical castration or another additional punishment which still needs to be formulated. A careful assessment must be made before imposing chemical castration punishment, particularly in the preparator's hormonal disorder. If there are no hormonal abnormalities found, then another form of punishment is suggested. Educating executors who came from non-medical backgrounds is also necessary. Special training and improving executor competencies to perform chemical castration is needed.

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Islamic Law as A Value to Solve The Humanitarian Crisis: Lessons from Indonesia

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Abstract. This research aims to discuss about the humanitarian crisis that occurring in Indonesia. Nowadays, humanitarian crisis in Indonesia is due to the lack of fulfillment of human rights, intolerance, racism and other factors. The humanitarian crisis should not happen, if Indonesia applied the principle of Islamic Law, named Maqashid Sharia. Implementation of the concept of Maqashid Sharia should be carried out with the approach of the Qur'an and Hadith. Based on literature studies, this research will analyze how to Indonesian Government solve their humanitarian crisis problem by using Maqashid Sharia in practice. In the end, the author found that the humanitarian crisis in Indonesia could be prevent by Maqashid Sharia.

Keywords: Islamic Law, Value, Maqashid Sharia, Humanitarian Crisis

1 Introduction

Historically, democracy has emerged and developed long ago. Since it was first discovered, the terms and conceptions of democracy have metamorphosed several times. This situation eventually forced democratic countries to implement democratic systems with different models and characters. However, the majority of justices in several countries are very strongly influenced by the values or culture of the nation and its historical side, including Indonesia. The source of democracy in this country consists of 3 (three). One socialism from the west which defends the principles and values of humanity, this is also believed to be a goal. Second, Islamic values that command to do right and reflect God's justice in the life of society, nation, and state. Three, the way of life of collectivism or harmony in togetherness as in villages in Indonesia. These three sources of democracy can guarantee the sustainability of democracy that grows and develops in Indonesia so that democracy in Indonesia has a strong and deeply rooted basis [1].

Democracy has many meanings and interpretations. The meaning and interpretation are closely related to the social system that supports and follows it. Democracy contains elements and universal values (common denominator) as well as contextual contents attached to a particular social system (cultural relativism) [1]. So that almost certainly in every democratic country, there is a value and local wisdom that becomes its supporting style.

According to language, democracy consists of two words derived from Greek, namely demos, which means people and cratein or kratos, which means power or sovereignty. In the language of demo-cratein or demo-kratos (democracy) is the state of the state wherein the system of government sovereignty is in the hands of the people, the people in power, people's

government, and power by the people [2]. In other words, in a democratic country, the people are the highest authority.

The legal and political experts agree that the term democracy comes from the era of the city-state (polis) in the Ancient Greek period. However, it is believed that the model of democracy in the modern era does not originate there. The assumptions and practices of democratic state administration at that time were very different from the practices and dynamics of democracy in the modern era now. In ancient Greece, democracy was not founded on the idea of individual citizens' rights. This right is only given to a small number of citizens who live in the city. The word democracy in the modern sense began to be used in the nineteenth century to designate a system of representative government, where the people's representatives were elected through free competitive elections by citizens [3].

Democracy will not come, grow, and develop by itself in the life of society, state, and nation. Therefore democracy requires the real effort of every citizen and supporting device that is conducive to culture as a manifestation of a community's mindset and design. The concrete form of the manifestation is made democracy as a way of life in every aspect of state life both by the people and the government. Democratic governance requires a democratic culture to make it exist and upright. The culture of democracy is in the community itself. A good government can grow and be stable if society, in general, has a positive and proactive attitude towards the basic norms of democracy. A truly democratic political system, the minimum requirement is the existence of a balanced political power of the community, besides the existence of other balance factors, such as ideology, economic, social, and cultural systems [4].

As for the norms that make the democratic way of life as follows [4]:

1. The importance of awareness of diversity and moderation;
2. Deliberation;
3. Moral considerations;
4. An honest and healthy agreement;
5. Fulfillment of economic aspects;
6. Collaboration between citizens and attitudes to trust each other's good intentions;
7. A democratic outlook on life must be an integral part of the education system [5].

If we interpret the true identity of a democratic state, then democratic ideas must be substantially realized in aspects of state life, both in the political, social, and economic fields. This is in accordance with the modern democratic political theory popularized by Boron, where the democratic model is divided into four levels, namely [6]:

1. Electoral Democracy;
2. Political Democracy;
3. Social Democracy;
4. Economic Democracy.

From these four levels, to achieve a true concept of the rule of law and democracy, there are several pre-conditions that must be met. The prerequisite is seen from the way to interpret the concept of the rule of law and democracy. Democracy can be explained in two aspects. First, democracy as a system, then democracy is bound by the rules of the game (constitution, laws, regulations) that have been mutually agreed upon. Second, democracy as an ideology. Here is explained how to realize government by a concern of The people based on an ideology. Here the importance of democratic countries respecting the values of human rights, namely freedom of thought and expression, freedom of the press, organization, freedom of speech, freedom of choice of representatives, freedom of politics, freedom of religion, and so on [4].

A scholar, Ruslan, emphasizes the concept of democracy to the fulfilment of human rights that will guarantee openness in living systems of society, nation, and state [4]. However, lately,

we often get information that some community groups, especially in Indonesia, are starting to be anti-democratic. They allegedly want to replace the Pancasila ideology and democratic values with other ideologies, such as the Khilafah, which is actually taught in the teachings of Islam. So, the question arises, how true is the Islamic law to see democracy and the values of humanism contained in it. Is Islam really anti-democracy or just the opposite.

2 Method

This research is a type of legal research, namely research conducted to produce new arguments, theories, or concepts as a prescription in solving the problems faced [7]. Meanwhile, the research approach used is the conceptual approach and the statue approach. This research uses primary and secondary legal materials. Primary legal material consists of statutory provisions and case to be studied. Whereas secondary legal material consists of textbooks, legal dictionaries, and legal journals.

3 Result and Discussion

3.1 Democracy in Indonesia on Islamic Law View

Fundamentally, the theory of democracy is a government that places sovereignty in the hands of the people. Leaders who are appointed in a democratic system are bound by social contracts to carry out people's aspirations. The existence of criticism, correction, and even the dismissal of leaders in the democratic system, are all related to the aspirations of the people. Parmudi argues that democracy is a system of government in a country where all citizens have rights, obligations, positions and powers both in carrying out their lives and in participating in state power, where the people have the right to participate in running the country or oversee the running of state power, both directly for example through public spaces (public spaces) and through representatives who have been chosen fairly and honestly [8].

According to Ma'arif, basically, Islam recognizes the existence of democracy [9]. Democracy taught by Islam was born first and is clearer than democracy originating from the West (Ancient Greece). Islam not only supports but can make the principles of teachings in social life [10]. It can be understood that what is meant is the democracy that is compatible with Islam. Whereas in the view of Fachrudin, democracy, in accordance with Islam, contains democratic ideas and institutions based on the following principles or values: First, the highest and absolute power belongs to God. Shura is the basis of the principle of God's sovereignty and sharia supremacy. Second, the highest and most regal authority in an Islamic state is the Holy Qur'an and the Sunnah, while human power is under God's control. Third, humans on earth derive their power from God's power according to the concept of the Caliphate [11].

In any concept of shura, the issues to be discussed in the shura council must first be referred to the basis and source of the law of the Koran and Sunnah, and if there is no strong text (the basis of the Koran and Sunnah), then the members of the shura assembly do *ijtihad* to seek law by comparing and examining common verses and traditions as well as adjusting and considering the case being discussed then it is violated with the existing law that is adjacent to the case under discussion. In the Shura system, the truth is not known by the majority, but by its compatibility with the source of Sharia law. Whereas in a democratic system, truth is the majority vote despite opposing the clear Shari'a of God. In addition, he also said that shura is a form of faith because with shura we practice the teachings of Islam [12]. While democracy is a form of *kufr* to God, because if the majority decides the disbelief, then that is the decision that must be followed

according to them, likewise, if the Shura respects the scholars, while democracy respects the infidels.

According to Abdul Qadir Audah mentioned by A. Hasymy that there are five rules that form the principle of shura, summarized as follows [13]:

1. Shura rights set for the government and the people in this case both parties are equal, not there is one party that has more rights than another. Just as the leaders of a country may at any time state their opinions in government affairs, so can the people or the people's representatives.
2. The obligation of the government to deliberate with the people in state affairs, both large and small. And the people can exercise their rights at any time to give advice to the government or propose regulations and can sue the government to implement Islamic sharia.
3. Shura is based on sincere lillahi; the ideals of shura must be carried out sincerely because God is to uphold the truth of Islam, without being influenced by inheritance and personal interests, nor by the interests of groups and regions.
4. Shura is not unanimous; it does not become a necessity so that all people (people's representatives) agree on one opinion. Decisions are the opinions of the people; after exchanging thoughts freely, without any pressure.
5. The necessity of implementing decisions by a small group. After deliberation freely, all groups must carry out the decision, especially by the small groups who are defeated. Regarding this, the Prophet gave an example in the Uhud war negotiations, where the Apostle submitted to the will of the people who wanted to meet the enemy to the hill of Uhud, while the prophet himself thought it was better to stay in Medina. After becoming the decision with the most votes, the Apostle immediately put on his armor and went out to lead the crowd towards the battlefield.

Islam also limits the power and authority of rulers. This ethical value is outlined by Rasulullah SAW; "Obey the leader as long as he does not command evil." This hadith ipso facto gives political restrictions in relation to the problem of limiting the position of leader. That is if power has opened up, given space for, or ordered to despotism, then the community is obliged to boost and overthrow that power. In the Koran, this type of leader is depicted with the symbolization of *thâghût* (tyranny) followed by the derivation of "*aduw*" (repeated 99 times), "*thagâ*" (repeated 39 times), "*Pharaoh*" (repeated 74 times), "*Baghâ*" (repeated 97 times). The symbolization of "*thaghût*" along with its derivation, according to Mohamed Arkoun, contains the effectiveness of ethical values, which was later able to inspire the Islamic revolution in Iran in 1979 [14].

The limitation of power and authority of these rulers was stated by Syed Hussein Alatas as quoted by Ismail, as one of the democratic norms highlighted in sharia [15]. A rule states that "political power must be exercised within the framework of the Shari'a" (Sharia is the highest law of the Muslim community). This means that the authorities must submit themselves to the laws, values, and principles of religion.

According to Islamil, restrictions on state authority can also be aligned with other democratic principles, namely the principle of public responsibility [16]. Leaders must be accountable to the people not only in terms of general administration but also in terms of how public funds are managed. Even a caliph himself must obtain public approval before they can use public money for a personal purpose. The principle of public responsibility (public unaccountability) is supported in the Koran. "... their business is (decided) with deliberation between them." This verse points to a clear concept of deliberation (with the people) regarding matters relating to the public interest. This is the basis of administrative relations between the

government and the people. Therefore according to this principle of public responsibility, the people have the right to choose and dismiss their rulers.

Previously it was agreed that Islamic teachings contained democratic values. Democracy itself can be in the form of institutions and value systems. In other words, democracy is a concept of a political system. Based on this, Islam should favour the concept of a political system or the concept of a democratic state. Because, after the democratic value system is "Islamized," the political system preferences that were initially empty become contained. Islam and democracy complement each other. Islam fills value preferences, while democracy provides the concept/form of the political system. Thus, democratization is not impossible in countries with a majority Muslim population. In other words, the Islamic religion is able to contribute to the process of democratization as long as it is held that Islam is always trying to "liberate."

According to Sudirman, as quoted by Ichsan, the most fundamental difference between the concept of shura according to Islam and democracy according to the West is that deliberation according to Islam is a system of government in which all people participate in governing through *ulil amri* and all affairs must be returned to the basis and source the law that was revealed by Allah SWT and was exemplified by Rasulullah SAW [17]. Democracy is a system of government in which all people participate in governing both through direct means such as referendums and indirectly through the mediation of their representatives.

So the concept of shura, according to Islam, is a government system where Allah SWT is sovereign, while the concept of democracy is a government system where people are sovereign. Therefore the concept of shura according to Islam and the concept of democracy, according to the West (Greek) is very much different. Shura bases that all problems must be returned to the Koran and Sunnah, while democracy will return all problems to the people. In shura, rules, laws, laws must first be referred to the basis and source of the law of Allah SWT and the Sunnah of Rasulullah SAW, while in democracy, rules, laws, laws continue to be built, formed, determined based on what is generated by thought the people either directly like the referendum or through their representatives.

3.2 Islamic Law Values (accompanying Democracy) to Solve Humanitarian Crisis

According to Fachrudin (2006), democracy following Islam contains democratic ideas and institutions based on Islamic principles or values where the supreme power is only in God, and shura is the basic principle of the sovereignty of God and Sharia supremacy [11]. That is, in a country that embraces democracy in Islam, it is not justified in having an authoritarian and ruling leader for life as is happening today in Muslim countries.

Furthermore, Muslim countries must start a revolution and amend their constitution to be in harmony with the Qur'an. State leaders must be limited by the highest law, both the Qur'an and the constitution, while the administration of government must be based on Sharia and/or the constitution. Islam basically provides basic principles and values in managing an organization or government. Al-Qur'an and As-sunnah, in this issue, have hinted at some basic principles and values relating to leadership, community life, organization, state (read: politics), including a government system in which the notes are social contracts. The principles or values include the principle of monotheism, As-syura (deliberation) Al-'is (fair) Hurriyah Ma'a Mas'uliyah (freedom with responsibility) Legal Certainty, Guaranteed Haq ul Ibad (Human Rights) and etc.

Islamic law is intended for the benefit of living in the world and the hereafter. And the scope of Islamic law covers the area of religion and country. Islamic shariah generally applies to all humanity and is eternal until the Day of Judgment. The laws strengthen and strengthen each other, both in the fields of creed, worship, ethics, and muamalah, in order to realize the

peak of the pleasure of Allah SWT, peace of life, faith, happiness, comfort and regularity of life and even give happiness to the world as a whole. All that is done through conscious awareness, sense of responsibility for obligations, feelings are always monitored by Allah SWT in all aspects of life, both when alone or in front of others, and by glorifying the rights of others.

Through democracy that guarantees the fulfilment of human rights and the values of humanism, modern Islamic countries continue to fight for the codification of humanism values in accordance with the provisions of Islamic law in various conferences, both through the United Nations, the OIC and so on. Although there have been efforts from Muslim countries to support the fulfilment of human rights, in reality, there are still many countries that have not been serious about complying with the declaration. One form of state obedience is in the form of ratification. Ratification is mostly one way of ratifying an international treaty to be able to become one of the legal products in the countries participating in the agreement—the term ratification used in the practice of international treaty law. The ratification of international treaties can be done in the form of legislation or in the form of a constitution. Based on the provisions of Article 2 paragraph (1) b of the 1969 Vienna Convention on International Treaties, ratifications are: "Ratification," "acceptance," "approval," and "accession" mean in each case the international act so named when a State establishes on the international plane its consent to be bound by a treaty.

History has proven that the inclusion of democratic principles and the values of humanism based on Islamic law in the constitution has brought peace and prosperity to the country and its people. This is as done by the Arab kingdom, which included the principles of democracy and the fulfilment of human rights in the Charter of Medina. The core of the Medina charter contains the principles of equality, brotherhood, unity, freedom, religious tolerance, peace, justice, please help, and defend the persecuted. While the substance of the summary of the Medina Charter, as summarized by Sudjana includes [18]:

1. Monotheism, namely, recognizing the existence of one god (Articles 22, 23, 42, and the final part of Article 42).
2. Unity and integrity (Articles 1, 15, 17, 25, and 27). In these Articles, it is stated that the entire population of Medina is one person. There is only one protection if Jews have followed this charter, it means they are entitled to security and religious protection.
3. Equality and justice (Articles 1, 12, 15, 16, 19, 22, 23, 24, 37 and 40). These articles contain the principle that all residents of Medina have the same status before the law and must enforce the law and justice.
4. Freedom of religion (Article 25). Jews are free to practice their religion, and Muslims are also free to practice Islamic law.
5. Defend the country (Articles 24, 37, 38, and 44). This article explains that every citizen of Medina who recognizes the Medina charter has the same obligation to uphold and defend Medina from enemy attacks, both attacks from outside and from within.
6. Recognition and preservation of customs (Articles 2 to 10). These articles state that good practices among Jews must be recognized and preserved.
7. The supremacy of Islamic law (Articles 23 and 24). Every dispute must be resolved according to the provisions of Allah and the provisions of the Prophet Muhammad (Al-Quran and Sunna)
8. The politics of peace and internal protection and the problem of external peace (Articles 15, 17, 36, 37, 39, 40, 41, 47).

4 Conclusion

Islamic law has a view of the concept of democracy, which is based on the values contained in the Qur'an and Hadith. If, according to democracy, the highest sovereignty is in the hands of the people, then according to Islam, the highest sovereignty is absolutely God's. The Shura Council aims to find solutions based on provisions in the Qur'an and Hadith, not to take a majority vote based on general agreements as is usual in democracy. Islam then gives color in modern democracies with the limits of power for rulers so that there is no arbitrary action (abuse of power). Therefore, in today's modern democracy, Islam is present to fill preference values, while democracy itself provides the concept/form of the political system.

In Islam, there are the principles of Maqashid Sharia or ad-dloluriyat al-khomsah or al-huquq al-insaniyah Fi al-Islam, which are five basic things that must be maintained by each individual, including hifdzu al-din (respect for religious freedom), hifdzu al-mal (mal. respect for property), hifdzu al-nafs Kwa al-'ird (respect for the soul, the right to life and individual honor), hifz al-aql (respect for freedom of thought), and hifz al-nasl (a necessity for protecting offspring). Those values, will help society to solve their humanitarian crisis, especially in Indonesia.

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Temporary Compensation Policy For Village Land Taken Over By The Government For Public Interest

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Abstract. Village land that is used for public purposes will be compensated replacement land under the Law on Acquisition of Land for Public Interest. This paper reveals that replacement land cannot always be held in accordance with the planned stages and time of land acquisition. In practice, money as temporary compensation is more used than replacement land, as compensation for village land that is used for public purposes. The government adopted a temporary compensation policy to take over village land and agreed with the parties concerned, so that land acquisition activities could be carried out according to the planned stages and time. However, the provision of temporary compensation in the form of money needs to be regulated more clearly so that the land acquisition regulations and village land regulations are aligned.

Keywords: village land, land acquisition, temporary compensation, replacement land

1 Introduction

The development carried out by the government is mainly infrastructure development requires large amounts of land. In the regulation of acquisition of land for public interest in Indonesia, infrastructure development for public interest comes from the responsibility of the state to realize public welfare as contained in the constitution, among others through state control over land. [1] Data from several ministries shows that the land to be used for the construction of electricity and energy infrastructure, toll roads, airports, ports, dams, and drinking water needed by the government covers an area of 140,704 hectares. Land for industrial land reaches 1,200 ha. In 2005-2019, land needs were estimated at 133,657 hectares, consisting of 456 hectares for public housing, 21,172 hectares for roads, 111,437 hectares for water resources, and 592 hectares for copyright.[2] More specifically in the construction of toll roads, Semarang-Solo toll road requires an area of 5,967,074 hectares consisting of 3,135 parcels of land [3], so the government needs to take over lands that are controlled or owned by other parties, including village land. Village land consists of “bengkok land and titisara land”[4]. “Bengkok land” is land whose tenure is given to village officials as a form of respect for the duties and obligations that are carried out, which are generally in the form of agricultural land. In general, bengkok land is good and strategic soil. Unlike the bengkok land, “Titisara Land is a village land that is generally in the form of agricultural land, which is leased to community members through open auctions. This land is also called the village treasury. The purpose of this land control by the village is as a source of village income to carry out village management

and development[5][6]. Therefore it could be stated that village-owned land is a land that is important for the village, which will be used to achieve villager welfare as the recompense for the village head and officials or as a revenue stream for the village's finance.

The regulation used as the basis for the government to take over village land for the implementation of development is the Law Number 2 of 2012 and its implementing regulations. Village land that was taken over by the government was compensated replacement land. Compensation village land for public interest is given at the time of the release of village land, even though the replacement land as a form of compensation does not yet exist, as stipulated in Article 77 of Presidential Regulation Number 71 of 2012. Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2016 which forms the basis of village land management also stipulates that village land can be used for public purposes by means of exchange, which can be done even though there is no replacement land. In the event that replacement land is not yet available, compensation for village land is provided in the form of money, as temporary compensation. The compensation money must be used to buy replacement land.

The temporary compensation policy is carried out by the government because of 2 (two) things, first, land acquisition must proceed according to the stages and time specified in the legislation, and secondly, village land as a village asset must be protected by substituting other land of the same quality. Although the temporary compensation is well intentioned, the arrangements need to be improved so that it is more synchronous with the laws on land acquisition and the laws on village land. The discussion in this paper begins with the reality of the use of village land for development in the public interest, the regulation of village land compensation used for public interest, and a temporary compensation policy for village land used for public interest.

2 Research Method

This research is doctrinal legal research or normative legal research.[7] In this study law is defined as rules as contained in laws, legal documents and research results. Primary, secondary and tertiary legal materials in the form of laws and regulations, decisions and other legal documents are the main data sources in this study.[8] The legislation and the legal documents analyzed consist of Law No.2 of 2012, Presidential Regulation No. 71 of 2012, Law No. 6 of 2014, and Regulation on Village Asset Management. This study uses text analysis of regulations to see the contents of regulations, analysis of social, economic and political contexts that influence the formation of laws and regulations, and analysis of legal and regulatory praxis about land acquisition and village land. [9]

3 Result and Discussion

3.1 The Reality of Village Land that Is Used for Public Purposes

Land for road construction including toll roads, power plants, airports, some of which are filled with village land taken over by the government on a public interest basis. The village land in Tegal Regency which is used for the construction of the Pejagan-Pemalang toll road, covers 25 villages located in 9 subdistricts, which as a whole covers 312,716 m². [10] Village land in Semarang Regency used for toll road construction is in 9 villages in 4 sub-districts with a total

area of 119,153 m². [11] In addition, according to Senthot Sudirman, the village land for the Solo-Mantingan toll road construction that cannot be acquired until October 2014, amounted to 29 parcels of land with an area of 45,206 m² or 1.94% of the total land assets of villages affected by toll road construction. [12] The data shows that the number of village land assets that have been successfully acquired is greater (98.06%), so it can be said that the village land used for the construction of the Solo-Mantingan toll road is up to hundreds of hectares.

The village land used for the construction of the Central Java Power Plant 2 GW consists of 6 plots of land covering an area of 1,959 m². [13] The village land used for the construction of the Kertajati airport in West Java Province is more than 81 hectares, which is located in Bantarjati, Kertasari and Kertajati village. [14]

3.2 Regulation of Compensation for Village Land that Is Used for Public Purposes

The limitations on village land used for public purposes as regulated in the Law on Acquisition of Land for Development in the Public Interest, are:

- a. land for public use taken through land acquisition will be compensated in the form of money, resettlement, replacement land, ownership of shares and other forms agreed by both parties (Article 36)
- b. Compensation for customary land rights is given in the form of substitute land, resettlement, or other forms agreed by the indigenous peoples concerned (Explanation of Article 40).
- c. Other forms of compensation for village land are in the form of temporary money, meaning that the compensation money will be used to buy replacement land.
- d. The procedure for providing compensation in the form of replacement land is contained in Presidential Regulation No. 71 of 2012.

Article 77 Presidential Regulation of the Republic of Indonesia Number 71 of 2012 regulates the following matters:

- a. replacement land as compensation for village land is provided by parties who will use village land for public use through the Land Acquisition Implementation Team..
- b. The compensation is provided by an agency that requires land after receiving a written request from the Chairperson of the Land Acquisition Officer
- c. Replacement land is given for and on behalf of the Rightful Party
- d. Provision of replacement land is carried out through buying and selling or other agreed methods in accordance with statutory provisions.
- e. Giving compensation is carried out simultaneously with the release of rights by the rightful party without waiting for the availability of replacement land.
- f. During the process of providing replacement land, the funds for providing replacement land are deposited in the bank by and on behalf of the agency requiring land.
- g. Implementation of the provision of replacement land shall be carried out no later than 6 (six) months after the determination of the form of compensation by the Implementor of Land Acquisition

Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2016 stipulates that village land as a village asset can be transferred to another party for public interest through exchange. One important principle in relation to the exchange of village land for public use is that exchange is carried out in accordance with statutory provisions. In the concept of

land exchange, there must be land to be exchanged. This means that village land that is transferred to another party must be exchanged for land owned by another party. Thus, village land that is transferred to another party will get a replacement land. Article 33 Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2016 stipulated that the exchange of village land is carried out after an agreement of compensation is in accordance with the price that benefits the village by using the fair value calculated by appraisers. If the replacement land is not yet available, the replacement land can be given in the form of money first. Reimbursement in the form of money must be used to buy an equivalent replacement land.

The stages of exchange of village land for public use based on Article 34 of the Minister of Home Affairs Regulation of the Republic of Indonesia Number 1 of 2016, are:

- a. The Village Head submits a letter to the Regent or Mayor about the results of the Village Deliberation regarding the exchange of land belonging to the Village with the prospective location of the replacement land located in the local village.
- b. The Village Head submits the permit application to the Regent / Mayor, henceforth the Regent / Mayor continues the permit application to the Governor.
- c. If the prospective replacement land location is not available in the local village, the following steps will be carried out:
 - 1) The Regent / Mayor conducts a field review and data verification to obtain material and formal truth as outlined in the official report. A field survey was carried out to see and know materially the physical condition of the location of village-owned land and the location of a potential replacement for village-owned land. Data verification is carried out to obtain formal evidence through meetings in the village attended by elements from the Village Government, BPD, the party conducting the exchange, the land owner used for replacement land, the Subdistrict apparatus, the District and Provincial Regional Governments, as well as parties and / or other related agencies. The Minutes are signed by the parties and / or other relevant agencies, which contain a) the results of village deliberations, b) location, size, fair price, type of village land based on their use, and c) proof of ownership of the village land in exchange and its successor.
 - 2) The results of the field review and verification of the data are submitted to the Governor as consideration for granting approval.
 - 3) Before granting approval, the Governor can conduct field visits and verify data. The field visit and verification of the data are the same as those described.
 - 4) After the Governor gives his approval, then the Village Head establishes a Village Regulation regarding the exchange of land belonging to the village.
- d. The Governor reports the results of the exchange with the Minister

Based on Presidential Regulation No. 71/2012 and Regulation of the Minister of Home Affairs of the Republic of Indonesia No. 1/2016, it can be stated that village land used for public purposes should in principle be replaced with land, even though the terms used are not the same. In Presidential Regulation Number 71 of 2012, the term replacement land is used, while in the Republic of Indonesia Minister of Domestic Affairs Regulation Number 1 of 2016, the term exchange is used. The two terms are the same substance, that is, village land that is used for public purposes is replaced by land to ensure the sustainability of the function of village land.

3.3 Temporary Compensation Policy for Village Land

Temporary compensation policy carried out by the government for at least 2 (two) reasons, first, land acquisition must proceed according to the stages and time specified in the law, and secondly, village land as village assets must be protected by replacing quality land same. The stages of activities and the time of land acquisition have been determined limitatively by the law on land acquisition and its implementing regulations. Stages of land acquisition activities include planning, preparation, implementation and delivery of results. Provision of compensation is part of the stages of the implementation of land acquisition. The period of time at the stage of implementing land acquisition is determined at the earliest 200 days if there are no objections and lawsuits on state administration and the maximum is 288 days if there are complaints and objections.

Land acquisition regulations specify that the form of compensation for village land used in the public interest is replacement land. On the other hand, Law of the Republic of Indonesia Number 6 of 2014 and Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2016 also regulates the mechanism of village land release and determines the criteria for replacement land for village land used for public purposes. Both of these can lead to the release of village land and the acquisition of replacement land can not always be done in accordance with the time allotted. As a result, replacement land is not yet available but the release of village land must be done so that land acquisition can continue at the next stage. For example, substitute land for village land in the Semarang Regency area used for the construction of the Semarang-Solo toll road, village land in Batang Regency used for power plant construction cannot be provided at the time of village land release, so compensation is given in money. Provision of temporary compensation is a solution to the problem of unavailability of replacement land. This policy is carried out because in the context of land acquisition, one of the important and decisive things is the availability of land. Land that is not available on time can have an impact on many aspects of land acquisition, especially development costs that can exceed planning.

Village land based on Article 76 paragraph (1) of the Law of the Republic of Indonesia Number 6 of 2014 is part of village assets. Village land as a village asset shows that village land belongs to the village, not to individuals. Village land ownership is communal ownership managed by the village. Article 34 paragraph (1) Government Regulation of the Republic of Indonesia Number 47 of 2015 stipulates that village land management is one of the village's authorities, while Article 100 paragraph (3) stipulates that the results of village land management can be used for additional allowances for village heads and village officials. Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2016 concerning Management of Village Assets confirms that village land is a strategic village asset as the original wealth of the village. Thus village land used for public purposes must be replaced with other land of equal quality. The goal is that the village land can still function as a genuine asset of the village that is strategic in order to realize the welfare of the village community. In fact, finding replacement land that is of equal quality to village land is not easy. For example, prospective land substitutes for village land in the Semarang Regency area do not meet the requirements as determined by the law on village land, so they must be consulted with the Regent and Governor. This process requires quite a long time, so that the village government is not considered to make mistakes in procuring replacement land.

Regulations that need to be improved in the context of compensation for village land are Article 77 paragraph (6) of Presidential Regulation Number 71 of 2012. The article stipulates that the money that will be used to provide replacement land, is deposited in banks by and on behalf of agencies that require land, not in the name of the party entitled, in this case the village. Normatively, this provision causes that at the time of compensation no one is given either a

replacement land or money (which will be used to obtain replacement land) by the agency that requires the land through the executor of the land acquisition. In fact, Article 77 of Perpres 71 of 2012 clearly stipulates that the granting of compensation is carried out simultaneously with the release of rights by the rightful party without waiting for the availability of replacement land (can be realized in the form of money).

The provisions of Article 77 paragraph (6) of Perpres 71 of 2012 that the money to be used to provide replacement land, is determined to be deposited at the bank by and on behalf of the agency requiring this land is also out of sync with Article 33 of the Minister of Home Affairs Regulation of the Republic of Indonesia Number 1 of 2016, which stipulates that if replacement land is not yet available, compensation can be given in the form of money, for which the compensation money must be used to purchase the equivalent replacement land. In other words, Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2016 confirms that if replacement land is not yet available, compensation is provided in the form of money. For example, in the construction of the Semarang-Solo toll road concerning village land in the Regency of Semarang, compensation is provided in the form of money deposited in a village account with a note that there is a Commitment Statement from the Commitment Making Official to cover the costs of finding replacement land as mandated in Article 44 Permendagri Number 1 of 2016, the administrative financing of the exchange process until the completion of the certificate of replacement village land as referred to in Article 33, Article 38 and Article 42 shall be borne by the requesting party. There are two important things in the practice of providing compensation for village land for which replacement land is not yet available, namely money deposited in the village account, not in the account of the agency requiring village land, and secondly all administrative costs incurred to obtain replacement land until registration (certification) is the responsibility of agencies that require land. This can be interpreted that the full compensation money can be used to obtain replacement land without having to reduce administrative costs.

4 Conclusion

The temporary compensation policy implemented by the government is a solution to overcome the problem of the availability of land in the public interest. Through a temporary compensation policy the land acquisition process can be guaranteed in accordance with the planned stages and time. In addition, the existence of village land as a strategic village asset can also be protected by replacing it with quality land. The implication of this study is that the policy for providing temporary compensation needs to be more clearly regulated in legislation so that it does not conflict with regulations on land acquisition or regulations on village land.

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Actualizing Land Bank as One of The Efforts to Prevention of Land Disputes and Conflicts Settlement

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Abstract. One of agrarian problems in Indonesia is about prolonged and unresolved land disputes and conflicts. The land disputed and conflicts become strategic including land disputes and conflicts and land tenure, the acquisition of land problems for development in the public interest including to private interest, land supplies to serve national strategic programs, land conflicts impacts to decrease in productivity, neglected land problems and etc. The establishment of the concept of land bank development is expected to become one of solution to prevent land disputes and conflicts especially related on acquisition and availability of land for public interest performed by government or private. The truly substance of this land bank is land reserves conducted by the government through the legitimate acquisition according to the law provisions to fulfillment of the land. The constitutional basis of establishing a land bank is 1945 Constitution especially article 33 paragraph 3 and Law of The Republic of Indonesia Number 5 of 1960 Concerning the Fundamentals of Agrarian Affairs. Research on this land bank is carried out normatively. The research on land bank is conducted in a normative juridical manner in particular this study examines the conception of land bank stipulated in Draft Bill on Land how it can be realized as an effort to prevent land disputes and conflicts in Indonesia.

Keywords: *Land bank, Prevention, Conflict.*

1 Introduction

Disputes and conflicts agrarian or land when this is very complex, both which are horizontal and vertical. Agrarian conflict is a central issue and is the tip of the iceberg of various types of basic and historical land problems in Indonesia [1]. Djalil suggested that one of the causes of Easy of Doing Business (EoDB) lower in Indonesia because settlement of the problem of land deemed not quite good [2]. Tjandra to mention that the problem of agrarian is a problem serious that get attention specifically on the President of the Republic of Indonesia Joko Widodo [3].

Settlement of disputes and conflicts land to be one of the programs of strategic Government in order to provide protection law and certainty of law to the owner of the land that is eligible. In addition to efforts to handling and settlement the Government also undertake efforts to prevention to reduce disputes and conflicts land one of them to carry out registration of land systematically complete in all over Indonesia. With the implementation of registration of land in all over Indonesia are expected to disputes and conflicts of land will be further reduced due to have obtained the boundaries of ownership of land are fixed or permanent.

To download prevent the occurrence of problems of land mainly supplies the land interests of development for the benefit of public as well as investments by private idea of the establishment of a land bank had long proposed. In various seminars scientifically that int he

behavior right by activist land or being campus idea of the establishment of a land bank that became one of the topics are interesting to talk about or discussed. The establishment of the land bank is expected to be one of the solutions to solving the land problem especially the problem of land acquisition and the availability of land for investment purposes.

Based on data from the Directorate General of Handling Agrarian Issues on Spatial and Land Utilization, the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency released at the end of 2019, stated that the distribution of land disputes and conflicts based on the subject is (a) Individual (64.00%), (b) Legal Entity (15.00%), (c) Government Agencies (1.90%), (d) BUMN (5.40%), and (e) Community Groups (9.70%). The data was obtained based on data obtained from the Regional Offices of the National Land Agency of Provinces throughout Indonesia.

The occurrence of land disputes between the community and the government is one of them caused by the acquisition of land that is not complete. Act acquisition of land by the State for the benefit of the common good through the acquisition of land or through the revocation of rights on the ground required to provide compensation losses were decent [4]. In the implementation of land acquisition by the State in the public interest, it causes legal problems, one of the causes is land regulations that do not provide guarantees of legal protection [5]. In line with the terms of the Hernando de Soto argued that governments in some countries much involved in the process of expropriation of land for the benefit of the economy is extralegal [6]. Parlindungan suggests that a lot of land that do release the pretext of the interests of general and how the court can participate interfering hand in the manipulation of these [7].

Efforts to seek settlement of the disputed land is not able to be released from effort to understand the various roots of the problems are so complex dimensions. Dimensions are covering the conflict interests, conflicts structural, conflict of values, conflict relationships and conflict data [8]. Regulation of the Minister of Agrarian and Spatial Planning / Head of the Agency Land National Number 11 Year 2016 concerning the Settlement Case Land said that the settlement of disputes and conflicts of land carried out by the Ministry if there is a defect of administration in the issuance of certificates of rights over land or through the courts if it involves ownership. The Bureau of Land National is not authorized to perform the test material in order to find the truth of the dispute is pleased with the correctness of data juridical and / or the data physically [8].

When this term land banks already commonly heard and known, even if the institution is not yet formed, so much that is not understood by either. Understanding that both of the landbanks this becomes an impetus to consider the presence of land banks in the system of law of land in Indonesia. The presence of land banks will be increasingly important because there are many problems and obstacles that can be overcome in the implementation of the procurement of land, especially Developing infrastructure. Because it is the presence of land banks apart resolve the problem of procurement of land, is also expected to be a solution that can provide prevention to the dispute and ground.

2 Methods

The research method used in this research is the type of research legal normative, research to examine the application of the rules or norms of the law positive or reviewing regulatory law in a system of law that is coherent. The rules by laws and regulations that is Law No. 5 of 1960 on Basic Agrarian Principles and Law No. 2 of 2012 on Procurement Land for Development to

Interests General along with regulatory implementation. In addition to that carried out a search of the literature that is associated with the object of writing that institution bank lands.

3 Result and Discussion

3.1. Definition and Role of a Land Bank

There are two terms that differ regarding the banks land. There is mention of a land banking, there are call l and banks. Land banking is the process or policy by which local governments acquire surplus properties and convert them to productive use or hold them for long-term strategic public purposes. Land banks are public authorities or special purpose not-for-profit corporations that specialize in land banking activities [9]. If referred to as land banking refers to the activities of the institution land bank, while understanding the bank of land as the land bank refers to the institution or body of law of public who undertake the management of land. Land banks is an institution which provides the ground for the purposes of development, at the same time acting as the institution that has authority form the controller right price of land. Land banks also acts as an agency business which acts as the manager of the land of the terms of controlling the price of land and support the implementation of the Plan of Spatial. Can mentioned that the land bank was present to support the task the Government in the management, provision and control the price of land.

Limbong said land bank as an instrument of management of land which has been used in various countries to deal with various issues such as the removal of land bank and the use of land that is more productive [10]. On the other hand Van Dijk and D. Kopeva argued that Land banking is a systematic acquisition of often large pieces of land, normally land that is pre-development but could be considered having potential for development. Land banking has been defined as public or publicly authorized acquisition of land to be held for future use to implement public land policies [11]. Land bank is defined as the acquisition or expropriation of the lands that have not been developed, the land is empty, or the land of derelict who do it systematically the potential to be developed. Takeover is done in order to use the land that is more optimal in the future will come in order to support program policy of the public. Land banks will provide benefits to the price of land which is cheap and the availability of land will be possible the development of an area that is good and organized Based on experience in countries that have implemented land banks, there are a number of activities that can be carried out through landfills, namely : (a) land acquisition ; (b) soil maturation ; (c) administrative requirements ; (d) land plot arrangement is ready to build ; (e) sale of lots to those in need, and ; (f) the administration of the transitional land in accordance with the provisions of the regulation.

In the Draft Bill of Land, the term Land Bank is referred to as the Land Management Institution. Institutions Management Land is a body of law specifically which manages land and has a wealth that is separated from the financial state and serves as a land banks who do the planning, acquisition, procurement, management, utilization and distribution of is intended to ensure the availability of land within the framework of economic justice, to: (a). public interest; (b). social interests; (c). development interests; (d). economic equality; (e). land consolidation; and (f). agrarian reform and justice land. The nature carry out the task and authority institutions that are transparent, accountable, and nonprofit, while the source of the wealth derived from income alone, the budget, investments in the country's capital, the accumulation of capital and sources of other legitimate in accordance with the provisions of the rules and regulations.

In the Draft Bill of Job Creation, term land bank is raised back to the term Agency Land Bank. For the purposes of the management of land the Government formed a body specifically the agency bank land. The assets of the land bank entity are the separated state assets. The land bank body functions to carry out the planning, acquisition, procurement, management, utilization, and distribution of land bank agency ensures the availability of land in the framework of economic justice, for the benefit of the general, the interests of social, interest development, equitable economy, consolidation of land and Agrarian Reform. Furthermore, the bill that affirmed that land bank in carrying out duties and authority are transparent and accountable. Source of wealth the agency land bank comes from the state budget, revenue alone, investments in capital and sources of other legitimate in accordance with the provisions of regulation law. Land status who managed entity land bank that will formed are given the right of management.

Indeed, land banks is not a concept that is new. The idea to establish a land bank has been doing quite a long time in countries in Europe and America. Typing authorized city planners suggest that every town clicking land. The land is empty which is not utilized which is located on the outskirts of the city. The lands that serve as the object of planning the use of long-term are aimed at controlling the conditions of the city were not organized. Land bank proposed to be present as an alternative method of land use planning the Government through supervision that aims to control stability bag prices land domestic. The implementation of the land bank which is run in Europe mainly intended for the modernization of the city.

To acquire land in general, the land bank me to take some control of land owned by the community as a land fund through the sale and purchase. In some countries land banks acquire land through the mechanism of mandatory purchases and non- mandatory purchases. Method shall when activity land bank has a major impact on the development of the city. In addition, the land bank enables the Government to acquire and compile land for long - term and short - term strategic objectives. Through the land bank the Government can give effect to the policies that have implications for the infrastructure, the arrangement of the area, the maintenance of the environment which have an impact on the prevention of the emergence of speculation and land mafia. In this case through the land bank the Government took over land that was considered gray status, or became the object of speculation and made it a savings that could be utilized for the welfare of citizens.

Based on studies on the land bank in other countries, there is 6 (six) which becomes the function of the bank ground. Functions that includes : (1) the Land Bank as a collector of land (land keeper); (2) Land Bank as a land security (land waretee); (3) Land Bank as the controller of land acquisition (land purchaser); (4) The Land Bank as an appraiser of land (land value); (5) Land Bank as distribution of land (land distributor) and; (6) the Land Bank as management of land (land management).

3.1. The role of the Land Bank to Prevent Disputes and Conflict Land

One of the disputes and conflicts of land that often occurs is a matter of cultivating the people on land estates. The occupation of the people on the lands of the estate becomes a trigger of conflict between employer plantation with the community around it. Directorate General Handling Problems Agricultural Utilization and Space and Land Ministry ATR / BPN noted that the dispute caused by the control and ownership of land as many as 5,187 (56.73%), as well as cases that are caused by the control and ownership of land as many as 7786 cases (61%). Categories that become the cause of the dispute and the case highs that occurred in Indonesia.

The occurrence of occupation of the people of the area of plantation can be caused by the expiration of the right to a business that is given to entrepreneur plantation. The cultivation is

done as the effort mastery of physical land by the public is illegal to land belonging to the company plantations. Principle law of the land we are asserted if the rights to the business ended the status of the land into the land of the country is often interpreted diverge. Understanding it is understood as companies' plantation at once is not entitled on land the former rights to businesses that include plants and buildings belonging to the company that there is in it. Cultivation of this be evidence of mastery of the physical that is done by the community around the plantation often becomes the arena of speculation by the other to acquire the land that even divert it to the other.

Deign to dispute the occupation and cultivation of the land bank, Sumardjono argues that there are two patterns of the base on the culprit that is done by those who feel have rights over the land and occupation/cultivation of the land that is not productive or considered not productive by groups of people who live in around the location of the land without considering the pedestal right [8]. The desire to own and control of land the former the right to a business estates into factors main cultivation of the land bank such. Cultivation of the will increasingly massive if at the beginning of the provision of the right to a business is not preceded by the settlement of a dispute possession or cultivation of the people on the ground are to be completed.

The function of the land bank as a land keeper and land warrantee can be a solution to the land of the former right to use the business that is not given an extension of rights or renewal of rights. One of the provisions in Article 34 BAL states that the right to attempt to remove because of term time expired or abandoned. If the right to a business already ended period of time then the status of the land bank into which is controlled directly by the state. As an institution that was established by the Government land bank can take over the land of former rights to attempt it to be used as a bank's assets land. Mastery and utilization of land can be carried out later in accordance the provisions and directives layout space locals. Expropriation of land by the land bank will prevent the land bank ex- rights to the business estates of disputes and conflicts of land including from spekkulan ground.

Not much different if the land has been confirmed as an abandoned land object. Even though Government Regulation Number 11 Year 2010 jo. Regulation of the Head of BPN Number 4 Year 2010. have determine that the object of land bank displaced serve as land reserves of the general state, but the presence of land bank as a function of land and land keeper Purchaser will provide enrichment to the control of land abandoned it. Expropriation of land abandoned as an object land bank will prevent are of mastery or the cultivation of the people. Land bank as a collector of land in the system of law of land in Indonesia will have the authority of its own. His role as a land distributor will distribute the land in accordance with the designation, using and utilization which refers to the layout space area including planning detailed space. Except for public interests and development interest, abandoned lands that have been taken over by land banks can also be distributed to communities who need according to Presidential Regulation Number 86 Year 2018. The existence of the arrangement and the role of bank land to the land that is earmarked for the benefit of the general and the interests of the people will create regularity possession and use of land to the front.

Pay attention to the many needs of the land for the benefit of public as well as the interests of private, not closed the possibility of the presence of speculators ground and mafia land in provision. The presence of rogue elements have been certainly would create problems of its own which resulted in the occurrence of disputes or conflicts of land horizontally. Not without reason the presence of them will be one of the obstacles to carry out the liberation of land, especially procurement is very urgent for the interests of the development of the economy. If the object of land that needed to be or is located in an area that is positioned as in central urban areas or in the area of development of urban areas, provision of land or release not be done in a time that

is short. Besides going to take some time which is very long, the land will be more expensive and not covered possibility would be the object of a case until all levels of the judiciary supreme (Supreme Court of Indonesia).

The presence of a land bank will precede the expropriation of land long beforehand, because indeed for that matter a land bank was formed. Functions of land bank as land keeper can buy land that of its owner before used as an object for interests that are strategic. Expropriation of land much earlier would shortly right land bank that of the object of speculation. Land bank a role not only as a provider of ground but also into institutions that can prevent the occurrence of disputes and conflicts land bank. By as established by an authority based on the law, then the power bank land to the land that is in that power will be increasingly strong. Possibilities exist parties who questioned its presence in the system of control of land in Indonesia, but the process of the settlement will be running gathering is and lasts a long time and is not going to affect the mechanism the working of land bank.

3.2. Expected Land Bank

According to Sumardjono, based on the assumption that in Indonesia there is the possibility of convening the two kinds of activities of land bank, namely : (a) the institution bank of land specifically the acquisition of land can be implemented through procurement / revocation hak on the ground and the sale and purchase ; (b) the institution bank land public that in accordance with the nature of the use of land yet to be determined at the time of the acquisition of land should be done through the sale and purchase [8]. The existence of this assumption gives flexibility to the Government to establish a land bank institution that is in accordance with statutory provisions. Whether determining the activities of the land bank in advance (land banking) or directly forming the institution land bank) is an option that can be made to establish regulations for the establishment of a land bank institution that will apply in Indonesia.

Taking into account the design of establishing a land bank institution as in the Draft Bill of Land and the Draft Bill of Job Creation it was obtained the hypothesis that the land bank institution to be formed was a special land bank institution. In the Draft Bill of Land stated that the institution managing the land that will be formed is the body of law specifically which manages land. and has a wealth that is separated from the financial state and serves as a land banks who do the planning, acquisition, procurement, management, utilization and distribution of land institutions that aims to ensure the availability of land within the framework of economic justice, within the framework of the interests of the general, the interests of social, interest development, equitable economy, land consolidation, as well as agrarian reform and land justice. Likewise, also the case in the Draft Bill of Job Creation stated that the Government formed body specifically the agency bank land which serves to implement the planning, acquisition, procurement, management, utilization, and distribution of land. Almost the same with Draft Bill of Land fond in the Draft Bill of Job Creation mentioned purpose bank land to ensure the availability of land within the framework of economic justice, for the benefit of the general, the interests of social, interest development, equitable economy, consolidation of land and agrarian reform.

The substance actually from the land bank this is backup ground were conducted by the Government through the acquisition of the valid corresponding provisions of law in order to meet the requirement to be ground. Land bank also becomes a means of management of land in order to use and the use of land that is more productive to achieve the objectives and targets of development as a whole. Through the presence of land bank is also expected to be instrumental

maintain the availability of land for the benefit of the Government and the private sector as well as guaranteeing free from the problems of disputes or conflicts. If viewed from the constitution, the establishment of a land bank in Indonesia refers to the provisions of Article 33 paragraph (3) of the 1945 Constitution and Law Number 5 of 1960 (LoGA), specifically the authority to control the state.

If the institution land bank which would set up an agency specialized, then pay attention to Sumardjono opinion activities of the acquisition of the land can be done through the sale and purchase and/or through the revocation of rights. Acquisition of land by way of sale and purchase can be done through the deed of sale and purchase, Engagement sale and purchase or provision of compensation damages on land cultivated according the agreement between the land bank o with the owner of the land/plots. If through the revocation of the right to the acquisition are based to Article 18 of the BAL, as well as provisions regarding the abolition of the rights on land as in Article 27, Article 34 and Article 40 BAL. One of the ways the abolition of the right over the land is caused by the revocation of the rights over the land by the Government. Article 18 of the BAL mention that for the benefit of public, including to the interests of the nation and the state and the interests together of the people, right on the ground can be revoked, by giving compensation losses were worthy legislation.

As an institution land bank which is the body specifically there is the authority of the public which is attached to the land bank that will be formed. The authority was an authority attribution are obtained by law, in case the Draft Bill of Land and the Draft Bill of Job Creation has been passed into law. Because of having the authority in accordance with the law the land bank can exercise authority to regulate the land which is controlled based on the designation, control, use and utilization of the land according to the spatial plan. Land bank also can perform the acquisition of the lands that status into the ground state as the land estates former rights to businesses, lands abandoned, or the lands of the state that has been removed from the area of forestry or land which is the result of the settlement of disputes and conflicts land bank.

Although the acquisition of land that is done through the provision of compensation and loss, but the right of priority to take control of land as mentioned in the above into an absolute for the institution land bank. Presence land bank of with the authority that is attached to it, in addition to air function as agencies collecting land (land keeper), also will be present and functioning as an institution to carry out the prevention of disputes and conflicts land bank. The activities of land bank that do acquisitions or takeover of land by planning how the provisions of law, will stop the step speculators lands, bandit land or mafia land. Stopping the step is meant to close the door or access to perform activities of land tenure is illegal which affects also the reduction of disputes and conflict land that will arise. Land bank that will be formed is expected to serve up the appropriate authority and the authority that is attached to it to perform the control further regulation of use of land which became the object land bank.

4 Conclusion

Establishment of institutions land bank aims to ensure the availability of land within the framework of economic justice, within the framework of the interests of the general, the interests of social, interest development, equitable economy, consolidation of land, as well as agrarian reform and land justice. Establishment of a bank of land in accordance with the constitution of 1945 Article 33 paragraph (3) and BAL, as well as based on the laws that will be formed (Draft Bill of Land and the Draft Bill of Job Creation). Therefore, so land bank has the authority to perform the functions as a collector of land (land keeper), security of land (land warrantee), controlling possession of land (land purchaser), Assessor land (and value), the distribution of

land (land distributor) and management land (land management). Through the authority which owned land bank can play a role as an institution that serves to carry out the prevention of disputes and conflicts land bank.

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Interpretation of Judicial Review of The Law Number 42 of 1999 On Fiduciary Guarantee Regarding the Decision of Constitutional Court Number 18/PUU-XVII/2019

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Abstract. The issuance of Decision of the Constitutional Court Number 18/PUU-XVII/2019 on Petition for Execution of the District Court triggers a conflict of interest, especially the interests of fiduciary recipients (creditors). The research questions in this study are First, how is the interpretation of the Judges of Constitutional Court in conducting a judicial review of Article 15 paragraph (2) of the Fiduciary Guarantee Law. Second, what is the view of legal experts and the public regarding the results of the judicial review of Article 15 paragraph (2) of the Fiduciary Guarantee Law. The results of this research show that the results of the judicial review issued in the decision of Constitutional Court Number 18/PUU-XVII/2019 apparently did not provide legal protection and legal certainty for fiduciary recipients in terms of carrying out the execution of fiduciary security objects.

Keywords: Juridical Interpretation, Judicial Review, Constitutional Court

1 Introduction

The issuance of Decision of the Constitutional Court Number 18/PUU-XVII/2019 concerning Application for Execution to the District Court, on January 6, 2020 is as a result of the material test of Article 15 paragraph (2) along with its explanation and Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees. In line with the title of this paper, the author will discuss and review the legal interpretation of the Constitutional Court judges in conducting the material review of Article 15 paragraph (2) of the Fiduciary Guarantee Law, and discuss and examine the perceptions of some legal practitioners in assessing the results of the judicial review of material allegedly more impartial in the interests of the fiduciary giver, and overrides aspects of legal protection and legal certainty for fiduciary recipients (creditors).

On the other hand, the review of the Constitutional Court's ruling shows that the Constitutional Court is too hasty in making a decision that has a big impact on the public and finance companies. In the ruling, the Court only saw one case out of thousands of cases or even millions of cases of "credit defaults" that were happening in the community. Supposedly, the Constitutional Court is more concerned with bad credit and cases of unscrupulous mafia leasing which are detrimental to creditors who may reach trillions of rupiah, with various modes of operation. Cases like the one above, should be a consideration for the Constitutional Court before deciding because the objects which are the object of collateral are movable objects and it is not certain that the vehicle is always in the same place.

Therefore, in the writing of this journal, the problem is limited first, how is the interpretation of the Constitutional Court Judges in conducting a material test of Article 15 paragraph (2) of the Fiduciary Guarantee Law. Secondly, what is the view of legal experts and the public regarding the results of the judicial review of Article 15 paragraph (2) of the Fiduciary Security Act, and their explanation

2. Method

This research used normative juridical research method by examining inter-related legislation. For example, this research examined the Constitutional Court judge's legal interpretation in conducting a judicial review of the Fiduciary Guarantee Law, the decision of which has permanent legal force (*incracht*) as regulated in Article 1 paragraph (1) of Law Number 48 of 2009 on Judicial Power, stating that the judge's decision is an independent to administer justice in order to enforce law and justice.

3. Results and Discussion

The results showed that there had been an unlawful act with case registration Number 345/PDT.G/2018/PN.Jkt.Sel. This case is a case of breach of four-wheeled motor vehicles resulting in the forced withdrawal of fiduciary collateral objects (in the form of a Toyota Alphard V Model 2.4 A / T 2004) by the creditor. In this case, the South Jakarta District Court granted the petition of the two petitioners, the Court was of the opinion that the norms of Article 15 paragraph (2) and (3) of the Fiduciary Guarantee Law had no legal certainty regarding the procedure of execution or the time when the fiduciary giver (debtor) declared "breach of promise" (default) and loss of opportunity for the debtor to get the sale of fiduciary collateral objects at a reasonable price.

This section discusses the issues stated in the problem formulation, including:

3.1. Interpretation of the Constitutional Court Judges regarding the Judicial Review of the Fiduciary Guarantee Law

The provisions of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Security Act (the *a quo* Law), in principle, provide guarantees and legal certainty protection for fiduciary recipients (lenders) in providing credit to fiduciary givers (debtors). This protection of legal certainty is clearly seen in the weighing considerations which are the basis for the establishment of the Fiduciary Security Act. The form of guarantee and protection of legal certainty in granting such credit, is shown by the arrangement of guarantee of execution of fiduciary objects, by equating the executorial power of the Fiduciary Guarantee Certificate with a court decision that has permanent legal force [vide Article 15 paragraph (2) of the Fiduciary Guarantee Act]. Therefore, the Fiduciary Guarantee Certificate includes the words "FOR JUSTICE UNDER THE ALMIGHTY GOD" like a court decision [vide Article 15 paragraph (1) of the Fiduciary Guarantee Law]

Based on the provisions of Article 15 paragraph (2) of the aforementioned *a quo* law, the main principle of this fiduciary institution is to provide legal certainty to immediately execute fiduciary objects, because it has strengthened the right to fiduciary recipients (creditors) to sell objects that become the object of fiduciary security over his own authority, in the case of a defaulting debtor. The provisions in article *a quo* only focus on providing legal certainty over the rights of fiduciary recipients (creditors) by directly executing fiduciary objects. For this reason, this provision finds weaknesses, especially in providing meaningful details of its implementation which can actually violate the rights of fiduciary providers (debtors). The provisions of the article *a quo* actually escaped to provide fair legal certainty, guarantees, and equal treatment before the law, as well as protection of the private property of the fiduciary giver (debtor).

The incomplete contents of Article 15 paragraph (2) of the Fiduciary Guarantee Law has implications for ignoring the principle of legal certainty and legal justice, because it is more likely to protect fiduciary recipients rather than protecting the interests of consumers (fiduciary givers). Supposedly by equating "fiduciary certificates" with "court decisions that have permanent legal force", the procedure for executing fiduciary objects should also be equaled or at least similar to the procedure for executing court decisions that have permanent legal force (*incracht van gewijde*)

3.2. Interpretation of the Parties to the results of judicial review of the Fiduciary Guarantee Law

The Constitutional Court stated clearly and clearly that the constitutionality aspect contained in the norms of Article 15 paragraph (2) of the Fiduciary Guarantee Act did not reflect the provision of balanced legal protection between the parties bound in the fiduciary agreement and also the object which became the Fiduciary Guarantee, both legal protection in the form of legal certainty and justice. Because, the two fundamental elements contained in the article a quo, namely "executorial title" or "likened to a court decision that has permanent legal force", implies that execution can be carried out immediately as if it were the same as a court decision that has permanent legal force by the fiduciary recipient (creditor) without the need to ask for court assistance for the execution.

In this paper the author includes several views of experts, the purpose of which is to have a balance of justice to debtors and creditors. Some of these views or interpretations, including:

1) Government View

The Government or President also provides a written statement. According to the government, what the Petitioner argues is not a constitutional loss that is contrary to the Constitution. The Petitioner should understand well that the Fiduciary Guarantee Law as the basis for the Petitioner's engagement, especially the provisions on the execution of fiduciary guarantees. The Government is of the opinion that the Fiduciary Guarantee Certificate Number WII.0167952. AH.05.01 is evidence that the Petitioner has entered into a civil agreement as a fiduciary agreement. Normatively, this agreement acts as a law for those who make it. Like it or not, the applicant must obey and abide by the contract that was made.

In accordance with the evidence of the Fiduciary Certificate, the Petitioner's loss is a legal loss on a civil basis. Even if the petitioner questions, it is more about the implementation of the agreement, namely the execution of fiduciary guarantees. This is also evident from the South Jakarta District Court Decision Number 345 / PDT.G / 2018 / PN.Jkt. Cell who granted the plaintiff's claim to partially prove that a legal dispute from a civil dispute became a criminal dispute. The government is of the view that "the arguments of the Petitioners' losses have clearly been the arguments of legal damages in a civilian manner with objects that can be counted in real terms, whose implementation is based on fiduciary guarantee engagement laws.

3.3. The views from the government experts

Government experts consisting of 2 (two) lecturers at the Faculty of Law, University of Indonesia, and lecturers at the Jentera Law College, explained that after the enactment of the Fiduciary Security Law, the execution was regulated in Chapter V starting from Article 29 to Article 34. One the form of execution as regulated in Article 29 is the implementation of the executorial title referred to in Article 15 paragraph (2) of the Fiduciary Security Act. Therefore, the provisions of Article 15 paragraph (2) cannot be separated from the provisions of Article 29 of the Fiduciary Security Act.

One of the special guarantee characteristics of material is that it is easy to execute. This is based on the consideration that in a special material security guarantee, the debtor has bound himself with the creditor to provide specific guarantees to the creditor in the form of certain objects owned by the debtor to guarantee the debtor's obligations as stated in the main agreement if the debtor defaults. In addition to the object that has been specifically designated, the special guarantee of material also indicates a special relationship between the creditor and the debtor based on the agreement. With this specificity, the execution mechanism also needs to be regulated specifically (*lex specialis*) which is different from the execution in general.

3.4 The views from the House of Representatives

In its statement, the House of Representatives emphasized that the Petitioner did not describe concretely the related rights and/or constitutional authorities as what was impaired by the

provisions of article *a quo*. The Petitioners only described the problems experienced by the Petitioners' own default.

In the view of the House of Representatives, the Fiduciary Guarantee Law instead provides legal guarantees both for fiduciary givers and fiduciary recipients. Provisions in the Law *a quo* has clearly stipulated how the execution of the fiduciary guarantee object can be carried out and what are the obligations and rights of the parties. Therefore, there are no constitutional rights and/or authorities of the Petitioners who are disadvantaged by the coming into effect of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law. In addition, there are no constitutional rights and/or authorities of the Petitioners who are disadvantaged by the enactment of the provisions of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law. Because there are no constitutional rights and/or authorities of the Petitioners who are harmed. Therefore, there is no specific and actual or potential loss that can be ascertained.

The House of Representatives also believes that the Petitioners as a whole do not have a legal position (*legal standing*) because it does not meet the provisions of Article 51 paragraph (1) and the Elucidation of the Law on the Constitutional Court, and does not meet the requirements of the constitutional impairment which was decided in the decision of the previous Constitutional Court. Moreover, the Petitioners did not concretely describe their constitutional rights and/or authorities which were considered to be impaired due to the enactment of the provisions of the Fiduciary Guarantee Law.

4. Conclusion

The provisions of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law (A quo Law), in principle, provides guarantees and legal certainty protection for fiduciary recipients (creditors) in providing credit to fiduciary givers (debtors). However, in the case of debtor's default, the Constitutional Court decision Number 18/PUU-XVII/2019 stated that the execution of the fiduciary guarantee object execution must go through court procedures as regulated in Article 196 HIR or Article 208 RBg., except if the debtor recognizes the default it does. However, the problem is that the execution through court procedures certainly takes a long time and needs a lot of costs. This is where aspects of legal protection and legal certainty for creditors are ignored.

To avoid a prolonged conflict of interest regarding the absence of legal certainty and legal protection for creditors for the issuance of the Constitutional Court Decision Number 18/PUU-XVII/2019, it is better that the Fiduciary Guarantee Law (a quo status) needs a comprehensive review at least the revision of Article 15 paragraphs (2) and (3). Therefore, the results of the judicial review of the Fiduciary Guarantee Law can provide legal protection and legal certainty for both creditors, debtors, and KPKNL.

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Legal Protection for Buyers in Car Sale-Purchase Transaction on Indent Basis

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Abstract. The study aims to discuss about legal protection for buyers (car indenters) considering that in new car sale-purchase transactions on indent basis, often having various problems done by the seller (car dealer). The problem included in the transaction in sale-purchase transaction because the legal position of the customer (indenter) was weaker than the position of the businessman (seller). Another problem was the long period of indentation and sometimes exceeding the promised schedule. The research method used was normative juridical approach by comparison between *das sein* (the facts found) and *das sollen* (which should be based on statutory regulations). The results of the study show that based on the problems that occur in new car sale-purchase transactions on indent basis, guided by Law on Customer Protection in Article 2, Article 7, Article 15, Article 16, Article 18 (1a), and Article 1338 verse (3) of Civil Code, legal protection for indenter car was required. The legal protection was prioritized in the aspect of equality, in line with the injustice between the seller and the buyer, especially in their legal positions. Furthermore, as a form of civil accountability for a businessman who had bad deed, in legally formal, Article 60 of Law on Customer Protection was imposed as a form of civil accountability and Article 62 of Law on Customer Protection as a form of criminal sanction.

Keywords: Legal Protection, Transaction, Sale-Purchase, Indent

1 Introduction

Sale and purchase are a form of transactions that are often done by the community. Usually, a sale and purchase agreement are made orally or in writing based on the agreement of the parties (seller and buyer). Article 1457 of the Civil Code define sale and purchase as “an agreement, with which one party is bound to submit a material, and the other party is to pay the price promised.” In accordance with the principle of “*consensualism*,” the sale and purchase agreement has been born at the time of the achievement of “agreement” regarding goods and prices. Once the two parties have agreed on the goods and price, a legitimate sale and purchase agreement is born. Once the agreement is born, it raises the rights and obligations between the parties; thus, the sale and purchase agreement is also called an *obligatoir agreement*, meaning that the sale and purchase does not transfer ownership rights but only distribute rights and obligations to both parties.

However, at this time, the sale and purchase agreement has changed, especially the procedures or rules used. One of which is the use of the “*indent system*”, a form of object development in the sale and purchase agreement for new goods in the future as stipulated in Article 1334 of the Civil Code. Sale and purchase agreement with a system like this can be done by ordering in advance or “*indent*”.

“*Indent system*” is a command system (*order*) of a purchase by a seller to a buyer at a price set in advance for the intended specifications and carried out within a certain period. Meanwhile, the agreement and payment system depend on each car seller company set to the buyer. Generally, buyers order certain car models and types or brands with a down payment, while the method of payment is agreed in a Vehicle Order Letter. Sale and purchase agreement with indent system lead to the transfer of ownership of the object sold once the levering is done or handover from the seller (business actor) to indenter (customer).

Car sale and purchase with indent system does not end immediately after unit handover, but it still continues within a certain period. It is intended to anticipate that there is a discrepancy in the car received by indenter; in this case, the seller generally has specific accountability to the indenter. However, this accountability can be considered optimal but sometimes it can be also considered less or even not optimal.

Several cases regarding the discrepancy of cars ordered by indenter are as follows:

- a. Discrepancy of the car ordered by indenter is a car with the brand “Chevrolet Spin LTZ type of diesel fuel”, the car was in trouble (the body parts of the right and left front doors are different, in which the right door body was smashed in). This led the indenter to complain and feel dissatisfaction and considered that the buyer was cheated by the seller.
- b. Car handover which is not in accordance with the order of indenter because unilaterally without consent of indenter, the seller handed over the wrong color which was different what intender ordered. The intender ordered metallic green car, but the seller handed over metallic dark blue car; it is completely different. In this case, the seller has defaulted (broken promise) for not delivering the car as ordered by indenter.
- c. Discrepancy of the car ordered by indenter. This case started from a promotion carried out by seller through both printed and electronic media stating that the fuel oil consumption of Nissan March, according to their claims, is very economical to reach 18.5 - 21.8 km/liter. Triggered by the promotions in various media, consumers finally decided to buy Nissan March. After driving Nissan March car for several times, it turned out that the fuel consumption of Nissan March cars does not match what was promised before, so indenter felt dissatisfied and cheated, and then brought the case to the Consumer Dispute Resolution Agency (BPSK).

In addition to the three examples of dissatisfaction cases felt by indenter against the car sellers as described above, there is another problem which is no less interesting, i.e. indent period which takes too long and sometimes even goes beyond the promised schedule. At the time of the indenter receives the car, there has been an increase in car prices in the market. This condition makes the indenter confused, especially for those who have a limited budget.

The aforementioned examples show that their legal protection of car indenter is needed. However, it remains a problem since the car indenter is in a weak position of law compared to car seller. Therefore, intenders tend to be powerless to defend their rights because the intenders are weaker than the car sellers in terms of economics, technical knowledge and in taking legal actions through the courts.

Therefore, in an effort to provide legal protection to car consumers who feel disadvantaged, the agreement or consensus reached in the sale and purchase agreement needs to be reviewed. Based on the agreement referred to, the parties are legally bound to make

achievements. Article 1234 of the Civil Code stipulates that achievement can be in the form of activities to do something, give something, or not do something. The seller is obliged to hand over the goods sold to the buyer, while the buyer is obliged to pay the price of the goods in accordance with what was agreed with the seller.

In fact, the author finds that the agreement between the two parties (buyer and seller) written in a standard agreement contains injustice. It is considered injustice since buyer has never been consulted or included in the preparation of the agreement clause. The dealer apriori determines all the contents of the agreement, both regarding the rights of the dealer and the buyer's obligations, risks, prices and authority of the parties. The dealer has also printed the agreement form, which will then be presented to the buyer for approval and signature.

In that position, there is no opportunity for the buyer to submit an offer, propose their rights, etc. The buyer has no choice but to agree to all the contents of the agreement that has been offered by the seller. If the buyer states that they disagree, the seller cannot force himself to add, subtract or change the contents of the agreement. Thus, the agreement to buy and sell new cars with indent system will never happen.

2 Methods

Research on the Legal Protection Aspects of Buyers in car sale and purchase with indent system used an empirical juridical approach, i.e. research on legal identification and legal effectiveness. The nature of this study utilizes descriptive analytical research, i.e. research that seeks to describe the research object in full, so that the state or condition of the object is clear. It is descriptive because the results of this study are expected to be able to provide a systematic, detailed and comprehensive picture of the legal protection in the aspect of buyers in car and purchase transactions with indent system. It is analytical because henceforth there will be an analysis to answer some of the problems that have been formulated before.

3 Result and Discussion

3.1. Legal Protection Aspects For Car Indenter For Discrepancies Of Vehicles Handed Over By Car Dealer

The sale and purchase agreement with indent system between the dealer and the buyers did not just happen, but it was driven by the motivation to make buying and selling transactions only. Initially, it began through a negotiation between the parties aiming to reach an agreement or consensus.

In general, the agreement was not made formally but through the conformity of the will of the parties (consensus) which later became known as the principle of consensual-ism, with the existence of conformity of the will, then the agreement was made.

The form of agreement or consensus reached in the sale and purchase agreement transaction with indent system was set forth in the written agreement. With this agreement, the parties are legally bound to make achievements. Article 1234 of the Civil Code stipulates that achievement can be in the form of activities to do something, give something, or not do something. The seller is obliged to hand over the goods sold to the buyer, while the buyer is obliged to pay the price of the goods in accordance with what was agreed with the seller.

Article 1458 of the Civil Code emphasizes that the sale and purchase agreement is considered to have taken place between the seller and the buyer if an agreement has been

reached regarding the condition and the price of the goods even though the goods have not been delivered and the price has not been paid. This means that the sale and purchase agreement cannot be canceled unilaterally. In other words, sale and purchase agreement is applied if there is an agreement between the seller and the buyer regarding the goods and price, because the goods and prices are the essence of the sale and purchase agreement. If there are no goods to be sold, it is impossible to have sale and purchase transaction; on the contrary, if the goods which are the objects of the sale and purchase agreement are not paid for a price, there will be no transaction.

However, in reality, the author finds that the agreement between the two parties (buyer and seller) written in a standard agreement contains injustice. It is considered injustice since buyer has never been consulted or included in the preparation of the agreement clause. In this case, the dealer priory determines all the contents of the agreement, both regarding the rights of the dealer and the buyer's obligations, risks, prices and authority of the parties. The dealer has also printed the agreement form, which will then be presented to the buyer for approval and signature.

In that position, there is no opportunity for the buyer to submit an offer, propose their rights, etc. The buyer has no choice but to agree to all the contents of the agreement that has been offered by the seller. If the buyer states that they disagree, the seller cannot force himself to add, subtract or change the contents of the agreement. Thus, the agreement to buy and sell new cars with indent system will never happen.

Referring to the facts above, the sale and purchase agreement with indent system is classified into standard practice agreements. It is called standard agreement because it is not made through a balanced negotiation process between the two parties, but the agreement made by the car dealer provides the standard conditions in an agreement form that has been printed and is ready to be presented to the buyer for approval and signature. In this condition, the car dealer does not provide the opportunity or freedom at all for buyers to negotiate or have other offers.

Regarding to the author's analysis as stated above, Sudikno uses a term of standard contract to refer to standard agreements defined as agreements in which the contents are determined a priori by one party having a superior position to other parties. Meanwhile, Badrulzaman stated that the standard agreement is an agreement in which its contents are standardized and set forth in a certain form. Likewise, everything that happens in an agreement between a car dealer and a buyer in a car sale and purchase transaction with indent system is a standardized clause. However, there are some parts that have not been standardized including the brand, type, color choice, additional equipment, and number of units, car price, method and time of payment and time of unit handover. Although the clause contains an agreement between the two parties, the buyer has never been included in determining the contents of the agreement.

Regarding the validity of a standard agreement and the presence or absence of an element in the agreement, the weak party is forced to accept the contents of the agreement. In such circumstances, Sudikno said that "to determine whether or not there is an agreement in the standard agreement, it must first be seen the parts of the standard agreement." The standard agreement consists of three parts, namely the main agreement, additional or supplementary agreements, and standard terms.

In the main agreement and the additional or supplementary agreement section, there is an agreement; while in the standard conditions section, there is no agreement from the parties. However, the three parts constitute an inseparable unity. Therefore, it can be said that there is an agreement from the party making the agreement in a standard contract.

If this is reviewed in theoretical juridical terms, the standard agreement does not meet the provisions of the law, but based on community needs; however, in reality, it can be accepted. Badrulzaman said that standard agreements have binding power based on habit (*gebruik*) prevailing in the community and trade.” This is reinforced by the statement of Asser Rutten and Stein stating that “in accepting standard agreements by the community, the motivation is that the law functions to serve the needs of the community, and not vice versa”. Since it tends to bind the purchaser, the Law No. 8/1999 on Consumer Protection (UUPK) regulates the issue of the inclusion of the standard agreement as stipulated in Article 18 of UUPK.

It was issued since standard agreements in practice are often misused for the sake of obtaining profits solely by the seller. It can be seen in the inclusion of an exoneration clause in each standard agreement. Exoneration clauses are clauses that intend to limit, reduce, or even transfer responsibility that should be borne by the producer or seller, but which is borne by other parties. Therefore, this clause is considered a clause which is burdensome for one of the parties to the agreement.

Related to the importance of protection of the buyer in an agreement with the car dealer party which has more dominant position, UUPK provides limits and controls in the use of the standard clause so as not to cause a very detrimental effect for the buyer.

Article 18 paragraph (1) letter (a) of the UUPK states that business actors in offering goods are prohibited from making and/or including standard clauses on every document and/or agreement that states the transfer of business actors’ responsibilities or contains an exoneration clause. The provisions of letter (b) and so forth provide examples of responsibility transfer to other parties, e.g. business actors have the right to refuse the return of goods or money paid for goods and/or services purchased by consumers.

Such conditions, of course, hinder the right of a buyer to demand the cancellation of the sale and purchase agreement, known as *actio redibitoria* and the right to request a reduction from the purchase price paid or referred to *actio quatiminoris* as a result of hidden defects in material purchased by the buyer. Therefore, all unilateral actions taken by business actors/sellers are unfair.

The author considers that the prohibition in Article 18 paragraph (1) of the UUPK is actually intended to place the position of the purchaser equal to business actors based on the principle of freedom of contract, so as to create *bargaining power* balanced between the parties. For example, the buyer will make a purchase with the color, type, price, and delivery time which have been mutually agreed upon if the car dealer is able to provide the units within the next three months; and if the car dealer is unable to do so, the agreement is considered canceled and the purchase money is returned in full. To realize this condition, it takes courage to negotiate in order to obtain a balanced position; thus, the buyer’s rights can be accommodated by the car dealer in a sale and purchase agreement. This is the main purpose of prohibiting the inclusion and/or making of standard clauses containing exoneration clauses in each document and/or agreement as mentioned in the explanation of Article 18 paragraph (1) of the UUPK.

This provision is emphasized in Article 18 paragraph (2) stating that standard clauses must be put in a place which is easily visible and can be read clearly and easily understood. The provisions contained in the article are motivated by the condition where the seller often includes exoneration clauses in standard agreements such as using unclear small letters, unattractive placement, and hard to notice or tends to make people ignore it, do not expect the buyer can read it, even to understand it. In other words, the inclusion of standard clauses that are deemed unnatural and ineffective for communicating them to the buyer and causing the buyer not to read them is prohibited.

Referring to these conditions, there are indications of bad faith from the seller which is contrary to Article 7 of the UUPK. Even, the bad intention can be categorized as an attempt to fraud (Article 378 of the Criminal Code) by the seller to the indenter. Therefore, Article 7 of the UUPK affirms that business actors are required to have good faith in carrying out their business activities. In this study, it appears that good faith is more emphasized to business actors than to the buyer. This is due to the possibility of the buyer to incur losses for the seller starting when making a car purchase transaction. Conversely, the seller can do it at any time, from the time the units are produced until the units are in the hands of consumers.

Therefore, the agreement made by the parties must be implemented in good faith as affirmed in Article 1338 paragraph (3) of the Civil Code. Good faith, in this case, implies that the parties of the agreement are obliged to have proper actions. It means the car dealer and buyers in carrying out the agreement are prohibited from doing actions that cause harm to others, apply fairly and balanced, and heed the norms prevailing in society while maintaining mutual concern for the reasonable interests of each party. If the matters mentioned in Article 1338 paragraph (1) and (2) of the Civil Code are not fulfilled, the standard clause becomes null and void. Thus, it can be concluded that what determines the use of standard clauses by the seller is that they must be easily understood and understood by the buyer, so as not to cause harm to the buyer.

3.2 Civil and Criminal Liability of The Car Dealer Against Indenter for The Discrepancy of The Car Ordered.

Product liability is the legal responsibility of the person or legal entity that produces a product, (producer/manufacturer) and/or the party that sells the product and/or the party that distributes the product, including herein those involved in the commercial chain on the preparation or distribution of a product, the business people, agents and workers of the above business entity. Product liability can also be defined as a legal conception which is essentially intended to provide protection to consumers by freeing consumers from the burden of proving that consumer losses arise due to errors in the production process and at the same time the producers are responsible for providing the compensation.

The core of this definition is that the business actor is responsible for all losses arising from the results of the product or service. Article 19 paragraph (1) of the UUPK stipulates that business operators are responsible for providing compensation for damage, pollution, or losses suffered by consumers due to having goods and/or services produced or traded.

There are some reasons why the principle of responsibility is applied in the law of product liability as follows:

- a. Among victims/consumers on the one hand and producers on the other hand, the burden of loss (risk) should be borne by the party producing/removing the defective/dangerous goods in the market.
- b. By placing/distributing goods in the market, it means that the manufacturer guarantees the goods are safe and suitable for use; and if it is proven, the manufacturer must be responsible.
- c. Without applying the principle of absolute responsibility, producers who make mistakes can be prosecuted through the process of successive prosecution. Implementation of strict liability is intended to eliminate this long process.

As in the relationship between businesses and consumers/car buyers in a sale and purchase transaction with indent system, this implementation will have legal consequences that are consciously desired by the parties. The legal consequences are not only subject to the applicable

positive law, but also to the values of public order. This is based on the view that the term responsibility is more likely to embody ethical and moral values, while the term obligation is an embodiment of legal values or rules.

For this reason, looking at the responsibilities of business operators towards consumers is not enough in terms of business ethics. Besides, there may still be other perspectives from the social and individual sides, so it is natural that if someone expects more business actors to actively realize their responsibilities to consumers in order to carry out their role in the field of car trade, which of course without ignoring the obligations of consumers to the perpetrators effort. The claim of responsibility is also based on the fact that there is a loss suffered by a party as a result of a relationship between consumers and business actors in the utilization by consumers of goods and/or services produced by business actors. Along with the discrepancy with the car ordered by the buyer, the civil liability for business actors (car dealers) is regulated in the UUPK, especially Article 19 to Article 28.

In accordance with the implementation of the aforementioned articles for business actors who commit some form of irregularities, the Indonesian Consumers Foundation (YLKI) believes that the relationship of new car buyers with business actors (car dealers) cannot be said to be good. The main problem is that business actors often default on agreements or sale and purchase agreements, as well as lack of sense of responsibility to fulfill the rights of consumers, especially in terms of compensation. Therefore, YLKI mentions that there are several causes of defaults undertaken by business actors, including incompatibility between bidding and reality, internal aspects of business operators (car dealers) whose information is difficult to access by car buyers, standard agreements even though they have been banned by the UUPK, standard agreements in the norm of sale and purchase transactions, for example car buying and selling transactions with indent system, renegotiation with business actors, and bad faith in business. When there is a default, in which the business actor fails to carry out his obligations, the business actor still demands the buyer to pay his obligations, regardless of whether the buyer does not receive the rights according to the agreement.

Responding to the behavior of business actors who do not have good faith, car indenter has the right to report the matter to the relevant institutions on the legal basis, as follows:

- a. The 1945 Constitution Article 5 paragraph (1), Article 21 paragraph (1), Article 21 paragraph (1), Article 27, and Article 33.
- b. The Law No. 8/1999 on Consumer Protection (State Gazette of the Republic of Indonesia of 1999 No. 42 on the Supplement to the National Gazette of the Republic of Indonesia No. 3821).
- c. The Law No. 5/1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.
- d. The Law No. 30/1999 on Arbitration and Alternative Dispute Resolution.
- e. The Government Regulation No. 58/2001 on Supervision, Development, and Implementation of Consumer Protection.
- f. Circular of the Director General of Domestic Trade No. 235/DJPDN/VII/2001 on Handling Consumer Complaints addressed to all Industry and Trade Office in the Province/District/City.
- g. Circular Letter of the Director General of Domestic Trade No. 795/DJPDN/SE/12/2005 on Guidelines for Consumer Complaints Services.

With some of the legal basis mentioned above, the DKI Jakarta provincial YLKI seeks to summon the car dealer three times. However, in response, the car dealer countered the YLKI invitation by giving consumers an ultimatum. Then, YLKI recommended the buyer to submit the case to the Indonesian Ombudsman Commission and then to the Consumer Dispute

Resolution Agency (BPSK). The Commission also tried to mediate between the two parties to the dispute. After several mediation efforts have not yet found a solution, the Ombudsman finally stated that this case was part of a consumer dispute regulated in the UUPK.

UUPK Article 45 paragraph (1) states that “Every consumer who is disadvantaged can sue a business actor through an institution tasked with resolving disputes between consumers and business actors or through the courts within the general court environment.” A lawsuit against the issue of consumer rights violations needs to be done, where the position of consumers and business actors are equally balanced before the law. Consumers who feel their rights have been violated need to complain to the authorized institution. Consumers can ask the help of the Non-Governmental Consumer Protection Institute (LPKSM) in advance to ask for legal assistance or can directly resolve the problem with the Consumer Dispute Resolution Agency.

Consumers can also go to the Complaints Services sub-directorate at the Consumer Protection Directorate, Ministry of Trade. After the confirmation process is carried out, the official concerned will conduct an analysis of the problem in question, then clarify the consumer by asking for evidence and a chronology of the incident. After that, there will be a process of clarification be made to business actors. If the business actor refutes the accusation and there is no point of clarity, several steps will be taken such as mediation or conciliation. If there is no decision made after the aforementioned two steps, other two steps can be taken, 1) delegation to the Consumer Dispute Settlement Agency (BPSK), and 2) formally conducting juridical (court) channels, by prioritizing the application of Article 60 of UUPK as a form of civil liability for business actors. Whereas, the criminal liability for business actors is regulated in Article 62 of the UUPK. The imposition of criminal sanctions is applied because of the fact that there is an element of loss suffered by consumers due to a discrepancy of the car ordered.

4. Conclusion

The car sale and purchase with indent system which involves sellers (car dealer) and buyers (indenter) sometimes creates many problems including the time of car delivery the buyer is not in accordance with what was promised by the car dealer, and the car color provided sometimes does not match what was ordered and promised by the car dealer. Referring to UUPK in Article 2, Article 7, Article 15, Article 16, Article 18 paragraph (1a), and Article 1338 paragraph (3) of the Civil Code, legal protection for car indenter must be needed while prioritizing the equality aspect. As a form of civil liability for business actors who have bad faith legally formally charged /enacted Article 60 UUPK as a form of civil liability and Article 62 UUPK as a form of criminal sanctions. This is because there is an element of loss suffered by consumers with a discrepancy of the car ordered.

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Online Health Consultation Services In Indonesia Law Perspective

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Abstract. The rapid development of information technology in industrial revolution era 4.0 demands modern society to produce intellectual works that have brought plenty extraordinary changes among people's lives in almost all fields, both nationally and internationally. Rapid progress is happening in the global community, including the emergence of online health consultation services. This service needs legal assistance, thus the existence of the state as a law state can be maintained. Furthermore, the benefit of technological progress is maximally used by society and the country. This paper attempts to review the legal aspect of online health consultation services, since this sophisticated solution will create controversy without a legal entity. This research uses normative juridical approach. In normative legal research, literature review serves as a basic data which is classified as secondary data.

Keywords: health, consultation, legality, online

1 Introduction

Technological developments continue to evolve and change every second because of the highly needed information and dependence of technology innovations. Fast and dynamic information is important for industrial, trade and health sectors. Thus, electronic devices like smartphones that are now getting cheaper and easier to find in remote areas. These gadgets provide convenience in various aspects for its users. Technology has made it possible to sell products and services quickly and efficiently, while providing satisfaction for its users. In fact, nowadays technology has become part of human's personal life. Namely as a personal secretary, health, diet and sports trainer, investment manager and finance manager through mobile banking in a cashless society. In addition, through the latest application people are able to order a ride, food, massage and plane tickets, download the latest music from the most popular singer, play games, watch the latest movie and so on.[1]

Millennials as a technology savvy generation has been dominating Indonesian youth. Response speed from the younger generation in utilizing various advances and sophistication of the digital era must be utilized in the health sector. A survey conducted by Indonesian Internet Service Providers Association (APJII) in October 2016 reported that 132.7 million or 51.8% of Indonesia's population is connected to the internet. As the third largest smartphone user in the Asia Pacific, Indonesian internet penetration rate to children age 10-14 years old as well as employees in the private and health sectors is 100 percent. This means that technological advances provide opportunities for digital health as health programs in Indonesia.[2]

Indonesian health care system is currently well developed. However, people still encounter some shortcomings. Namely, the doctor examination schedule is relatively short and has limited hours, moreover its queue is burdening. An on-house call doctor is also uneasy due to the doctor's tight schedule and the high costs. Based on these reasons, The existence of an online health consultation technology application will provide help for the patients.[3]

Currently patients are able to consult with the doctors about their health through various online applications and websites. These applications related to online transportation applications and would help patients to do an on-house check up, laboratory tests and drugs booking. This latest innovation was recognized as a industrial era 4.0 digital innovation, especially in terms of cost savings and efficiency. Some hospitals have implemented integrated electronic support systems, such as electronic medical records that can help doctors make better therapeutic decisions according to clinical electronic prescribing guidelines. However, lately there has been news on social media regarding false medication to a patient through online consulting services[4]. As a consequence, the online health consultation ethic is still debated in the medical viewpoint.

Consultation on personal and health problems can easily be done online. However, flexibility and openness in online platforms has caused a meaning shift in a "therapeutic contract" between doctors and patients. It is a legal relationship that involves the doctor and the patient called *Inspaning Verbitennis* therapeutic relationship. As a special legal agreement to conduct services, this relationship requires the doctors to do their work in maximum efforts[5]. Therapeutic agreements are defined as the legal medical service relationship between doctors and patients based on the doctor's medical skills competencies that are admitted by certain expertise and juridical experts. This therapeutic transaction is not only managing the drugs, but also gives promotive, diagnostic, preventive, and rehabilitative health [6]. Online health consultation through chat, telephone or video calls should be further considered based on the concepts of beneficence, autonomy, non-maleficence, and justice. Online consulting service schemes are not complicated. Patients choose expert medical personnel in accordance with their complaints, then conduct health consultations through the available communication channels. Furthermore, patients will be billed according to medical personnel rates. Through this service, patients and doctors benefit from the cost, accessibility, convenience, increased privacy and communication, with certain conditions that must be agreed equally.[7]

The main problem is, the examination conducted online is not as thorough as face-to-face medical consultation. Doctors must examine a patient's physical including their body weight, height, blood pressure and heart rate through a stethoscope. Those examinations have ceased in online health consultation [8]. Minister of Health issued Regulation No. 46/2017 on the National e-Health Strategy and Regulation No.29 / 2019 on Telemedicine Services. However, technical and detailed aspects are not yet available in these regulations. Including the reliability of business models, service standards, workflows, patient safety, quality assurance, data protection, , supervision and guidance of e-Health applications.[9]

Based on the background written, there are two main problem in this paper about (1) how is online health consultation services legal provision based on telemedicine laws, (2) how is the doctor's accountability as an online health consultant based on the medical practice law and health law.

2 Method

The research method used is a normative legal research or library law research. In this method, literature review serves as a basic data which is classified as a secondary data.

3 Result and Discussion

3.1. Legal provisions for online health consultation services based on telemedicine laws.

In Indonesia health services are still not optimally operated. Plenty of basic health facilities do not meet the standard criteria such as under level of health service quality and lack of facilities, medicines, medical devices and health workers. To increase the ability of life of the nation, basic health, science and technology policies and other sector policies need to be synergized. Telemedicine is one of the facilities that fulfil basic health needs. By using information and communication technologies, telemedicine overcomes geographical barriers, improves access to health services as well benefits rural communities in developing countries that lack access to health services.[10]

The World Health Organization has urged member countries to consider a long-term strategic plan for the development and implementation of e-Health services which including telemedicine. Besides, WHO also recommends them to establish institutions related to e-Health on national level and supported by the ministry of health as the executive [11]. Record of births and deaths as well as control of drug availability are also recommended.

Telemedicine policy has been regulated in Minister of Health Regulation No.20 of 2019 concerning the Implementation of Telemedicine Services Between Health Service Facilities. It is stated that telemedicine is a distance health service conducted by using information and communication technology by health professionals. Including information exchange on diagnosis, prevention of illness and injury, treatment, research and evaluation, and continuing education for health service providers to improve individual and community health. Telemedicine service conducted by health workers who have a license from the Health Service Facilities (HSF) administrator as the consultant and recipient of the consultation. Consultant HSF receive requests and provide telemedicine consulting services, namely hospitals owned by the central and regional government as well as private hospitals. Meanwhile, consultation recipients HSF are the one that send telemedicine consultation requests like hospitals, first-level health facilities, and other health facilities.[12]

The types of health facilities refer to article 4 paragraph (1) Government Regulation Number 47 Year 2016 concerning Health Service Facilities. Those are health workers' independent practice, clinics, optics, community health centers, pharmacies, hospitals, health laboratories, blood transfusion units, medical service facilities for traditional health and legal purposes service facilities. Telemedicine services include tele-radiology, tele-electrocardiogram, tele-ultrasonography, clinical teleconsultation and other telemedicine consulting services related to science and technology development.[13]

Online health consultation categorized as clinical teleconsultation, a distance clinical consultation services to help diagnose, and / or provide advice, implementation and consideration. Indonesian Health Ministry mention four telemedicine services provided in their official website *Telemedicine* Indonesia (Temenin) namely radiology, ultrasound, electrocardiography and consultation. Teleconsultation on this website aims to unite patients with expert doctors through an online consultation to find out the patient's condition and make treatment recommendations.

Digital platform that provides online health consultation and facilitates health service search is currently popular in Indonesia. Every e-health business platform should be listed by the Ministry of Communication and Information as an electronic system provider. Referring to the Minister of Health Regulation 20/2019 article 12 paragraph 2 and 3, telemedicine application is only provided by the Ministry of Health. Thus, other independent developed applications, both e-business and telemedicine practitioners must be registered by both ministries.

Based on Law Number 19 of 2016 concerning Information and Electronic Transactions, the electronic system organizer is defined as every person, business entity, state operator, and community that provides, manages, and or operates electronic systems to the users

independently or jointly for their own needs and or other party's needs [14]. Minister of Health Regulation No. 46 of 2017 Regarding the National E-Health Strategy explains that e-health is utilization of information and communication technology for health services and information. Especially to improve health service quality as well as an effective and efficient work process[15]. It is important to note the difference of liaison platforms, service providers and telemedicine providers.

Both consultant HSF and consultation recipient HSF must be registered by the Minister of Health through the Directorate General of Health Services. Meanwhile, online health consultation platforms with its doctors are not the part of both HSF, so that their service is not categorized as telemedicine. Online applications and websites run as platforms that offer various health services are not telemedicine between HSF, as mentioned by Minister of Health Regulation 20/2019. Thus, the government must immediately create regulations regarding online health consultation services, so that they can have legal implications.

3.2. Accountability of doctors who conduct online health consultations based on the Medical Practice Act and the Health Act.

Article 1 paragraph 7 of Law No. 36 of 2009 concerning Health defines health facilities as tools and or places used to carry out health services, both preventive, curative, promotive and rehabilitative conducted by the community, regional governments and the central government. [16]. Health is a state of well-being of the body, soul and social that enables everyone to live productive socially and economically. Health care by preventing health problems requires examination, treatment and care that can be done online. Online health consultation service platforms and applications that provide consultation and health protection service are demanded by the community.[17]

Government Regulation No. 47 of 2016 Article 4 paragraph 1 concerning Health Service Facilities mentioned clinic as one of the health service facilities for the community. According to Minister of Health Regulation No. 9 of 2014 article 1 paragraph 1, clinics provide individual, basic and specialist medical services like in the hospital. Health workers provide health services to patients. Then the doctor conducts a physical examination by looking (inspection), palpating (palpating), knocking (percussion), listening (auscultation) and smelling (smelling). Furthermore, the doctor conducts supporting examinations, such as laboratory and radiological examinations if necessary. Finally the doctor diagnoses the patient's illness with his medical science as mentioned in the Medical Standard Operating Procedure and prescribes medicine for the patient [18]. In online health consultation, patients consult with a doctor without going through a physical examination and supporting examination. However, doctors can still provide medication and prescription recommendations without meeting the patients.

By conducting an online health consultation, patients feel comfortable because they do not need to leave the house, examination is also more affordable and efficient. Despite its advantages, various aspects of online health consultation need to be explored further, especially in terms of medical records [19]. Law Number 29 of 2004 concerning Medical Practices article 46 paragraph 1 to 3 states that every doctor or dentist holding medical service is obliged to write down medical records as soon as the examinations are done. Officer's names, times and signatures who provide services or actions must also be recorded [20]. In line with article 57 paragraph 1 of Law no. 36 of 2009 concerning health, every patient has the privacy rights on their health condition mentioned to the health service providers. Regulation on protecting the patient's privacy rights over electronic medical records in the health care facilities also needs to be regulated to limit access for unauthorized parties. Confidentiality guarantee for patient medical records should be written on paper so that it has legal implications if abuse occurs.[21]

Compared to the medical practice standard at conventional clinics, the patient's privacy rights regulation is more obvious. Unfortunately, there is a high possibility of patient misdiagnosis through online health consultation. Thus, the government must immediately create regulation for online health consulting services to ensure user data security. The rules regarding drug delivery through online health applications also need to be explored. On one

hand, society needs technological advancement in medical services, on the other hand governments have to update the regulation on it. So that, medical practice, the doctors and patients obtain legal protection.

Article 23 paragraph 3 of Law Number 36 Year 2009 concerning Health which regulates the delivery of health services requires health workers to have permission from the government. Article 36 of Law Number 29 Year 2004 concerning Medical Practices regulates that dentists and doctors who practice medicine in Indonesia are required to have a practice permit. Based on both regulations, it is clear that as a medical practitioner, doctors are able to perform medical practice after obtaining a practice permit from the district / city health office.

Doctor and patient relationship also mentioned in Law No. 29 of 2004 concerning Medical Practice. Medical practice is implemented based on the agreement of health relations, treatment of diseases and health recovery, health promotion and disease prevention. The agreement mentioned must be made by dentists and doctors for medical profession devotion. Healing and recovery is carried out to the fullest in accordance with patient medical needs, standard operating procedures, service standards and professional.[21]

Applicable location of practice license regulated in article 37 paragraph 2 and paragraph 3 of Law Number 29 Year 2004 concerning Medical Practices. In paragraph 1, a doctor's or dental practice permit is only granted for at most three places. Paragraph 2 stipulates that a practice permit is only valid for one practice place. According to article 38 Paragraph 1b, the doctor or dentist must have a place of practice. To sum up, medical practice providers and health service providers must have a practice location. So practice location of online health consultation doctors are still questionable legally and ethically. It is hoped that the government will soon create regulation about online health consultation services.[20]

Health Act article 59 also regulates traditional health services that are defined as treatment through manner and medicine which refers to hereditary experience and skills empirically that can be justified and applied in accordance with prevailing society norms.

The World Health Organization defines traditional health service as a combination of knowledge, practice and skills based on beliefs, theories, and experiences from certain cultures, both those that can be explained or not, which are used in health care and diagnosis, prevention, improvement or treatment of physical and mental illness. Traditional health service regulated both in Health Act, Government Regulation No. 103/2014 concerning Traditional Health Services and Minister of Health Regulations that divided into several types, namely empirical, integration and complementary traditional health services, spa health, efforts to develop traditional health through independent usage of family herbal medicine (Asman TOGA) and acupressure [21]. To sum up, online health consulting services require national regulation in order to provide legal certainty like traditional health services. So that technological development demands in the health sector can be answered if experiencing legal problems.[20]

4 Conclusion

As a medical service provider, doctors have authority to practice medicine with a permit granted by the government, because the state is responsible for regulating and fostering medicine practice in Indonesia. Medical practice through online consulting service is influenced by many factors, namely social, economic, political, cultural, security and defense as well as technology and science. Thus, those factors potentially change medical practice orientation in terms of values and consideration and later may affect the health development process. Moreover, specific license regulations made by the government and the provisions regarding its accreditation are not yet available. Thus, national standards and guidelines for online health consultation services need to be established, so that responsible, safe, qualified, equitable and non-discriminatory health services can be created. This is a shared responsibility between the government, health practitioners and the community.

Online health consultation services usage has increased annually because many health services in the world today have adopted it. The effectiveness of promotive and preventive health services has been proven by many studies and it helps to promote health. Although many benefits are offered from online health consultations, the usage should be considered wisely. Because technology may strengthen the mechanistic paradigms and instrumental approaches to the human body. Unfortunately the law is always left behind. It is time for the government to create regulations on online health consultation services. So, as a part of technological developments in medical practice, patient data security is guaranteed and legal implications are made.

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Form And Anatomy of The Branding Outlet Agreement (Cooperation between PT. Surya Madistrindo and Legita Café)

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Abstract. Branding is a marketing strategy tool for industrial companies. Doing branding, means companies need cooperation with other parties. PT. Surya Madistrindo carries out cooperation in the form of a branding outlet agreement with Legita Café, this agreement was made and signed on 27 July 2018 and ends on 10 November 2019 . In the implementation, the branding outlet agreement between PT. Surya Madistrindo did not run smoothly due to the lack of good draft agreements both anatomically and substance hence the contents of the agreement were unclear and multiple interpretations. The Legita Café is also not careful in making and studying agreements so that the achievements carried out by Legita Café include the implementation of imperfect achievements so that the Legita Café is categorized as having done a default.

Keywords: Agreement, Forms, Anatomy, Branding Outlet

1 Introduction

Indonesia is a developing country, this can be marked by its developments in economic sector. Increasingly intense business competition require strategic business able to compete. Because it is necessary to have a strategy in the form of product branding so that the wider community knows the product so that product sales will increase. Branding is built by many factors and is communicated through aspects of integrated marketing communication such as through advertisements, events, or promotions.[1]

The company's business to expand marketing and optimize sales is by product branding. Branding is an effective marketing strategy tool and has often been used by industrial companies. Branding is considered able to influence consumers to choose the product compared to other competing products. Sometimes we encounter outlets that are designed with the product wall brand. The wall brand is a branding outlet strategy to introduce and encourage consumers to buy the product. Business actors branding their trademarks by using other people's outlets with an agreement called a branding outlet .

Business strategies in the form of branding outlets are outlined in the form of a cooperation agreement . This cooperation agreement was born based on the principle of freedom of contract. This principle contains a view that people are free to do or not do agreements, free with whom to do or not do agreements, free with whom they enter into agreements, free about what is promised, and free to set conditions for the agreement.[2]

PT. Surya Madistrindo is a company owned by PT. Gudang Garam Tbk. which responsible to handle the distribution of Gudang Garam products. PT. Surya Madistrindo uses a variety of strategies to do marketing Gudang Garam products to be able to compete with other cigarette company products. PT. Surya Madistrindo has 12 offices regional representatives and 180 offices scattered areas throughout Indonesia. In carrying out marketing functions, each area office has its own marketing strategy thus consumers are interested in the products of PT. Gudang Garam Tbk. One of the strategies in marketing PT. Surya Madistrindo Pekalongan Regional Office Area is a joint branding outlet .

Legita Cafe is a coffee shop domiciled at Ruko Grand Comal Purwosari, Jl. Ahmad Yani, Comal, Pemalang. Legita Cafe is a famous cafe among teenagers because everyday the consumers are mostly teenagers. Legita Cafe was chosen by PT. Surya Madistrindo to be one of the sponsor for PT. Gudang Garam Tbk products.

Based on the results of the assessment, PT. Surya Madistrindo offers cooperation to Legita Cafe in the form of a Branding Outlet Cooperation . In this outlet branding agreement, Legita Cafe is willing to provide a place outside and inside the outlet for sponsorship so PT. Madya Madistrindo can place branding material. In the contents of the branding agreement, Legita Cafe has also agreed to sell products owned by PT. Gudang Garam in sufficient quantities to meet consumer needs, including the launch of new products. Legita Cafe has also agreed to hold the event twelve times in the period according to the agreement period. But until the agreement ends, Legita Cafe cannot compliance their event in accordance of agreement.

2 Method

The method used in this study is to use a qualitative approach to the type of empirical juridical research. Data sources used are primary data sources and secondary data sources. Data collection techniques are by interview, documentation, and observation. In testing the validity of the data, this study uses a triangulation technique with the source that is comparing the observational data with interview data and comparing the results of the interview with a related document.

3 Results and Discussion

3.1. Form of Branding Outlet Agreement between PT. Surya Madistrindo with Legita Café

Form agreement can be divided into two kinds, such as the written agreements and verbal agreements. A written agreement is an agreement made by the parties in written form, while verbal agreement is an agreement made by the parties in oral form (sufficiently enough if both parties agree). This branding outlet cooperation agreement is included in a reciprocal agreement because it contains rights on one of the parties, and the rights are at the same time an obligation for the other party. In this agreement, Legita Café has the right to get cooperation funds from PT. Surya Madistrindo if Legita Cafe willing to provide a branding place and held events as agreed in the agreement. This outlet branding agreement is also doesn't legally known, because it is not regulated in Indonesian Civil Code. This agreement is a result of development and community needs.

3.2. Agreement (toesteming or permission) of both parties.

An agreement is a conformity of statement of will in between one or more people with another party. The first condition of the agreement is considered valid is the agreement of those who bind themselves [2]. PT. Surya Madistrindo and Legita Café come into a cooperation agreement we could viewed from the bidding process until the implementation of the agreement we couldn't found any coercion between the two parties. Because PT. Surya Madistrindo offers cooperation in the form of a branding outlet agreement that is mutually beneficial to both parties and the offer of cooperation is well received by the owner of Legita Café.

3.3. Prowess ability. Prowess are the skills or abilities to do legal actions.

Legal actions are actions that will have legal consequences. The people who will enter into an agreement must be capable and authorized people to carry out legal actions as stipulated in the legislation [2]. In making a letter of agreement, if one of the parties or the parties is an attorney / representative, then the reader must pay attention to whether or not the sentences have been included. It is important to include this formulation because it prevents disputes or disputes so as not to throw each other responsibility. The parties that made a branding outlet agreement between PT Surya Madistrindo and Legita Café were legal persons so that the terms of the agreement were valid, namely that they were fulfilled. In the agreement, PT. Surya Madistrindo was represented by Arif Setiawan as Regional Marketing Manager, while Legita Café was represented by Gideon Kurniawan Rahardjo as the owner of Legita Café.

3.4. The object of the agreement (*onderwero der overeenkomst*).

Performance is what is the debtor's obligation and what is the creditor's right [3]. According to the provisions of article 1234 of the Civil Code, achievements consist of giving something, doing something, not doing anything. The object of the branding outlet agreement between PT Surya Madistrindo and Legita Café is stated in the provisions of Article 6 which consists of giving something and doing something. PT. Surya Madistrindo, among others, is obliged to pay the agreed cooperation fund and is entitled to have full access and the right to supervise the material units at Legita Café. Then the rights and obligations of Legita Café, among others, are required to obtain prior permission at PT. Surya Madistrindo if using a Trademark in carrying out this agreement, Legita Café is entitled to a cooperation fund by PT. Surya Madistrindo, Legita Café is obliged to do work and sell products that have been determined by PT. Surya Madistrindo, Legita Café is also obliged to carry out the event 12 times according to the agreement of the parties, and must selling all material products of PT. Surya Madistrindo according to the agreement. In this case the condition of the object has been fulfilled.

3.5 The existence of *halal causa* (*geoorloofde oorzaak*).

In Article 1320 the Civil Code does not explain the meaning of *geoorloofde oorzaak*. Article 1337 of the Civil Code only lists prohibited causes. A cause is prohibited if it conflicts with law, decency, and public order [3]. This requirement has also been fulfilled by PT. Surya

Madistrindo with Legita Café because in the contents of this outlet branding agreement there are no provisions that conflict with law and public order.

3.6. Anatomy of a Branding Outlet Agreement

The inclusion of the title in the agreement is an indication of the main agreement agreed by the parties [4]. Branding outlet agreement between PT. Surya Madistrindo with Legita Café. The title of this agreement is " Legita Cafe Branding Outlet Agreement ". According to Satya Peloryandi Branding Outlet is an effort to present a brand somewhere or shop for people knowing the brand. However, in this outlet branding agreement, besides containing the obligation of Legita Café to provide a place for branding by PT. Surya Madistrindo and sells PT. Gudang Garam Tbk., Legita Cafe must also hold an event. Judging from the title, the obligation to hold an event is not appropriate to enter into a branding outlet agreement . It would be more appropriate if the event was made in a separate agreement and different title. The title made in the agreement must be clear and concise. By seeing the title of the agreement, people will immediately be able to imagine what things should be regulated in the agreement [4].

- a. Opening. The opening in the agreement letter serves to show whether the agreement letter was made under or before a notary public, indicating where the agreement letter was made and the date the agreement was made. In the branding outlet agreement between PT. Surya Madistrindo with Legita Cafe, writing a complete and correct opening.
- b. Comparison (The Parties). Comparison means the identity of the parties involved in making the agreement which includes the name , date and year of birth, address and position. Compilation is an indication that the parties have the right and authority (competent) to carry out legal actions. The compilation contains the function of explaining the identity of the parties making the agreement, in what position the person acts and based on what the position is.[4]. PT Surya Madistrindo and Legita Café have made a branding outlet agreement where the compilation is clearly written. PT Surya Madistrindo was represented by Arif Setiawan as Regional Marketing Manager while Gideon Kurniawan Raharjo was the owner of Legita Café.
- c. Premise. The premise in the letter of agreement serves as a guide to the main discussion of the parties and the formulation of the reasons why an agreement was made [4]. In this case part of the premise has also been contained in a branding outlet agreement between PT. Surya Madistrindo with Legita Café.
- d. Content of the Agreement. There is an important principle in the agreement one of which is the principle of Pacta Sun Servanda which reads all treaties made legally apply as a law for those who make them. so the parties involved in the agreement must pay close attention to and pay attention to all the provisions contained in the agreement to minimize the possibility of feeling disadvantaged in the future. Important elements in the contents of the agreement include:

(1) Essential Elements

This element is a must to be include on agreement. The essential element consists of the main object and the promised achievement. The basic terms of the one agreement with the other agreements vary depending on the type of agreement concerned.[4] An

essential element of the branding outlet agreement between PT. Surya Madistrindo with Legita Cafe is the importance of branding by PT. Surya Madistrindo, the existence of branding material, the presence of Legita Café, the place to place the branding material, the cooperation costs, and the agreement period.

(2) Natural Elements

The natural element is an element that does not have to be in the agreement because even though the formulation or provisions are not included, it does not make the agreement made flawed and invalid so that it still has force to force and bind. If there is no natural element in an agreement, the law can be used as a guide in completing this natural element.[4]. Natural elements that can be seen in the branding outlet agreement between PT. Surya Madistrindo with Legita Café is an event conducted by Legita Café that does not contain activities that violate the norms of decency or moral norms that can result in the brand name of PT. Surya Madistrindo is not good in the eyes of the community and resulted in a decrease in product sales of PT. Surya Madistrindo even though the agreement does not regulate what events can be held by Legita Café.

(3) Accidental Elements

Accidental element is inversely proportional to natural element because in accidental element, if something is not written in the agreement, the law does not appear to fill in the blanks because the law does not regulate it. And because the law does not regulate it nor is it stated in the agreement, it is not binding on the parties so there are no legal consequences.[4]. Accidental elements in the branding outlet agreement between PT. Surya Madistrindo with Legita Café. This element is considered incomplete and there are some unclear provisions. This can be seen in the provisions regarding rights and obligations which are basically a translation of the scope of the agreement, but in this agreement there are provisions regarding rights and obligations that are not regulated in the scope of the agreement. Then there are also conflicting provisions between the scope and rights and obligations.

In the scope of the agreement explained that PT. Surya Madistrindo has the exclusive right to do the work of branding a room in Legita Café, then the material unit will be placed outside and inside the outlet. So it can be seen that Legita Café is obliged to provide a place for PT. Surya Madistrindo to put the material unit in question. However, this matter is not explained in the provisions regarding rights and obligations because the provision of this place is the main thing needed in branding.

The provisions regarding the rights and obligations that must do the work are Legita Café There are provisions that conflict between rights and obligations with the scope of the provisions regarding the obligations to do the work. Within the scope of Article 2 paragraph 1 letter a it is explained that doing work is an obligation of PT. Surya Madistrindo but in the provisions of the rights and obligations in Article 6 paragraph (2) letter c the obligation to do work is an obligation of Legita Café. The provisions of the rights and obligations in this agreement also regulate the obligations of Legita Café in carrying out the event twelve times, but the provisions of the debut are not seen to be related to the scope of the agreement. The lack of relevance of some provisions in the agreement between the scope of the rights and obligations can cause the parties who read it do not understand and misinterpretation so that the agreement can not be implemented properly.

In the agreement, performance is a contractual obligation (contractual obligation) . These contractual obligations are from [5] :

1. Obligations determined by statutory regulations.

2. Obligations agreed in the agreement.
3. Obligations required by propriety and customs.

Performance settled in Article 6 of the rights and obligations of PT. Surya Madistrindo and Legita Cafe. In this agreement the obligations that must be fulfilled by PT. Surya Madistrindo is paying cooperation funds to Legita Cafe and the rights that must be received by PT. Surya Madistrindo is entitled to have full access to and the right to supervise the unit of material at the outlet . In this case, PT. Surya Madistrindo has obtained its rights in the form of full access and has the right to supervise the material units in Legita Cafe.

Then, under Article 6, Legita Cafe must obtain prior permission from PT. Surya Madistrindo if it will use trademarks in carrying out this agreement with conditions to protect and maintain the integrity and good faith associated with trademarks, Legita Cafe must comply with the identity standards and instructions for use made by PT. Surya Madistrindo to use the trademark. PT. Surya Madistrindo has the right to review and give final approval on all plans to use the trade mark in whatever form and manner . If Legita Cafe uses the trademark of PT. Surya Madistrindo without the approval of PT. Surya Madistrindo, the Legita Cafe hereby releases PT. Surya Madistrindo of all responsibilities arising from the use of trademarks without such permission . Legita Cafe understands that all rights, ownership and interest in and goodwill inherent in trademarks, are and will always be the property of PT. Surya Madistrindo and Legita Cafe will not take or assist other parties to take actions that can interfere with, hinder, or reduce the rights, ownership and interests of PT. Surya Madistrindo in and for these trademarks . This provision has been implemented by Legita Café.

Another obligation that must be implemented by Legita Café is to held events twelve times in accordance with the agreement. These obligations have not been adhered to by Legita Cafe because Legita Cafe is only able to held such event five times.

This agreement is also said to be incomplete because in the provisions regarding the method of payment, it is explained that the payment phase must be preceded by the submission of documents from Legita Cafe, but the documents that must be submitted by Legita Cafe to PT. Surya Madistrindo is not explained in this agreement.

Then Legita Cafe has the right to pay cooperation funds by PT. Surya Madistrindo as referred to in Article 4 and Article 5 of this outlet branding agreement . In terms of payment, Legita Café has not yet received a full collaboration fund because there are stages in granting cooperation funds. Legita Café has just received a cooperation fund in the form of down payment with a nominal value of Rp.4,123,711. This down payment is given after Legita Café signs an agreement.

Payment of cooperation funds for phase I and phase II has not been paid by PT. Surya Madistrindo because the event has not been carried out in accordance with the agreement. Cooperation fund Phase I with a nominal of Rp 18,556,701 , - will be given after Legita Cafe implement event six times. Phase II payments will also be given after Legita Cafe has conducted the event six times. However, these provisions are not contained in the agreement. This results in the reader being misinterpreted so that the agreement is not properly implemented.

Provisions regarding the termination of the agreement provided for in Article 9 are also not consistent between Article 9 paragraph (1) letter a and letter b. The provisions of Article 9 paragraph (1) letter a which explains that if there is an error or omission

committed by Legita Café in the implementation of this agreement, then PT. Surya Madistrindo will give a warning to Legta Café to correct any mistakes or omissions that have been made and the warning must be carried out within 10 (ten) days after receiving the warning. While Article 9 paragraph (1) letter b explains that the agreement terminates if one party neglects or violates one of the agreements in the agreement. This unclear clause can cause the reader to be misinterpreted so that the implementation of the agreement cannot be carried out properly.

- e. Closure (Cover). The letter of agreement usually states that the letter of agreement was made with the necessary copies / copies and also the agreement letter was signed by the representing parties and witnesses and affixed with a sheet. Branding outlet agreement between PT. Surya Madistrindo with Legita Cafe has been completed by the concluding part of the agreement which is deemed to have been completely made in duplicate and the parties' signature is affixed with official stamp.

4. Conclusions

Form agreement can be divided into two kinds, such as the written agreements and verbal agreements. A written agreement is an agreement made by the parties in written form, while verbal agreement is an agreement made by the parties in oral form (sufficiently enough if both parties agree).

The form of a branding outlet cooperation agreement between PT Surya Madistrindo and Legita Cafe is a written agreement, made under the hand without involving a notary public in making the agreement. This type of agreement is a reciprocal agreement and an anonymous agreement (innominat). The agreement has been made proportionally but in substance, there are still some unclear and unclear provisions that can cause misinterpretation. This agreement also contains essential, natural and accidental elements.

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Constitutional Implications of Medical Action Refusal by Pediatric Patient's Parents

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Abstract. The law recognizes qualified adult patients to have right in refusing or accepting medical treatments, even if the refusal may cause fatal risk. In the other hand, for pediatric patient, the parents are the one who responsible for their medical treatment agreement. This phenomenon puts the child in a difficult situation as well as raises ethical and professional dilemmas for the doctors. This research aims to reveal the problem faced by pediatric patients in obtaining health right, health services specifically. The research type conducted is normative juridical. As a consideration, the research started by analysing laws and regulations to identify legal concepts and principles used in regulating children's rights. Thus, the approaches taken are the statutory approach and the conceptual approach. Research result shows that the child's health rights are guaranteed by child rights convention and regulation concerning child protection, Law Number 23 Year 2002 which revised into Law Number 35 Year 2014. However, refusal of medical treatment by pediatric patient's parent has no specific legal consequences. As the research recommendation, to legally protect children's health rights, the government should formulate specific regulation for pediatric patient's parent. So that, they can be legally accused when they refuse medical treatment that important for children health interest.

Keywords: Children's Health Rights; Patient's Parents: Medical Treatment.

1 Introduction

Basically, human live needs the laws. Along the history, the law has a central role to make humans feel protected, live side by side in peace and keep their existence recognized [1]. The dependence of human life on law is confirmed through literature, from classical law era to the post-modern era. Similarly, law also has a strategic role in the health field, especially in the relationship among doctors and patients.

Relationships between doctors and patients categorized as personal relationship due to their trust to the doctors. Wilson depicts the relationships as personal as relationship between the priest and the congregations who was expressing their feeling [2]. Personal recognition is very important for self-exploration and requiring protected conditions in the private consultation room. In receiving medical treatment, patients will disclose their confidential information to the doctor. Patients have strong reason to trust and entrust themselves to the doctors because doctor has been declared as a professional [3].

Recently the relationship pattern has change from vertical paternalistic becomes contractual horizontal (contract relationship). Patients visit is considered as receiving help offers for the health complaints, and vice versa for the doctor who provides help in accordance with the medical science. This contractual relationship occurs because of the patient's trust toward the doctor's knowledge and ability to help patient's health complaints [4]. Patients need help with their unknown disease and rest their hopes on a doctor who has the knowledge. Position of the patient is weaker than the doctor and they are vulnerable to unfair actions. Therefore, doctors have an obligation to always respect

patients' rights related to decisions making process toward taken medical actions.

The relationship between the patient and the doctor is categorized as therapeutic relationship. In legal point of view, the relationship qualified as agreement-based engagement. The therapeutic agreement between a patient and a doctor created to provide health services based on the doctor's expertise [5]. Through this agreement, the rights and commitments of each party will appear to obtain certain goals desired by patients from medical services provided by doctors. However, it should be noted that the therapeutic contract is not an agreement based on results (*resultaatverbintennis*) but categorized as engagement based on maximum effort (*inspanningverbintennis*) [6].

In health services, patients as receiver and doctors as provider have equal rights and obligations and must respect each other. Problems often found in this relationship usually related to medical treatment approval. Generally, common people consider signed form before undergoing a surgery is just a formality. Obtaining patient consent before medical treatment, including pre-surgery is an essential part of current health care system. Achieving informed consent or "approved medical action" run as a patient's autonomy guarantee in right to self-determination and is seen as good practice in health care.

The Oxford English Dictionary defines, "*Consent*" as "*voluntary agreement to, or acquiescence in, what another proposes or desire; compliance, concurrence, permission*". Informed consent is free assent given by the patient for medical action, since the patient gets all significant information about the nature and consequences of the action [7]. The form is very important to determine medical actions validity carried out by medical personnel (doctors). In Indonesia, Informed consent in health services has been legitimately defended through Minister of Health Regulation Number 585/Menkes/Per/IX/1989 concerning Approval of Medical Measures. Afterward, it changed into Indonesian Minister of Health Regulation Number 290/Menkes/Per/III/2008 concerning Approval of Medical Measures. Medical actions without the patient's assent can bring about criminal allegations to the doctors for supposed maltreatment, as accommodated in Article 351 of the Indonesian Criminal Code. However, if the patient experiences an emergency condition informed consent is not needed in order to save patient's life [8].

In the other hand, there is also medical action rejection statement letter named "informed refusal". Rejection of medical treatment is the patient's right to determine what he wants to do to himself and is done after obtaining information from a doctor [9]. The act of giving consent or rejection to the future medical action is entirely the patient's right [10]. The law recognizes qualified adult patients to have right in refusing or accepting medical treatments, even if the refusal may cause fatal risk. In the other hand, for pediatric patient, the parents are the one who responsible for their medical treatment agreement.

Informed consent submission can only be given to patients who have the ability to accept and can understand doctor explanations. In general, the steps for granting informed consent are as follow [11]:

- a. The doctor provides accurate and complete information about the patient's medical condition, type, nature and purpose of the action, as well as the risk of the taken action;
- b. The doctor believes that the information has been understood by the patient;
- c. Doctors ensure that patients are able to make decisions;
- d. Doctors believe to the extent possible that patients provide decisions without coercion or manipulation.

By examining each part of the informed consent form, parents or guardians of pediatric patients who will sign the form are expected to comprehend the information gave by the doctor. Moreover, if in the future a problem related to a patient's health is found, the informed consent form can be presented as evidence in court.

Legally, all risks that may occur from medical treatment must be honestly conveyed to the parents of pediatric patients. They may refuse medical treatment even though the child really needs it and if not done immediately will cause fatal impact and can threaten the survival or cause disability of children. On the other hand, doctors are required to respect pediatric patients' parents' autonomy

rights in approving medical measures. This is what puts children in difficult situations and raises ethical, legal and professional dilemmas for the medical profession.

By *defacto*, children are separate individuals from their parents. They possess equal rights with adults, including Human Rights. Doctors and parents cannot deny a child's rights. If a father or mother takes the child to the doctor, the patient is the child, not the parents. Therefore, pediatric patients must be the primary consideration and become the main responsibility of the doctors [12]. The children's rights are stressed by the General Explanation of Law No. 23 of 2002 concerning Child Protection. It expresses that in the point of view of human rights, children's rights are included [13]. Child rights are likewise human rights contained in the 1945 Constitution of the Republic of Indonesia and the UN Convention on the Rights of the Child [14].

2 Method

The research method utilized in this paper is the normative legal research method, using the statute approach and conceptual approach. Statute approach is based on legal regulations review related to the problem discussed. These legal regulations become the primary legal material in this study. The conceptual approach will provide understanding by quoting legal experts opinions. This paper is written based on the previous studies' results, so that the problem will be analyzed more comprehensively. Deduction reasoning is used to solve specific problems.

3. Results and Discussion

3.1. Relationship between Doctors and Patients

The doctor and patient relationship basically lays on two kinds of human rights, in particular the right to self-determination and the right to information [15] as pedestal of the right to health care. Despite the fact that the right to health care and the right to self-determination are fundamentally equivalent, the second rights is viewed more essential since it contains privacy rights of their body [16].

Strictly Article 3 of the 1948 Declaration of Human Rights expresses that "Everyone has the right to life, liberty and security of individual." Therefore, there is an assurance that everybody has the right to life, freedom and personal security [17]. As the outcome, no activity is allowed against these rights. The doctor's activities towards patients depend on the principle of "equality before the law". Everyone, including doctors, has a comparable circumstance under the law. Besides, in the field of medical services patients must not be forced by anyone, both mentally and physically, to accept or dismiss the proposed medical actions. Doctors who will conduct medical treatment on patients must get their assent as the proprietor of the body, medical actions without the patient's assent are seen as ignoring the law or the rights of the patient.

In Indonesia, human rights in the health sector have been directed in the 1945 Constitution of the Republic of Indonesia, especially Article 28H section (1) which states:

Each person has the right to live in prosperity physically and intellectually, to live, to have a healthy environment and receive health services.

And Article 34 paragraph (3) which states:

The state is responsible for the provision of adequate health service facilities and public service facilities.

Besides, Indonesia has also stipulated Law Number 36 Year 2009 regarding Health as an effort to advance national welfare related to health and to protect Indonesian from violation related to health [18]. From a Civil law perspective, doctors who obtained a Registration Certificate (*Surat Tanda Registrasi*) and a Practice License (*Surat Izin Praktik*) are considered to have made a public offering (*openbare aanbod*) if they have opened a practice and installed a name sign. If the offer is accepted or approved by another party, an engagement is made. Article 45 Paragraph (1) and Paragraph (2) of Law Number 29 Year 2004 concerning Medical Practices expresses that in order to make a legal agreement between the patient and the doctor, the offer must be followed by a

complete doctor's explanation regarding diagnosis, treatment and prognosis as well. as a matter related to the patient's illness. If the patient agrees and wants to take medication, then a legal agreement between them takes place, known as a therapeutic contract [19].

The doctor and patient relationship are legal engagement based on agreement (*verbinten*). Quoting Article 1313 *jo.* 1234 Civil Code, agreement is actions of one legal subject (person or body) or more, commit oneself to one or more legal subjects (person or body), to do something and/or not to do something called performance (*prestasi*). Performance itself described as the legal obligations of each party which carries out a legal engagement. Thus, therapeutic contracts as legal engagement between doctors and patients require give and take each other performance [20].

The basic performances that doctors must give to patients in a therapeutic relationship consist of healing and prevention efforts, medical measures solely for the benefit of the patient's health. Performance is measured when actions are carried out optimally (*inspanning*) or not taking the necessary actions. Mainly based on medical professional standards and the standard operating procedures outlined in Article 50 of Law Number 29 Year 2004 concerning Medical Practices [21].

On the other hand, patients as recipients of medical services must participate and try as much as possible to recover. Without their involvement, doctor's medical efforts will not achieve the expected results. If the patient acts uncooperatively in their recovery and disobeying the doctor's instructions, their action categorized as *contributory negligence* and cannot be justified by the doctor [22].

Citing Hermien Hadiati Koeswadji [23], "*Therapeutic transactions are agreements (Verbinten) to find or determine the most appropriate medical treatment for patients by a doctor.*" While Veronica Komalawati stated that, "*Therapeutic transaction is a legal relationship between doctors and patients in a professional medical service, based on competencies that are in accordance with certain expertise and skills in the medical field*" [24]. Therefore, therapeutic transactions are clearly more specific agreement compared to general agreements, in example:

- a. The subject of therapeutic transactions consists of doctors and patients. The doctor is a service provider who has certain qualifications and authority as professionals in the medical field who are competent to provide the assistance needed by patients. Whereas patients are parties who do not have the qualifications and authority as doctors, and are those who need the help of doctors who are obliged to provide honoraria for services provided by doctors;
- b. The object of a therapeutic transaction is a professional medical procedure that has the characteristic of providing help;
- c. The purpose of therapeutic transactions is maintenance and improvement of family-oriented health, including promotive, preventive, curative, and rehabilitative activities to realize optimal health [25].

Therefore, therapeutic transactions are a special engagement form that has inspanningverbinten legal relationships, the legal principles and conditions that underlie the agreement must be fulfilled in a therapeutic transaction. The principles of therapeutic transactions according to Veronica Komalawati are as follows [26]:

- a. Principle of Legality
Derived from Article 50 of the Health Act, health workers are tasked with organizing health activities in accordance to their area of expertise and authority. This implies that, competent health services both education and licensing are in accordance with statutory provisions.
- b. Principle of Balance
Health services must be done in a balanced manner, between individual and community interests, between physical and mental, between goals and facilities, between facilities and outcomes, between benefits and risks arising from medical efforts undertaken.
- c. Principle of On Time
This principle is very important for health servants, especially doctors. Delay and negligence in handling the patient will be fatal and contrary to this principle. The speed and accuracy of handling patients is an important factor in supporting patients' recovery.
- d. Principle of Good Faith
This principle is based on the principle of good deeds (kindness) that should be applied in the commitments of doctors to patients. As professionals, in applying this principle doctors need to respect the rights of patients in doing medical practice as well as uphold their professional standards.
- e. Principle of Honesty
Honesty between doctors and patients is one of the important things in therapeutic transactions. Because the patient's position in the therapeutic transaction is very passive and very dependent on the doctor (vertical paternalistic).

According to Zaeni Asyhadie, the legal requirements for agreements relating to therapeutic transactions are regulated in Article 1320 of the Civil Code as follows [27]:

- a. Conditions concerning agreement between parties who bind themselves to each other (*toesteming van de genen die zichverbiden*)
Agreement in therapeutic transactions for certain medical measures requires *informed consent*.
- b. Conditions concerning party's ability to make a commitment (*debekwaamheid om eene verbintenis aan te gaan*)
According Article 1329 Civil Code, every person has the authority to make an agreement, unless he is declared incompetent for that matter. Meanwhile, those who are not permitted to enter into agreements based on Article 1330 of the Civil Code are:
 - i. Minors, a child who has not yet reached the age of majority;
 - ii. Person placed under guardianship;
 - iii. Married women if determined by law and generally anyone who by law is prohibited from entering into certain agreements.
- c. Conditions concerning certain topic (*een bepaald onderwerp*)
Certain topic related to legal object or thing agreed. In a therapeutic agreement, "certain topics" are medical actions which performed by the doctors, namely the treatment and cure of an illness.
- d. Conditions concerning permissible cause (*een geoorloofdeoorzaak*)
Agreement object must be in accordance with the law, public order and morality. For example, in a therapeutic agreement a doctor prohibited to conduct abortion without medical indication because it is against the law.

Thus, when the therapeutic transaction has fulfilled those legal conditions, obligations arising from the therapeutic transaction shall binding the parties, both the doctor and the patient. According to book III of the Civil Code which regulates engagement, there are two types of agreements:

- a. *Inspaningverbintenis*, an effort agreement, meaning that both parties pledge to make maximum efforts to realize the agreement.
- b. *Resultaatsverbintenis*, the party who promised must give the real result according to the agreement (*resultaat*) [28].

In therapeutic transaction, performances that doctor must provide to the patients consist of healing efforts and prevent medical action solely for patient's health interests. The performance measured when the action is done optimally (*inspanning*) or not performing required actions. Therefore, when doctors do not make the best effort to cure patients according to their professional standards, it has fulfilled the qualification as a default as regulated in Article 1239 of the Civil Code.

Besides, Doctor's wrongdoing in providing medical service achievements that cause civil loss to patients is qualified as malpractice. Physical health and the lives of patient loss as the result of doctor mistreatment become essential element of medical malpractice from civil and criminal law point of view [29].

3.2. Approval of Medical Treatment (Informed Consent)

The progress of informed consent in Indonesia was marked by an official statement from the Indonesian Doctors Association (IDI) through PB-IDI Decree Number 319 / PB / A.4 / 88 of 1988 concerning Informed Consent. After that, it was confirmed by Minister of Health Regulation Number 585 / Men.Kes / Per / IX / 1989 regarding approval of Medical Measures, which was later amended by Number 290 / Menkes / Per / III / 2008. In fact, long before the regulation existed, Indonesian health professionals have recognized and implemented it as a habit during operative actions and before performing surgery, in the form of written consent by the patient or his family [30].

Informed Consent composed of two words, *informed* which means they have received an explanation (information). *Consent* means approval or giving permission. In short, informed consent is consent given after obtaining information. For this reason, informed consent can be defined as the consent given by the patient or his family on explanation of medical actions taken against the patient as well as the risks that may arise. Every medical action taken must prioritize patient's health and there must be no coercion [31].

Based on Chapter I item Id Decree of the Medical Services Director General Number: HK.00.063.5.1866 concerning Informed Consent on 21th April 1999 stated that: in medical profession, Informed consent is a statement of assent or authorization from a patient that is given without forced by anyone, rationally, without coercion (voluntary), about the medical actions that will be carried out against him, after getting enough information [32].

Minister of Health Regulation No. 290 / Menkes / Per / III / 2008 concerning Approval of Medical Measures, provides a definition of informed consent as approval of medical actions by patients or immediate family, after getting a careful explanation of the actions of the doctor or dentist to be performed on the patient [33]. Sofwan Dahlan explains informed consent as unilateral statement from the rightful person (patient, family or guardian) containing doctor permission or approval to perform medical action after the rightful person receives sufficient information [34]. While Achmad Busro states that informed consent is a patient consent (or entitled family) for the doctor to take medical action on him, after complete explanation on the medical action taken is given [35].

There are two fundamental human rights that become the basis in informed consent, namely *the right on information* and *the right on self-determination*. According to Sofwan Dahlan, those rights are called *ethical and moral principles* and *patient autonomy* which contains two important things, namely:

- a. Everyone has the right to decide freely what they will choose based on adequate understanding;
- b. The decision must be made in possible circumstances to make a choice without interference. Because individuals are autonomous, information is needed to hold considerations in order to act in accordance with their considerations [36].

For service provider (doctor) and the user (patient) of medical treatment services, informed consent aims to legally protect the patient from illegal medical actions as well as to protect patients

from arbitrary services. Namely, actions that are contrary to the patient's human rights and Medical Professional Standards, as well as unnecessary and over utilization examination which using highly costs sophisticated tools without any medical reason. Besides, informed consent can also protect the doctor from patient's lawsuit if the medical actions results were not satisfying [37]. Thus, informed consent is important before doctors take medical action.

However, in an emergency circumstance, doctors can take medical measures or extra medical measures without prior approval for spare lives. Article 4 passage (1) Regulation of the Minister of Health Number 290 / Menkes / Per / III / 2008 concerning Approval of Medical Measures and in the Provisions of Article 45 section (1) of Law no. 29 of 2004 concerning Medical Practice: "In an emergency to spare a patient's life, approval isn't required". After medical treatment is done and an emergency can be avoided, the composed assent must be submitted [38].

For example, patients as victims of traffic accidents were brought to the emergency room in an unconscious and critical condition. Patients need immediate help and there was no time to contact their families for medical treatment approval. Medical action must be taken immediately to save patient life, so that informed consent is not an urgent matter. Therefore, in an emergency situation the the patient is presumed to approved medical procedure (*presumed consent*). In emergency conditions, doctors must immediately take action life-saving or limb-saving without prior permission from the patient and his family. In these conditions, the speed of saving lives becomes a priority [39].

3.3. Refusal of Medical Action (*Informed Refusal*)

As individuals who are competent, knowledgeable, and free, patients can give and refuse medical treatment approval. As stated in the Patient's Bill of Rights, the patient has the right to refuse treatment to the extent permitted by law, and to be notified of the medical consequences of his actions. [40]. What's more, Article 19 of the Universal Declaration of Human Rights and Article 14 of Law Number 39 of 1999 concerning Human Rights expresses that everyone has the right to get information. The Decalration of Lisbon also mentioned the rights of patients, including the right to self-determination by accepting or rejecting future treatment after getting adequate and understandable information [41]. Law No. 29/2004 concerning Medical Practice Article 52.d states that in medical practice, patients have the following rights:

- a. Obtain a complete description of medical treatment as referred to in Article 45 paragraph (2);
- b. Ask another doctor or dentist for another opinion;
- c. Getting services according to medical necessities;
- d. Deny medical treatment;
- e. Getting the contents of the medical record.

With the international and national provisions mentioned above, patients reserve the right to decline medical treatment subsequent to acquiring sufficient information. The consequences of rejection must be understood and be the responsibility of the patient. Such rejection is permissible as long as the patient's health condition does not interfere with others. The decision to accept or reject medical care is entirely the patient's right. If the patient uses the right to refuse medical treatment, he is deemed to have waived his legal rights against the doctor if an unwanted condition arises. [42].

Rejection of medical treatment is referred as the patient's right to obtain alternative medical treatment. This right become the expression of the right of self-determination. With the patient's right to refuse medical treatment, doctors must not force patients to accept certain medical actions. But the doctor is obliged to explain the risks or possibilities that would occur if the medical action was carried out. If after the patient receives an explanation he still refuses, then the patient must sign the refusal statement [43].

3.4. Position of Pediatric Patients in Therapeutic Transactions

There are differences in the definition of children in several regulations in Indonesia. Article 1 number 1 of Law Number 23 Year 2002 concerning Child Protection, validates a child as someone who has not been approved for 18 years and includes a child who is still in the womb. According to Article 1 number 5 of Law Number 39 Year 1999 concerning Human Rights, a child is someone who is under 18 years old and not married, including a child in the amount according to his interests. Under the International Covenant on the Rights of the Child, a child is anyone who agrees to be under the age of 18, except under the law applicable to children, which is determined based on the age of an adult who was previously obtained [44].

Even though a child's organs are the same as an adult's, their organ functions are not yet fully developed. So that health science is closely relating with child development. Infants and young children have not been able to provide consent [45]. In therapeutic transactions, patients as recipients of medical services can be anyone, whether they are capable or not. It is important for the doctors to note, as one of the parties who commit themselves in a therapeutic transaction, so as not to cause problems later on [46].

As indicated by Article 1329 of the Civil Code, each citizen is allowed to make an agreement, except if he is proclaimed incompetent as expressed in Article 1330 of the Civil Code. Be that as it may, in view of Article 1 passage 7 of the Minister of Health Regulation No. 290/Menkes/Per/III/2008 concerning Approval of Medical Measures, competent patients are:

Adult or non-child patients according to statutory regulations or have/have been married, have no disturbed physical awareness, able to communicate naturally, do not experience a setback (mental retardation) and mental illness thus able to make free decisions.

Therefore, child is incompetent in making engagement. In a therapeutic transaction, the pediatric patient cannot approve or reject the medical treatment independently. Thus, the decision-making process between accepting or rejecting a medical action taken is represented by parent or legal guardian. In more detail, this has been regulated in Decree of the Director General of Medical Services No. HK.00.06.3.5.1866 concerning Guidelines for Approval of Medical Treatment.

3.5. Legal Implications in Refusing Medical Actions by Pediatric Patient's Parents

Before conducting medical treatment, doctors must obtain patient approval, as regulated in Minister of Health Regulation No. 290 / Menkes / Per / III / 2008 concerning approval of medical treatment. Because the child patient is not competent to make an agreement, the decision to refuse or accept medical treatment is represented by a close family member. More specifically, father or mother, siblings or guardians. In the Minister of Health Regulation No. 290 / Menkes / Per / III / 2008 regarding approval of Medical Measures, there are no strict sanctions for parents who refuse medical treatment for their children. Ideally, approval of medical treatment should be done with the consent of children based on the principle of non-discrimination, the best interests of the child, the right to life, survival and development, and respect for the opinions of children. The principle of the best interests of children is the spirit of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (Explanation of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection).

In light of Article 8 of Law Number 23 of 2002 as changed by Law Number 35 of 2014, parents have duties regarding children's health: "Each kid has the right to get health and social security services as per physical, mental, spiritual and social needs." what's more, Article 26 passage (1) of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection, parents additionally have responsibilities and obligations to their kids, specifically:

- a. Encouraging, teaching and ensuring youngsters
- b. Develop kids as indicated by their capacities, talents, and interests;

- c. Avoid child-age marriages; and,
- d. Provide character education and teach the value of courtesy.

Parents are also obliged to keep up health and care for children, as regulated in Article 45 of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection, which states:

- a. Parents and families are responsible for caring and maintaining children health since in the womb.
- b. In the event that parents and their families can't do the obligations alluded to in paragraph (1), the central government and local governments must fulfill them.
- c. The commitment alluded to in paragraph (2) is done as per the provisions of the legislation.

The right to self-determination as referred to in Article 52.d of Law Number 29 of 2004 concerning Medical Practices gives patients the right to refuse medical treatment. Juridically, parents of pediatric patients can refuse medical actions to be taken for their children and that is not against the law. Even so, there are criminal sanctions against child violence that cause physical suffering, as determined in Act Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Furthermore, Law No. 23/2004 concerning the Elimination of Domestic Violence identified with the relationship of parents and children in the family also decided:

- a. Acts against someone that results in physical misery or suffering including domestic violence (Article 1 paragraph (1)). These acts are classified as physical violence that is causing pain, falling ill, or serious injury (Article 6 jo. Article 5.a). The criminal sanction is a maximum a prison sentence of 5 (five) years or a maximum fine of Rp. 15,000,000.00 (Article 44 paragraph (1)).
- b. Everyone is forbidden to neglect people within the scope of his household. According to applicable law or because of an agreement or agreement, he is obliged to give life, care, or care to that person (Article 9 paragraph (1)). Criminal sanctions are imprisonment for a maximum of 3 (three) years or a maximum of Rp. 15,000,000.00 (Article 49.a).

Therefore, if medical action refusal results in physical misery to the child, parents of pediatric patients considered as neglecting the children and can be prosecuted criminally. As mentioned in Article 76C:

Everyone is precluded from putting, letting, submitting, requesting or taking an interest in savagery against youngsters.

Article 1 paragraph (15a) of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection defines violence against children as:

Violence is an action against a child which results in physical, psychological, sexual, and / or neglect or suffering, including threats to take action, coercion or deprivation of liberty that violates the law.

Then, Article 80 section (1) of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection specifies that:

Every person who violates the provisions as referred to in Article 76C, shall be sentenced to a maximum imprisonment of 3 (three) years 6 (six) months and/or a maximum fine of Rp. 72,000,000 (seventy-two million rupiahs).

As a study case, neglect within the scope of the household is contained in the Sumbawa District Court Decision Number 113/Pid.B/2014/PN.Sbb. The defendant abandoned and did not financially support his family so that the child got sick.

In its decision, the Panel of Judges concluded that the litigants were legally and convincingly demonstrated responsible for making mistakes by ignoring others within the family scope as regulated in Article 9 paragraph (1) jo. Article 49a of Law No. 23 of 2004 concerning the Elimination of Domestic Violence; sentence the defendant to 2 (two) months in prison [47].

The rejection of medical actions by parents of pediatric patients who cause physical suffering to children is also classified as illegal in the perspective of civil law (Article 1365 of the Civil Code).

Rejection of medical actions that cause child suffering is contrary to the legal obligations of parents against children, as determined in Article 26 paragraph (1) of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection, as specified in Article 9 paragraph (1) of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence. The Indonesian Child Protection Commission (KPAI) must have a legal position to sue parents of pediatric patients who refuse medical treatment that is very necessary for their children. KPAI was formed based on the sequence of Law No. 23 of 2002 concerning Child Protection and is tasked with increasing the effectiveness, maintaining and overseeing child protection.

3.6. State Obligations in Child Protection

Children as future generations, constantly, become the concern of the community at global and national levels. On the other hand, their mental and physical limitations and dependence on adults including parents position children in vulnerable situations. Children have the same rights as adults. Unfortunately, they cannot protect and defend their rights independently. Thus, it is natural that children become the priority subjects of international and national legal protection.

As mandated in the opening of 1945 Constitution of the Indonesian Republic, the state's goal is to prosper the people, to educate the nation's life, defense and security and to uphold justice. Every individual in Indonesia, wherever they are, will get protection of rights from the State, including the rights of children. Related to human rights, Welfare and prosperity functions are listed in Article 28A of the 1945 Constitution which states *"Every person has the right to live and has the right to defend his life and life"*. Then, article 28B clause (2) of the 1945 Constitution of the Republic of Indonesia states, *"Every child has the right of survival, growth and development, and is entitled to protection from violence and discrimination"* [48].

In Indonesia, child protection is based on a few principles got from Pancasila, the 1945 Constitution and the Convention on the Rights of the Child which incorporates: non-discrimination, the best interests of children, the right to life, survival and development and respect childrens opinions [49]. Along these lines, each regulation and policy of the Indonesian government with respect to child protection must be guided by the principle of the the best interests of the child.

In the Tenth Part Chapter III of Law Number 39 Year 1999 concerning Human Rights with regard to the Rights of the Child, Article 52 paragraph (2) states that children's rights are human rights. For these rights, children are protected by law from the womb. The state is obliged to guarantee that Indonesian children are free from crime, discrimination and guarantees of child development and the right to education [50]. The state guarantees the protection and welfare of children through Law Number 23 of 2002 concerning Child Protection. Article 1 defines Child Protection as *"all activities to guarantee and protect children and their rights, so that they can live, grow, develop, and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination"*.

4 Conclusion

Pediatric patients are incompetent in conducting therapeutic transactions. Thus, to refuse or approve medical treatment, it is carried out by parent as their competent close relative. Through legal process, parents of pediatric patients who refuse medical treatment which have fatal physical consequences can be prosecuted as criminal based on Law Number 35 Year 2014, concerning Amendments to Law Number 23 Year 2002 concerning Child Protection and Law Number 23 Year 2004 concerning the Elimination of Domestic Violence. In the aspect of civil law, the refusal is included in acts against the law if it opposing the rights of children. However, in Indonesia there are no specific rules that concretely regulate legal sanctions for parents of pediatric patients who refuse medical actions that result in physical suffering for their children. Based on the mandate of the 1945 Constitution and the Convention on the Rights of the Child, the state is obliged to provide legal protection towards rights based on the best interests of the child. Therefore, if legal vacuum

related to child protection occurred, the state must immediately formulate the law and implement it. To fully apply the right of children in receiving health services, the state needs to formulate strict and specific rules. So that rejection of medical actions that inaccordance with the best interests of the child principle can be prevented.

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Authority of the State of the President in a State of Emergency

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Abstract. As a result of the crisis due to the Corona virus or COVID-19 outbreak, on March 31, 2020, President Jokowi issued 3 (three) regulations, namely 1) Government Regulation Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Corona Management. Virus Disease 19 and in the Context of Facing Threats to Disturb the Stability of the National Economy and Financial System; 2) Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating the Management of COVID-19; 3) Presidential Decree Number 11 of 2020 concerning the Determination of the Public Health Emergency for COVID-19. Then on April 13, 2020, the issuance of Presidential Regulation Number 12 of 2020 concerning the Stipulation of the Spread of the Corona 19 Virus Disease Non-Natural Disasters as a National Disaster. The purpose of this paper is to study the regulations for the formation of state policies in emergency/danger situations. The Covid-19 threat is a security threat for all of us. Let us unite to face and overcome it, regardless of political attitudes and political polarization in society. "Salus poluli suprema les esto", the safety of the people is the highest law. "Needs have no legem." The importance of salvation is lawless, but above all is law. regardless of political attitudes and political polarization in society. "Salus poluli suprema les esto", the safety of the people is the highest law. "Needs have no legem."

Keywords: Authority, State of Emergency, President

1 Introduction

The World Health Organization (WHO) declared a public health emergency caused by the existence of the Corona virus officially on February 11, 2020 which came to the attention of the international community (Public Health Emergency of International Concern / PHEIC).¹ Then on March 11, 2020 through the Director General of WHO Dr. Tedros Adhanom Ghebreyesus stated that based on the recommendations, COVID-19 could be categorized as a pandemic.²

In February 2020 WHO has established the Guidelines for the Country Preparedness and Response Plan (CPRP) through the standards and norms of the International Health Regulation (IHR) in 2005, in which Indonesia has been a state party since 2007, as a reference for integrated, coordinative, consultative and deliberative work policies. for all countries[1].

¹[https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov))

²<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

For Indonesia, the entry of the COVID-19 pandemic has drastically changed the activities of people's lives today. This complicates matters by requiring education and carrying out work from home. Also very risky to the pattern of resilience of community household life. Of course, Indonesia's future will be marked by the head or backbone of the family who has lost their jobs, declining incomes, limited logistics and access to other life necessities.

This is a test of the country's government system as well as human values. The State of Indonesia, in this case the Government and ministries / agencies, local governments and security actors are required to optimize their strength together with all elements of society to unite in facing this bad reality.

Through Presidential Decree No. 7 of 2020 President Jokowi has appointed the Head of BNPB as Chair of the Task Force for the Acceleration of Handling COVID-19, which has been amended by Presidential Decree No. 9 of 2020 and Presidential Instruction No. 4 of 2020 to support changes to the APBN and APBD.

The most recent and known, on March 31, 2020 President Jokowi issued 3 (three) regulations, namely 1) Perpu No. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 19 Pandemic and / or in the Context of Facing Threats that Endanger the National Economy and / or Financial System Stability; 2) PP No. 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating the Management of Corona 19 Virus Disease (COVID-19); 3) Presidential Decree No. 11 of 2020 concerning the Determination of the Corona Virus Disease 19 (COVID-19) Public Health Emergency. Then followed on April 13, 2020, the issuance of Presidential Decree No.12 of 2020 concerning the Determination of Non-Natural Disaster for the Spread of Corona Virus Disease 19 (COVID-19) as a National Disaster.

However, important regulations that have been issued by the community are immediately accepted by the community. After the issuance of the Perpu, a number of legal figures and experts agreed. They continue to conduct studies related to this Perpu and will file a judicial review against it. According to data from the Constitutional Court, during April 2020, three petitioners have submitted their lawsuit to the Constitutional Court.³ They considered that the Perpu was unconstitutional and had to be tested for material.

When looking at the substance in this Perpu, the focus of discussion is precisely the economy that saves humanity. The current situation in the field is the number of casualties, both patients and medical personnel. Especially when medical personnel who are victims and the implementation of Large-Scale Social Restrictions (PSBB) are still unable to meet the needs of the community by the government, there are still many problems in their implementation that are not on target.

Instead of discussing State Financial Policies and Financial System Stability in Handling the Corona Disease 19 Pandemic, the main point that urges rescue is ignored and focuses on saving the economy.

It was that the test of matter is put to the Constitutional Court, namely the material content of Article 27 concerning granting legal immunity to officials is one of the highlights of the problem in Perpu No. 1 of 2020, in addition to unconstitutional problems. The content of article 27 is not in line with the responsibility of the central government with limited steps in dealing with the Corona 19 Virus disease (COVID-19) pandemic through the PSBB. Even if it is in an emergency situation, the government should have taken certain area quarantine measures from the start to prevent the spread of the Corona Disease 19 (COVID-19) Virus.

³<https://mkri.id/index.php?page=web.EFormPUUDetail&id=2>

It was that the test of matter is put to the Constitutional Court, namely the material content of Article 27 concerning granting legal immunity to officials is one of the highlights of the problem in Perpu No. 1 of 2020, in addition to unconstitutional problems. The content of article 27 is not in line with the responsibility of the central government with limited steps in dealing with the Corona 19 Virus disease (COVID-19) pandemic through the PSBB. Even if it is in an emergency situation, the government should have taken certain area quarantine measures from the start to prevent the spread of the Corona Disease 19 (COVID-19) Virus.

In Presidential Decree No. 11 of 2020 in the weighing section states that the spread of Corona Virus Disease 2019 (COVID-19) which is of extraordinary character with the number of cases and / or the number of deaths has increased and spread across regions and across countries and has an impact on political, economic, social, cultural aspects, defense and security, as well as the welfare of the people in Indonesia[2]. This clearly shows that the consequences of this pandemic have an impact on political, economic, social, cultural, defense and security aspects as well as public welfare. However, Perpu No. 1 of 2020 published only about assistance regarding saving state finances. Likewise with a review of the considerations of the Presidential Decree No. 12 of 2020, namely a non-natural disaster caused by the spread of Corona Virus Disease 2019 (COVID-19) has had an impact on the number of victims and property losses, the extent of the area affected by the disaster, and has implications for broad socio-economic aspects in Indonesia[3].

Therefore, the question arises why the Presidential Decree for Emergency Public Health and the Presidential Decree for National Disaster along with the Perpu have considerations? Although it is clear that the incident is in a state of emergency and of an extraordinary nature, the number of cases and / or the number of deaths has increased and spread across regions and across countries and has an impact on political, economic, social, cultural, defense and security, as well as public welfare and the government's efforts to tackle the Corona 19 Virus Disease (COVID-19) and handling the implications of the pandemic.

Supposedly, with the determination of this Public Health Emergency and National Disaster, the government is expected to be more focused on resolving the break in the distribution chain by paying attention to all the points of impact that have been caused. In fact, handling the impact of this post-disaster should be the government's main focus. However, the principle of caution must be put forward in issuing regulations.

When the normal law cannot function, another law, namely the law of emergency must come into play. It is therefore very important to distinguish legal regimes in theory and practice, namely normal constitutional law and emergency constitutional law[4].

The issuance of Laws and Perpu must not contradict the Constitution, with permission for and in an emergency which is permitted for a limited time and is closely monitored, overriding or postponing the enactment of a provision of the 1945 Constitution with the intention of overcoming a state of danger until it becomes recovered under the provisions of Article 12 of the Constitution. 1945. The provisions of this article state that, "The President declares danger. The terms and effects of the danger are seen by law". And Article 12 of the 1945 Constitution becomes very clear when paired with Article 22 paragraphs (1), (2) and (3) of the 1945 Constitution which states:

- (1) In the event of any crisis that comes, the President has the right to be a manenforce government regulations as law;
- (2) This government regulation must be approved by the DPR in the following sessions;
- (3) If it does not get approval, the government regulation must be revoked.

In this paper the author would like to be particularly interested in Perpu No. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona

Virus Disease 19 Pandemic and / or in the Context of Facing Threats that Endanger the National Economy and / or Financial System Stability, in relation to Presidential Decree No. 11 of 2020 concerning the Determination of Public Health Emergency for Corona Virus Disease 19 (COVID-19) and Presidential Decree No. 12 of 2020 concerning the Determination of Non-Natural Disaster for the Spread of Corona Virus Disease 19 (COVID-19) as a National Disaster. Because none of the three have paid attention to Article 12 of the 1945 Constitution in advance of the Perpu No. 1 of 2020.

Referring to the 1945 Constitution which has undergone changes, according to Jimly[5], Amendments to the 1945 Constitution must be beneficial for the improvement of the nation's welfare, in accordance with the aspirations of the people and the development of the life of the Indonesian nation. In order for the amendment to the 1945 Constitution to have legal force, the amendments to the 1945 Constitution must have a clear legal basis / basis.

With the aim that we can better understand government regulations in making policy decisions that are of an emergency (state of emergency) because it does not rule out the possibility that a situation like the present could be more emergency / dangerous in the future. Therefore it is important for us to have an understanding of what forms of Perpu, their ordering and their withdrawal.

Based on the description of the State in a state of emergency, the problem formulations in this paper are:

1. Is with the issuance of Perpu No. 1 of 2020 is in accordance with the completion and handling of the impact of Corona Virus Disease 2019 (COVID-19)?
2. How is the 1945 Constitution policy regulation in the settlement and handling of a pandemic in which the State is in a state of emergency?

2 Method Research

This research is a normative-empirical legal research. Empirical legal research means research conducted directly in the community, in contrast to normative legal research which uses secondary data in the form of literature search results.[6]. This research will combine the normative and empirical legal approaches. Empirical legal research is commonly referred to as sociological legal research or field research. Tracing data in the field can be done by observation (observation), interviews or distributing questionnaires. Another reason that he chose to base his empirical legal research method is that the research examines not only legal issues, but also human rights issues. Legal research that can be carried out with other disciplines, namely sociology and anthropology. Normative legal research is carried out on the study of the 1945 Constitution before and after the amendment. Secondary data studies were also carried out with literature studies on related issues.

3 Discussion

3.1. President's Authority

In a democracy, sovereignty or supreme power rests in the hands of the people, not in the hands of people's representatives or the hands of the head of state and head of government. This is emphasized in Article 1 paragraph (2) of the 1945 Constitution, "Sovereignty is in the hands of the people, and is exercised according to the Constitution". In a democracy, the people who are self-supporting are sovereign in accordance with the principle of autonomy where the words "auto" and "nomos" mean self-help. People through their representatives in

the DPR, according to Article 20 paragraph (1) of the 1945 Constitution, are the holders of the power to form laws. Whereas in Article 5 paragraph (1) of the 1945 Constitution, the President is only entitled to appeal for drafting the DPR bill.⁴

Thus, generally binding regulations can only be implemented by the people through their representatives in the DPR. Or done based on the order or authority of the delegation based on law (legislative delegation of rule-making power). Also matters that really need to be regulated by the government based on the attribution of authority according to the Basic Law. By applying, based on the 1945 Constitution, the President as the head of a built government or "rule of power" in the following categories:

- 1) Article 5 paragraph (1) of the 1945 Constitution provides that the President has the right to submit a bill to the DPR. In addition, the President discussed together the bill to give approval or rejection of the bill according to Article 20 paragraph (2) and (3) of the 1945 Constitution, and finally health also ratified the bill that had received joint approval into law which should be according to Article 20 paragraph (4).) and (5) the 1945 Constitution.
- 2) Government Regulation as Law as referred to by Article 22 of the 1945 Constitution which states, "In the event of a crisis that comes, the President can refer to government regulations as law". This legal product is called PERPU which can be regulated in an ordinary situation or in an emergency situation;
- 3) Government Regulation atribusian UUD 1945 as referred to by Article 5 aat (2) UUD 1945 which states, "The President stipulates the provisions of government regulations to implement laws regulating mustya". This is the authority of attribution by the Constitution, ordered or not by law, the President can issue a PP to fill a legal vacuum or to enforce the law properly.
- 4) Government Regulations Legislation delegation refers to Law no. 12 of 2011 concerning the Formation of Legislative Regulations. If the law mandates the Government to further finance a statutory provision, the President has the authority to determine Government Regulations based on the delegation of authority by law.
- 5) Presidential Regulation (PERPRES) which can be stipulated by the President, either on the basis of a delegation of further regulations based on Law or Government Regulation, or based on the principle of "frij ermesen" in which the President as head of state and head of governance administers by himself assisting matters which administratively, and (ii) relating to internal government matters in the form of a Presidential Regulation.
- 6) Ministerial Regulation (PERMEN) as the basic rule of delegation authority based on Law, Government Regulation, and / or Presidential Decree. On the basis of the delegation or delegation of further regulatory authority based on the above mentioned Law, Government Regulation or PERPRES on the basis that further sub-delegation of authority, or sub-delegation of regulatory authority, is idealized as an official with the lowest authority that can be given regulatory authority.

The regulatory authority or the power to regulate rests with the President as head of government, limited only to the above. Apart from the foregoing, the President may not have constitutional powers that have been determined based on the 1945 Constitution, including in using the Perpu instrument to make new policies that are permanent or temporary in nature.

⁴Amendment, Article 5 paragraph (1) of the 1945 Constitution reads, "The President holds the power to form laws with the approval of the DPR". With the First Amendment to the 1945 Constitution in 1999, this article changed to, "The president has the right to submit a bill to the DPR", while Article 20 paragraph (1) of the 1945 Constitution became "the DPR holds the power to form laws".

In addition, the total hierarchy of statutory regulations above must be consistent, must not conflict with legal norms above it. A higher legal norm which presupposes the validity of the legal norm that is under it. Therefore, PERMEN must not conflict with PERPRES, PERPRES must not conflict with PP, and PP must not conflict with Law. Meanwhile, Law and PERPU must not contradict the UUD, except for PERPU for and in an emergency which is permitted for a limited time and is closely monitored to override or suspend the enforcement of a provision of the 1945 Constitution to overcome a state of danger until it returns based on the provisions of Article 12 of the 1945 Constitution.

However, it has been stated above, PERPU No. 1 of 2020 cannot be categorized as a PERPU for and in this emergency situation, because it does not at all apply to the provisions of Article 12 of the 1945 Constitution. The provisions of Article 12 are a statement "The President declares a state of danger. The conditions and consequences for the situation of danger are determined by law ". From Article 12 it can be seen that:

- 1) The legal requirements and consequences of a state of danger are established by law in the sense that the statement of the state of danger is stipulated by a law which regulates special policies that are implemented to solve the problem and return to its original state; and
- 2) The conditions and legal consequences of an emergency need to be further regulated in the laws included. Until now, the law that is still in effect regarding this matter is Law no. 23 of 1959 concerning State of Danger, but many of its contents are no longer in accordance with the times, including the new provisions of the 1945 Constitution after the First, Second, Third, and Fourth Amendments in 1999-2002.

3.2. About Perpu

PERPU is short for Government Regulation in Lieu of Law, as the name of the Old Order era, New Order era, and until now in the post-Reformation era, in referring to government regulations that are used as laws, when the President needs to enact new policies established by law. -invited. However, due to precarious circumstances, this regulation has not yet been submitted to the DPR, so it is deemed sufficient in the form of a government regulation or PERPU for a while. Therefore, PERPU itself is in the form of a Government Regulation. As formulated in the 1945 Constitution in Article 22 paragraphs (1), (2), and (3), which reads:

- (1) In the event of any crisis that comes, the President has the right to determine regulations as laws;
- (2) This government regulation must be approved by the DPR in the following sessions;
- (3) If it does not get approval, the government regulation must be revoked.

Based on the provisions of Article 22, PERPU is nothing but a Government Regulation containing normative policies on the contents of the Law which was formed through a joint agreement by the DPR and the President in accordance with the provisions of Article 20 paragraph (2) of the 1945 Constitution. However, due to the precarious conditions In the provisions of Article 22 paragraph (1), the material of the law is poured out temporarily in the form of a PERPU until it is later approved by the DPR so that its status is officially changed to an ordinary law. The 1945 Constitution itself does not mention the official name of this type of regulation, because in 1945 this matter had not been thoroughly discussed by the drafters of the 1945 Constitution. Therefore, at the time Soepomo and his friends rearranged the text of the 1949 RIS Constitution, The naming of this new regulation is standardized in the

formulation of the RIS Constitution under the name emergency law, which is established for emergencies. A name that continued to be used until the drafting of the 1950 Constitution.

In other words, from the beginning of the Order of the 1945 Constitution, it is actually, with government regulations the law in the formulation of Article 22 of the 1945 Constitution is an emergency law. Namely, laws that are formed for and in an emergency or in a state of danger that exists in Article 12 of the 1945 Constitution. Thus, the meaning of government regulation as a law that applies Article 22 of the 1945 Constitution, must use in its circumstances with the provisions concerning the circumstances. dangers regulated in Article 12 of the 1945 Constitution. Do not control both.

The development of the definition of PERPU as a provisional law does not mean that the PERPU, which is related to the provisions of Article 12 of the 1945 Constitution, which originated from the initial thought, does not function. PERPU which was formed and is in a state of danger according to Article 12 of the 1945 Constitution is still implemented differently and changes as an emergency law from an unusual meaning which does not constitute a temporary law. These two types of PERPU will be covered in the next section. What is clear, evidence-both exist and constitutionally valid. One is valid because its existence is determined according to the 1945 Constitution, namely (i) to determine the status of danger, (ii) to regulate special policies to be used in order to overcome hazards or emergencies with policies that are different from ordinary circumstances. Meanwhile, the second, arises from later interpretations that grow in practice into constitutional conventions which are also a form of informal constitutional amendments (formal amendments). Namely through the practice of constitutional conventions (constitutional conventions) according to CF Strong[7] also valid as a method of changing the modern constitution.

However, it also needs to be emphasized first, that from the description of the nature of the PERPU form as a government regulation, we can distinguish between the legal form and the material norms in regulatory regulations. The form of PERPU is a Government Regulation (PP) whose content is the material of Law (UU). Because of that, in fact PERPU is indeed a Government Regulation which is temporarily stipulated as law until the DPR is approved so that it is officially transformed into Law in due time. This means that PERPU can apply it as a temporary law, because in time it will change its status to become law. Therefore, all substantive requirements regarding regulation by law also apply to PERPU in the meaning of this law. In terms of this PERPU is a law,

Therefore, one must be aware of the difference and distinction between form and content, between structure and substance, and theory and practice. Theoretically, it can happen that the material being enforced is legal material, but by the Government it is set forth in the form of a Government Regulation or in the form of a Presidential Regulation. The same thing may happen when there is material normative policy that should be written in the form of Regional Regulation (PERDA), which the Regional Head states as a Regional Head Regulation (PERKADA). If the DPR and DPRD that supervise are not active in carrying out substantive normative oversight functions with regard to ordering regulations, which should only be implementing regulations of regional laws or regulations, then the products of "executive action" It runs very smoothly regardless of the legislative role of people's representative institutions at the central or regional levels. This can happen if the oversight function by the people's representative institutions does not work well. Supervision is not only related to the implementation of programs and implementation of government and development action programs, but also the supervision of the elaboration of policies contained in the form of laws as products of legislation into implementing regulations of laws as products of executing executive actions).

Therefore, it is very important to understand the meaning of "wet in formeele zin" and "wet in materiele zin" properly, so that it can be distinguished between the material context and its legal form. In carrying out their examining function, both the judges in the Constitutional Court and the Supreme Court must also be really aware of recommendations. So that there is no hurry in determining the attitude towards the proposed examiner. Only because the formal form is in the form of a regulation under a law, the Constitutional Court may not immediately declare that a regulation that contradicts the 1945 Constitution does not apply. A regional regulation can also be a regulation formally under a law but materially, has rules as material - invited.

Many people misunderstand the nature of PERPU and fail to understand the understanding between the two types of PERPU in our constitutional system. Based on the 1945 Constitution, explosions can be distinguished as:

- 1) PERPU as an ordinary law has not received DPR approval based on Article 22 of the 1945 Constitution which is temporary, due to the precarious conditions that have entered;
- 2) PERPU for and in state conditions which are in a state of emergency or in a state of danger according to Article 12 jo Article 22 of the 1945 Constitution.

Usually people talking about PERPU are only fixated on information about what is meant by "the urgency that is sent" as determined by Article 22 paragraph (1) of the 1945 Constitution. As quoted above, Article 22 paragraph (1) determines, "(1) In the event of any crisis that comes, the President has the right to determine regulations as laws ". In the legal consideration of decision Number 138 / PUU-VII / 2009, the Constitutional Court has outlined 3 conditions that must be fulfilled for the conditions that are entered, namely: (1) the proximity of requirements to resolve legal problems quickly based on the law; (2) The required law does not exist yet, so there is a legal vacuum, or there is a law but it is not sufficient; and (3) The legal vacuum cannot be resolved by making a law according to the usual procedure because it will take a long time while the proximity of the situation requires certainty to be excessive. However, these three requirements are still general in nature, not at all prepared for a situation that is very different between a hazard that is an emergency, a normal situation that is not an emergency.

Apart from that, these requirements are still too general, they must always be relevant to ordinary situations. Although the three of them can also survive the state of emergency as referred to in Article 12 of the 1945 Constitution, the requirements for PERPU in an emergency state require more detailed requirements, the relationship of which the conditions and consequences of the law of an emergency are very different from ordinary circumstances. The legal needs in this situation certainly require different legal means. The two situations require a legal regime that is very different from one another, because normal circumstances can only be approached by a legal regime that is also normal, while a state of danger or emergency that causes abnormal conditions must be approached with a legal regime that is also abnormal. "Normale rechts voor normale tijd,

Because the two PERPUs should be differentiated and validated from one another. In terms of statutory orders, reminders are equally constructed in an unusual manner, in a way that deviates from the usual provisions. However, in terms of the substance of the norm, it is very different. The first type of PERPU is a policy policy that controls policies that are contained in a basic law in general, while the material for the second PERPU policy is purely for a limited time, namely for and during an emergency, not for purposes of a permanent nature.

The Perpu which was first stated above, is currently a law in general, which is intended to take effect at the time after obtaining the approval of the DPR, and will act as an ordinary law; or if the DPR does not approve, then PERPU must be revoked. PERPU contains policies that are important to be immediately put into law, but due to the urgency of being included, there is not enough time to submit, discuss, and get joint approval with the DPR-RI to pass them into law. Therefore, the new policies referred to in the form of Government Regulations in lieu of laws or PERPU for the time being, until the approval of the DPR can obtain approval from Article 22 paragraph (2) of the 1945 Constitution. Thus the status is an ordinary law as in general. This first type of PERPU can change various provisions in other laws and even practice the "omnibus" method of changing many laws at once. Provided that the material does not conflict with the 1945 Constitution of the Republic of Indonesia.

Meanwhile, there is no permanent concern for the PERPU type. Only temporarily during an emergency. The functions of this second PERPU are: (i) can be used as a means of enforcing emergencies, as well as (ii) as a means of pouring out specific legal policies to overcome and overcome problems that arise during a hazard or emergency; and (iii) as a means to improve the situation so that it returns to its original state according to the normal legal system; and (iv) arrangements regarding the withdrawal or termination of a state of emergency after the arrangement regarding all hazards or emergencies is declared to have ended, in Transitional provisions or Closing provisions. As a temporary legal product for and in emergencies, government action in an emergency (Emergency Powers) can suspend or override various other statutory provisions. It has even postponed the articles in effect regarding human rights and others that have been determined and guaranteed by the 1945 Constitution.

This action to rule out or suspend cannot be done by the first type of PERPU. Because the first type of PERPU is an ordinary law that cannot contradict the 1945 Constitution.

If the conditions for ordering these two types of PERPU are more detailed, including the two conditions at once, the criteria for the criteria formulated by the Constitutional Court can be further clarified into the following four criteria:

- 1) The existence of a need for closeness (urgent need) based on the principle of "rule of needs" in general or in a state of emergency requires state government officials to act to resolve problems that arise related to the public interest or the interests of the state which the victim does not commit. or if done will violate the applicable law.
- 2) The existence of compelling needs which is based on the principle of "rule of needs" in general or in a state of emergency requiring the enactment of new policies that are not enforced will be detrimental to the public interest or the interests of the state but enforced will violate appropriate laws .
- 3) Both of these must be resolved immediately by enacting a new law, but the process of ordering it according to the usual procedure was impossible due to time constraints (limited time limits), so that the joint agreement with the DPR was not possible to fulfill the request properly.
- 4) If the three criteria above are met, then the President has the right to determine the Government Regulation in Lieu of Law, namely:
 - A. In ordinary circumstances, the PERPU functions as a provisional law until it is approved by the DPR so that the PERPU is changed to the law used by Article 22 paragraph (2) of the 1945 Constitution, or the PERPU must have the DPR's approval as meant by Article 22 paragraph (3) the 1945 Constitution.

- b. In a state condition in a state of emergency, PERPU is stipulated to withdraw or simultaneously with a declaration or statement of a state of danger or the imposition of a state of danger / emergency by the President who is in a proper condition according to Pas long as 12 UUD 1945 junto Article 22 UUD 1945. This PERPU is an emergency law that only exists for emergency response.

From the description above, it can be formulated that there are two absolute conditions for the issuance of a PERPU, both the first type and the second type, namely: (i) there is an absolute need for closeness or absolute requirements to enforce a new law, and (ii) there are limitations time to follow the usual procedures in statutory processing (time limits). In fact, in a state in a state of emergency, it is also required (iii) to enforce or declare the state of emergency itself as an absolute requirement for the validity of the enforcement of PERPU as an emergency law.

PERPU as an emergency law is intended only temporarily during an emergency and is precisely necessary to overcome everything during the emergency period. Meanwhile, PERPU as a temporary law, is intended as an ordinary law containing policies that are intended to continue permanently. The reason for this urgency goes to the basis of deviating from the procedure, but the material still follows the usual rules of law-making. Meanwhile, the reason for the urgency that is included in an emergency condition can become the basis for the President to determine PERPU in the emergency law by deviating from the usual constitutional rules.

3.2.1. Perpu enforcement

What is the procedure for applying PERPU? In simple terms, at any time, the President considers there is a need that is very close and cannot be postponed regarding government policies that need to be implemented, however, if implemented without first regulating them by law, then the policy will violate the law, then the need arises. real to form new laws. However, in the time available, there is not enough time to form a law according to the usual procedure, so that in a situation of urgency, the provisions of Article 22 paragraph (1) of the 1945 Constitution apply which authorizes the President to regulate government regulations as statutory rules. (PERPU). Thus, the President can enforce the PERPU unilaterally at any time he thinks is needed. provided that the PERPU is only temporary until the next DPR trial, it is proposed by the President to further seek mutual approval by the DPR-RI in accordance with the provisions of Article 22 paragraph (2) of the 1945 Constitution, the PERPU will be turned into law. If it is not approved, PERPU must be revoked in accordance with the provisions of Article 22 paragraph (3) of the 1945 Constitution.

Because PERPU is a legal product of the President, the PERPU text is written in the Head of the Presidential Letter of the Republic of Indonesia, not yet in the form of a Law. PERPU's numbering has not been based on the numbering of laws promulgated in the State Gazette and the Supplement to the State Gazette. However, because of the type of PERPU, which is described as being of two kinds, namely PERPU in ordinary circumstances but fulfilling the urgent requirements that are included in Article 22 of the 1945 Constitution, and PERPU which is determined to be in an emergency according to Article 12 of the 1945 Constitution, enforcement also requires an explanation. different.

The first PERPU, which is related as a temporary law, until it is approved by the DPR, will automatically be transformed into a law according to policies that will also apply in accordance with laws in general. Meanwhile, the second type of PERPU is PERPU which is set for and in emergencies. The intention is that the PERPU is stipulated (i) to impose a policy

emergency that is specific and has a temporary period of time until the state of emergency ends, and (ii) in an emergency that has been declared by the President which should be in accordance with the provisions of Article 12 of the 1945 Constitution.

The stipulation of this second PERPU can be preceded by or together with a Presidential Decree which declares a change from a normal state to an emergency according to Article 12 of the 1945 Constitution and the Law on Hazardous Situations. Apart from the Presidential Decree and the PERPU, a Presidential Instruction (INPRES) can be added which is more operational in its implementation by implementing agencies in the field. Thus, there are 3 legal instruments that can be stipulated at the same time on the same day, namely:

- 1) Presidential Decree which declared a state of emergency;
- 2) PERPU which contains temporary policies that can suspend the enactment of various other laws. Including special policies that suspend human rights or the enactment of certain provisions in the 1945 Constitution until conditions are restored;
- 3) INPRES which guides the implementation of operational and technical directions for implementing agencies or agencies, both at the central provincial level, as well as districts and cities throughout Indonesia

Particularly regarding the instrument for implementing an emergency and ending or lifting a state of emergency, it can be debated about two possible instruments, namely (i) by law, or (ii) by a presidential decree. Article 12 of the 1945 Constitution stipulates, "The President declared a state of danger. The conditions and consequences for the situation of danger are determined by law ". With what written legal instrument, did the President declare a situation of danger? In the formulation of Article 12 of the 1945 Constitution, there are 2 things, namely: (i) The President, either to declare the entry into force or to declare the end of the dangerous state, is declared or declared; (ii) the provisions regarding the terms and legal consequences of the state of emergency shall be established by law,

Therefore, the statement "stipulated by law" in the formulation of Article 12 can be interpreted in two senses, namely a general and a special meaning, where (i) the law that regulates general provisions regarding emergencies, and (ii) Law specified specifically to implement emergencies and special assistance for and during the emergency or danger. However, due to the urgency of the entry, this second category of law is set forth in the form of a Government Regulation in Lieu of Law referred to by 22 paragraph (1) of the 1945 Constitution.

In the second sentence the formulation of Article 12 clearly states that "the conditions and consequences of the danger are determined by law". That is, what is stipulated by the law are "conditions and consequences of a state of danger". The conditions are what and what are the consequences that are "stipulated by law". The word "stipulated" here can be implemented to contain the meaning "regulated by law", that is, regarding what are the conditions and what are the consequences of the regulation the meaning of danger must be regulated by law. Thus it can be interpreted that the statement of the entry into force of the emergency or danger does not have to be in the law that reports, but it is sufficient to be stated in an administrative decision, namely a Presidential Decree but the provisions regarding terms and regulations are regulated in advance by or in law. This is clear from the first sentence which determines that the President declared a state of danger. This means that the statement of the state of danger is not in the law which the joint agreement between the DPR and the President states is sufficient by the President alone. Thus, the statement that the conditions and consequences of a situation of danger "are regulated by law" are more accurately regulated in regulating "regulated by law". The law in question can be divided into two forms, namely (i) laws that address hazards in general, and (ii) laws that regulate specific policies for and in case of emergency, until the

emergency is recovered. . This second category of law, because of the precarious situation and refugees, can be pre-poured in an emergency PERPU. Meanwhile, laws that are generally applicable can also be changed in an emergency situation, so that changes can also be made in the form of a PERPU. For example, Law no. 23 of 1959 was originally PERPU.

3.2.2. Submission of Draft and Revocation of Perpu

Law number 12 of 2011 in conjunction with the MD3 Law, states that the revocation of PERPU is carried out with the help of Law. This is deemed inappropriate and should be a backup. Since PERPU is determined unilaterally by the President, it is sufficient for the President to revoke it unilaterally. Presidential Decree (Keppres) as an administrative product. However, Article 52 of Law no. 12 of 2011, determines that:

- (1) Government Regulations In Lieu of Laws must be submitted to the DPR in the following sessions;
- (2) (2) Submission of Government Regulations in Lieu of Laws referred to in paragraph (1) shall be made in the form of filing Laws concerning the stipulation of Government Regulations in Lieu of Laws into Laws;
- (3) The DPR only gives approval or does not give approval to Government Regulations in Lieu of Law;
- (4) In the event that a Government Regulation in Lieu of a Law is approved by the DPR at a plenary session, the Government Regulation in Lieu of a Law is stipulated as a Law;
- (5) In the event that a Government Regulation in Lieu of a Law does not get the approval of the DPR in a plenary session, the Government Regulation in Lieu of a Law must be revoked and must be declared invalid;
- (6) In the event that a Government Regulation in Lieu of a Law must be repealed and must be declared not bound by paragraph (5), the DPR or the President submits a Draft Law on the Revocation of a Government Regulation in Lieu of a Law;
- (7) (6) Draft Law on the Revocation of Government Regulations in Lieu of Laws referred to in paragraph (6) the legal provisions of the revocation of Government Regulations in Lieu of Laws;
- (8) (7) The Draft Law on the Revocation of Government Regulations in Lieu of Laws referred to in paragraph (7) which is stipulated by the Law on the Revocation of Government Regulations in Lieu of Laws in the same plenary session as referred to in paragraph (5).

According toThe provisions of Article 22 paragraph (2) of the 1945 Constitution, repeatedly by Article 52 paragraph (1) of Law no. 12 of 2011, PERPU must obtain the approval of the DPR-RI at the latest in the following trials. In the Elucidation of Article 52 Paragraph (1), it is emphasized that "What is meant by" the following trial "is the period of the first session after the Government Regulation in Lieu of a Law is enacted." Therefore, the President must submit the PERPU he has enacted to be approved or rejected by the DPR of Ciptanya, before the next session period. According to Article 52 paragraph (2) of the Law, "Submission of Government Regulations in Lieu of Law referred to in paragraph (1) shall be made in the form of filing Laws concerning the stipulation of Laws in Lieu of Laws into Laws".

The meaning, after the stipulation of the PERPU, the Government will immediately compile a Draft Law on the stipulation of the PERPU into law. The same thing must be done if the PERPU does not get approval at the DPRD meeting, namely the DPR or the Government must submit a Draft Law on the Revocation of PERPU as referred to in Article

52 paragraph (6). The Draft Law on the Revocation of PERPU which is stipulated in the same plenary session as referred to in paragraph (5), which states, "In the event that PERPU does not get the approval of the DPR in a plenary session, the PERPU must be revoked and must be declared invalid". Thus, the plenary session of the DPR which rejects PERPU, and which declares PERPU and declares the law on its repeal is the same plenary session. Therefore,

If such provisions are obeyed, so there is no need to worry about the protracted stipulation of PERPU into law or its repeal as prevailing statutory regulations. However, the weakness of this regulation can be seen from an administrative point of view. First, PERPU has not yet been promulgated in the State Gazette and the Supplement to the State Gazette, but when it is repealed by law, the revocation will automatically be promulgated in the State Gazette and the Supplement to the State Gazette. Such an arrangement is clearly inappropriate. Second, the PERPU which is stipulated by the President, it should be sufficient for the revocation of it to be carried out by the President as the official who determines the enforcement. The President determines it and the President must revoke it. The control authority by the DPR is sufficient with its authority to declare whether or not the PERPU is valid, while the rest, it is sufficient for the President to determine its revocation. Third, the revocation is carried out by law, meaning that the revocation must be carried out jointly by the President and DPR through a hearing in the DPR. Such a mechanism clearly violates the provisions of the 1945 Constitution which stipulate that "In matters of urgency the President has the right to determine government regulations as law". Therefore, if PERPU is rejected by the DPR, what is meant by Article 22 paragraph (3) of the 1945 Constitution in conjunction with Article 52 paragraph (4) and (5) Law no. 12 of 2011. Revocation is carried out by law, meaning that the revocation must be carried out jointly by the President and the DPR through a hearing in the DPR. Such a mechanism clearly violates the provisions of the 1945 Constitution which stipulate that "In matters of urgency the President has the right to determine government regulations as law". Therefore, if PERPU is rejected by the DPR, what is meant by Article 22 paragraph (3) of the 1945 Constitution in conjunction with Article 52 paragraph (4) and (5) Law No. 12 of 2011. Revocation is carried out by law, meaning that the revocation must be carried out jointly by the President and the DPR through a hearing in the DPR. Such a mechanism clearly violates the provisions of the 1945 Constitution which stipulate that "In matters of urgency the President has the right to determine government regulations as law". Therefore, if PERPU is rejected by the DPR, what is meant by Article 22 paragraph (3) of the 1945 Constitution in conjunction with Article 52 paragraph (4) and (5) Law No. 12 of 2011.

Because it is sufficient for the revocation of PERPU to be declared rejected or not approved by the DPR in the form of a decision signed by the President declaring the PERPU. This means that it is sufficient for the PERPU to revoke it by means of an administrative decision, not in the form of product regulations or legislation. Various provisions regarding the order and revocation of this PERPU must be regulated. Therefore, in Article 53 of Law no. 12 of 2011 also stipulates that "provisions regarding the procedures for drafting a Draft Government Regulation in Lieu of a Law with a Presidential Regulation." The words "regulated by Presidential Regulation" indicate that there should be a Presidential Regulation governing this PERPU. Unfortunately, until now the Perpres in question has not been established. What does exist is Presidential Regulation No. 87 of 2014 concerning the Implementation of Law no. 12 of 2011 concerning Legislative Regulations (LNRI 2014 No. 199). However, the Perpres does not regulate PERPU, the assistance of Law no. 12 of 2011 in general. In fact, Law no. 12 of 2011 mandates to regulate Presidential Regulations relating to PERPU. It should be that matters of an administrative nature regarding the design, submission, approval of becoming laws and the revocation of PERPU are regulated by a Presidential

Regulation in accordance with the mandate of Article 53 of Law No. 12 of 2011. 199). However, the Perpres does not regulate PERPU, the assistance of Law no. 12 of 2011 in general. In fact, Law no. 12 of 2011 mandates to regulate Presidential Regulations relating to PERPU. It should be, matters of an administrative nature regarding the design, submission, approval become Laws, and the revocation of PERPU is regulated by a Presidential Regulation in accordance with the mandate of Article 53 of Law no. 12 of 2011. 199). However, the Perpres does not regulate PERPU, the assistance of Law no. 12 of 2011 in general. In fact, Law no. 12 of 2011 mandates to regulate Presidential Regulations relating to PERPU. It should be that matters of an administrative nature regarding the design, submission, approval to become Laws and the revocation of PERPU are regulated by a Presidential Regulation in accordance with the mandate of Article 53 of Law No. 12 of 2011. Administrative matters regarding the design, submission, approval to become Laws, and the revocation of PERPU are regulated by a Presidential Regulation in accordance with the mandate of Article 53 of Law No. 12 of 2011. Administrative matters concerning the design, submission, approval to become Laws, and the revocation of PERPU are regulated by a Presidential Regulation in accordance with the mandate of Article 53 of Law No. 12 of 2011.

Regulated, regulated regarding the format of the PERPU formulation, and the determination and submission of it by the President of the DPR with the intention of being discussed to get a decision to be accepted or rejected by the DPR. In the event that the PERPU is approved by the DPR, it is also necessary to regulate how the PERPU format is converted into a law format. As a comparison, is it possible for the PERPU text to be equated with the text of the International Convention, and the RAPBN text which is translated into law with a text with attachments. Laws enacted by the DPR are only in the form of a written law, while the APBN and international conventions are placed as Annexes to Laws which are an integral part of the Law Text itself. Likewise, the law stipulated by the DPR is sufficient for one sheet only, while PERPU is used as an attachment that is inseparable from the Law. The law states the DPR's approval and sets the PERPU into effect as law. Meanwhile, if the PERPU is rejected, it is sufficient for the DPR to determine 1 sheet of DPR Decree which rejects it, so that on that basis, the President determines a Presidential Decree stating to revoke the rejecting PERPU.

3.3. Analysis of Perpu No.1 of 2020

To deal with and overcome the crisis due to the corona virus outbreak or covid-19, on March 31, 2020, President Joko Widodo has issued Government Regulation in Lieu of Law (PERPU) No. 1 of 2020 with a fairly long title, which is about "State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Pandemic (Covid-19) and / or in the context of Facing Threats that Endanger the National Economy and / or Financial System Stability".⁵

In Article 28 Government Regulation in Lieu of Law (PERPU), There are 12 laws in which some of the provisions contained in YouTube do not apply as long as they are related to the policies specified in PERPU No. 1 of 2020. The 12 laws still exist and are in effect, but some of the provisions of the articles contained therein do not apply with regard to state financial policies for handling the spread of Corona Virus Disease 2019 (COVID-19) and / or in the face of controlled threats national economy and / or financial system stability based on government regulations in lieu of this law. This means that with this PERPU, the provisions of

⁵ LNRI of 2020 Number 87, TLNRI Number 6485.

the articles mentioned in the 12 laws until or temporarily set aside, the goals achieved or in the Covid-19 report are declared to have ended.

The 12 laws which some of the provisions in it are enforced by PERPU No. 1 of 2020 are:

- 1) UU no. 6 of 1983 concerning General Provisions and Tax Procedures⁶ has been amended several times, most recently by Law Number 16 of 2009 concerning Stipulation of Government Regulations in Lieu of Law Number 5 of 2008 concerning the Fourth Amendment of Law Number 6 of 1983 concerning General Provisions and Tax Procedures into Laws;⁷
- 2) Act Number 23 of 1999 concerning Bank Indonesia⁸ has been amended several times, most recently by Act Number 6 of 2009 concerning Stipulation of Government Regulations in Lieu of Law Number 2 of 2008 concerning the Second Amendment of Act Number 23 of 1999 concerning Bank Indonesia to become Act;⁹
- 3) Law Number 17 of 2003 concerning State Finances;¹⁰
- 4) Law Number 1 of 2004 concerning State Treasury;¹¹

⁶LNRI 1983 Number 49, TLNRI Number 3262, namely regarding the provisions for the time period regulated in Article 11 paragraph (21), Article 17B paragraph (1), Article 25 paragraph (3), Article 26 paragraph (1), and Article 36 paragraph (1c) Law Number 6 Year 1983 concerning General Tax Provisions and Procedures (State Gazette of the Republic of Indonesia Year 1983 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 32621 which has been amended several times, most recently by Law Number 16 Year 2009 concerning Stipulation Government Regulation in Lieu of Law Number 5 of 2008 concerning the Fourth Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures to Become Law (State Gazette of the Republic of Indonesia of 2009 Number 62, Supplement to the State Gazette of the Republic of Indonesia Number 4999).

⁷LNRI Year 2009 Number 62, TLNRI Number 4999, namely Article 55 paragraph (41) Law Number 23 Year 1999 concerning Bank Indonesia (State Gazette of the Republic of Indonesia Year 1999 Number 66, Supplement to the State Gazette of the Republic of Indonesia Number 3843), has been amended several times, most recently by Act Number 6 of 2009 concerning the Stipulation of Government Regulations in lieu of Act Number 2 of 2008 concerning the Second Amendment to Act Number 23 of 1999 concerning Bank Indonesia to become Law (State Gazette of the Republic of Indonesia of 2009 Number 7, Supplement to the Republic of Indonesia Number 4962).

⁸LNRI 1999 Number 66, TLNRI Number 3843, namely Article 55 paragraph (41) Law Number 23 Year 1999 concerning Bank Indonesia (State Gazette of the Republic of Indonesia Year 1999 Number 66, Supplement to the State Gazette of the Republic of Indonesia Number 3843), which has been amended several times, most recently by Act Number 6 of 1992 concerning Stipulation of Government Regulations in Lieu of Law Number 2 of 2008 concerning Second Amendment to Act Number 23 of 1999 concerning Bank Indonesia into Law (State Gazette of the Republic of Indonesia of 2009 Number 7, Supplement to the State Gazette of the Republic of Indonesia Number 4962).

⁹ LNRI Year 2009 Number 7, LNRI Number 4962 Article 12 paragraph (3) namely along with the explanation, Article 15 paragraph (5), Article 22 paragraph (3), Article 23 paragraph (1), Article 27 paragraph (3), and Article 28 paragraph (3) in Law Number 17 Year 2003 concerning State Finances (State Gazette of the Republic of Indonesia Year 2003 Number 47, Supplement I, State Gazette of the Republic of Indonesia Number 4286).

¹⁰ LNRI of 2003 Number 47, TLNRI Number 4286, namely Article 3 paragraph (3) of Law Number 1 of 2004 concerning State Treasury (State Gazette of the Republic of Indonesia of 2004 Number 5, Supplement to the State Gazette of the Republic of Indonesia Number 4355).

¹¹LNRI Year 2004 Number 5, TLNRI Number 4355 namely Article 22 paragraph (2) and paragraph (3) Law Number 24 Year 2004 concerning the Deposit Insurance Corporation (State Gazette of the

- 5) Law Number 24 of 2004 on the Deposit Insurance Corporation¹² The agreement has been amended by Law Number 7 of 2009 concerning Stipulation of Government Regulations in Lieu of Law Number 3 of 2008 concerning Amendments to Law Number 24 of 2004 concerning the Deposit Insurance Corporation into Law;¹³
- 6) Law Number 33 of 2004 concerning Financial Balance between the Central Government and Regional Governments;¹⁴
- 7) Law Number 36 Year 2009 concerning Health;¹⁵
- 8) Law Number 6 Year 2014 concerning Villages;¹⁶
- 9) Law Number 23 Year 2014 concerning Regional Government¹⁷ has been amended several times, most recently by Law Number 9 of 2015 concerning Second Amendment to Law Number 23 of 2014 concerning Regional Government;¹⁸

Republic of Indonesia Year 2004 Number 96, Supplement to the State Gazette of the Republic of Indonesia Number 44201 has amended by Law Number 7 of 2009 concerning Stipulation of Government Regulations in Lieu of Law Number 3 of 2008 concerning Amendments to Law Number 24 of 2004 concerning the Deposit Insurance Corporation Into Law (State Gazette of the Republic of Indonesia of 2009 Number 8, Supplementary State Gazette of the Republic of Indonesia Number 4963).

¹² LNRI Year 2004 Number 96, TLNRI Number 4420 Article 27 paragraph (1) namely the explanation, Article 36, Article 83, and Article 10 paragraph (2) of Law Number 33 Year 2004 concerning Financial Balance between the Central Government and Regional Government (State Gazette Republic of Indonesia Year 2004 Number 126, Supplement to State Gazette of the Republic of Indonesia Number 4438).

¹³ LNRI Year 2009 Number 8, TLNRI Number 49631, namely Article 171 of Law Number 36 Year 2009 concerning Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to State Gazette of the Republic of Indonesia Number 5063).

¹⁴ LNRI Year 2004 Number 126, TLNRI Number 4438 Article 72 paragraph (2), namely along with the explanation of Law Number 6 Year 2014 concerning Villages (State Gazette of the Republic of Indonesia Year 2000 Number 7, Supplement to the State Gazette of the Republic of Indonesia Number 5495).

¹⁵ LNRI Year 2009 Number 144, TLNRI Number 5063 namely Article 316 and Article 317 Law Number 23 Year 2014 concerning Regional Government (State Gazette of the Republic of Indonesia Year 2014 Number 244, Supplement to State Gazette of the Republic of Indonesia Number 5587) through Law Number several times. 9 of 2015 concerning the Second Amendment to Law Number 23 of 2014 concerning Regional Government (State Gazette of the Republic of Indonesia of 2015 Number 58, Supplement to the State Gazette of the Republic of Indonesia Number 5679).

¹⁶ LNRI Year 2014 Number 7 TLNRI Number 5495, namely Article 177 letter c number 2, Article 180 paragraph (6), and Article 182 of Law Number 17 Year 2014 concerning the Ralqrat Consultative Assembly, the House of Representatives, the Regional Representative Council and the House of Representatives Regions (State Gazette of the Republic of Indonesia Year 2014 Number 182, Supplement to State Gazette of the Republic of Indonesia Number 5568) has been amended several times, most recently by Law Number 13 Year 2019 concerning the Third Amendment to Law Number 17 Year 2014 concerning the People's Consultative Assembly, Council Ralryat Representatives, Regional Representative Council, and Regional Ralryat Representative Council (State Gazette of the Republic of Indonesia Year 2019 Number 181, Supplement to State Gazette of the Republic of Indonesia Number 6396).

¹⁷ LNRI Year 2014 Number 244, TLNRI Number 5587, namely Article 20 paragraph (2) and paragraph (3) Law Number 9 Year 2016 concerning Financial System Crisis Prevention and Management (State Gazette of the Republic of Indonesia Year 2016 Number 70, Supplement to the State Gazette of the Republic Indonesia Number 5872).

¹⁸ LNRI of 2015 Number 58, TLNRI Number 5679, namely Article 11 paragraph (221), Article 40, Article 42, and Article 46 of Law Number 20 Year 2019 concerning the State Revenue and Expenditure

- 10) Law Number 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council¹⁹ It has been amended several times, most recently by Law Number 13 of 2019 concerning the Third Amendment to Law Number 17 of 2014 concerning the People's Consultative Assembly, the Ralryat Representative Council, the Regional Representative Council, and the Regional Ralryat Representative Council;²⁰
- 11) Law Number 9 of 2016 concerning Prevention and Management of Financial System Crisis;²¹
- 12) Law Number 20 Year 2019 concerning the State Revenue and Expenditure Budget for Fiscal Year 2020.²²

The 12 laws are declared invalid insofar as they are related to state financial policies for handling the 2019 Corona Virus Disease (COVID-19) and / or in the context of facing threats that threaten the national economy and / or financial system stability based on Government Regulations in Lieu of Laws this. This means that with this PERPU, the provisions of the articles mentioned in the 12 laws until or temporarily set aside, the goals achieved or in the Covid-9 report are declared to have ended.

Only Of course, specifically regarding the Law on the 2020 FY State Budget, the impact of this countermeasures is different from the 11 other laws. First, the budget is only for 1 year, namely 2020. Second, the APBN reservation is the absolute right of the President to stay, and the absolute right of the DPR to declare or reject the consequences of the previous year's budget if the new draft is rejected. Therefore, the postponement statement for the APBN Law is identical to the budget change, which regulates the DPR's authority to agree or not. The President may not determine the amendment to the budget by himself, only because there is a situation of urgency which the President himself interprets. Therefore, it can be said, Article 28 PERPU No.

The provisions in all of the aforementioned laws are declared invalid insofar as they relate to state financial policies in the spread of the 2019 Corona Virus Disease (COVID-19) and / or in the face of threats that threaten the national economy and / or financial system stability based on Government Regulation In Lieu of This Law. Thus, it is important to know that the ineffectiveness referred to only as long as this Perpu is valid and will be no longer there, either because it was rejected by the DPR-RI or for legal reasons that the enforcement of this PERPU has ended with recovery in the crisis caused by the Covid platform -19, this PERPU by itself no longer exists, PERPU No. 1 of 2020 was issued as "financial policy and financial system stability for handling the 2019 corona virus pandemic (Covid-19) and / or in the context of dealing with threats that threaten the national economy and / or financial system stability". This means that the objectives of this PERPU are (i) to deal with the Covid-19 pandemic, and / or (ii) to face threats that endanger the national economy, and / or (iii) to maintain financial system stability.

These three things are also in the formulation of considerations (Considering Preferences) in this PERPU, namely:

Budget for Fiscal Year 2020 (State Gazette of the Republic of Indonesia Year 2019 Number 198, Supplement to the State Gazette of the Republic of Indonesia Number 6410).

¹⁹ LNRI Year 2014 Number 182, TLNRI Number 5568.

²⁰ LNRI Year 2019 Number 181, TLNRI Number 6396).

²¹ LNRI of 2016 Number 70, TLNRI Number 5872.

²² LNRI Year 2019 Number 198, TLNRI Number 6410.

- a. that the spread of Corona Virus Disease 2019 (COVID-19) which was declared by the World Health Organization as a pandemic in most countries around the world, including in Indonesia, has shown an increase over time and has caused casualties, and greater material losses, which have implications for social, economic and social welfare aspects;
- b. The implications of the Corona Virus Disease 2019 (COVID-19) pandemic have an impact on, among other things, a slowdown in national economic growth, a decrease in state revenue, and an increase in state spending and financing, so that various Government efforts are needed to save health and the national economy, with a focus on spending for health, social safety nets, as well as economic recovery, including for businesses and communities affected;
- c. Whereas the implications of the Corona Virus Disease 2019 (COVID-19) pandemic will also have an impact on the deterioration of the financial system as indicated by the decline in various domestic economic activities so that it needs to be jointly mitigated by the Government and the Financial System Stability Committee (KSSK) to take forward looking actions in the context of stability financial sector;
- d. Whereas the policies in the policies referred to in letters a, b, and c, the Government and related institutions need to immediately take extraordinary policies and steps in the context of saving the national economy and financial system stability through various policies related to the implementation of the Income Budget. and State Expenditures (APBN) in particular with increased spending on health, spending on social safety nets, and economic recovery, as well as the authority of various institutions in the financial sector;
- e. Whereas the conditions as referred to in letters a, b, and d, have met the parameter as internal urgency that gives authority to Government Regulations in Lieu of Laws regulated in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia;
- f. Whereas in the consideration for the Government as referred to in letter a, letter b, letter c, letter d, and letter e, as well as in order to provide a strong legal basis and related institutions to take such policies and steps very quickly, it is necessary to determine Government Regulation In Lieu of Law on State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Disease (COVID-19) Pandemic and / or in the Context of Facing Threats that Endanger the National Economy and / or Financial System Stability.

InThe general explanation of PERPU, also explained the background of implementing this PERPU, in which in 2020 the world experienced the Corona Virus Disease 2019 (COVID-19) pandemic. The spread of the Corona Virus Disease 2019 (COVID19) poses a risk to public health and has even claimed lives in various parts of the world, including Indonesia. The Corona Virus Disease 2019 (COVID-19) pandemic has significantly disrupted economic activity and had a major impact on the economies of most countries around the world [8], including Indonesia. Global economic growth has decreased from 3% (three percent) to only 1.5% (one point five percent) or even lower. The development of the 2019 Corona Virus Disease (COVID-19) pandemic disrupts economic activity in Indonesia. One of the implications is the decline in Indonesia's economic growth which is estimated to reach 4% (four percent) or lower. This affects how long and no matter the spread of the Corona Disease

2019 (COVID-19) pandemic affects and even cripples community activities and economic activities.

The disruption of economic activities that affect changes in the State Revenue and Expenditure Budget Posture (APBN) for Fiscal Year 2020. Whether it's changes in State Revenue, State Expenditures, or Financing. Potential changes to the 2020 Fiscal Year State Budget occur due to disruption to economic activity or somewhat. Disruption to economic activities that disrupts the State Budget for the 2020 Fiscal Year from the State Revenue. The response to state financial and fiscal policies needed to deal with the risk of the 2019 Corona Virus Disease (COVID-19) pandemic includes increasing spending in the context of mitigating health risks, protecting the public and maintaining business activities. Pressure on the financial sector will affect the 2020 State Budget for Fiscal Year, especially on Financing.

In accordance with the Decision of the Constitutional Court Number 138 / PUU-VII | 2009, the aforementioned conditions have met the parameters as urgent that are included in the framework of enacting Government Regulations in Lieu of Law, among others:

- a. because of the need for requirements to quickly resolve legal problems based on the Act;
- b. The required law does not exist yet, resulting in legal vacuum or inadequacy of existing laws; and
- c. a condition of legal vacuum that cannot be resolved by making laws in a procedural manner which requires a long time while the proximity of the situation requires certainty to develop.

Based on the foregoing matters, in an incoming crisis, in accordance with the provisions of Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, the President shall stipulate a Government Regulation in Lieu of a Law. However, it is necessary to remember that all the critical considerations mentioned are not seen in the perspective of the dangers referred to by Article 12 of the 1945 Constitution. Therefore, in considering this PERPU, Article 12 of the 1945 Constitution is not mentioned and touched at all. PERPU No. 1 of 2020 is stipulated only by keeping in mind the provisions of Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. This means that this PERPU is still under the legal regime in ordinary circumstances. It is not an emergency legal regime or a state of emergency by Article 12 of the 1945 Constitution of the Republic of Indonesia. In addition, apart from this PERPU, Law no. 24 of 2007 concerning Disaster Management and Law no. 6 of 2018 concerning Health Quarantine also does not apply at all with or in the context of implementing Article 12 of the 1945 Constitution. In the preamble, considering that in the last two laws, Article 12 of the 1945 Constitution is also not mentioned as a reference. This means that although the material stipulated regarding disaster diversion and on health emergencies, it is still stipulated not in the context of state conditions in a state of disaster emergency as stipulated in Article 12 of the 1945 Constitution. 24 of 2007 concerning Disaster Management and Law no. 6/2018 concerning Health Quarantine also does not support or in the context of implementing Article 12 of the 1945 Constitution. In the preamble, considering that in the last two laws, Article 12 of the 1945 Constitution is also not mentioned as a reference. This means that even though the material stipulated regarding disaster diversion and health emergencies, it is still determined not in the context of state conditions in a state of disaster emergency as stipulated in Article 12 of the 1945 Constitution. 24 of 2007 concerning Disaster Management and Law no. 6/2018 concerning Health Quarantine also does not support or in the context of

implementing Article 12 of the 1945 Constitution. In the preamble, considering that in the last two laws, Article 12 of the 1945 Constitution is also not mentioned as a reference. That is,

Therefore, it can be said that, both Law no. 24 of 2007, Law no. 6 of 2018, as well as PERPU No. 1/2020 are both laws that were formed when the state was in a normal state, not when the state was in an emergency state by Article 12 of the 1945 Constitution as the only article of the 1945 Constitution that addresses this emergency situation. All three are laws that are in a normal state, so that the whole system is also in a normal state. In a normal legal regime, all laws and regulations that remain binding to the public, except those that have been expressly regulated in the second provisions of the Law on Disaster Management, and the Law on Health Quarantine, are now added with PERPU. No.1 of 2020,

The differences between normal and emergency legal regimes are markedly different from one another. In ordinary circumstances or norms, normal laws apply. If the law of normalcy was applied to an emergency, there would be no justice. Likewise, if under normal circumstances a law that should have been intended for emergencies or is not normal is enforced, then no justice will be generated. The principle that must be adopted is "normale rechts voor normale tijd, en attr abnormal rechts voor abnormal tijd". (Normal law for abnormal time, and abnormal law for abnormal time).

Abnormal circumstances can protect citizens, or even the safety of the nation and state. Of course, not all experts regarding the existence of the two legal regimes use this "dualism" approach. However, according to John Ferejohn and Pasquale Pasquino [9],

"In this case, the constitution which has provisions on emergency personnel already shows a dualistic element: there are two different normative systems, which are mutually isolated: a normal system of rights and procedures and a normative system that operates in an emergency. This also applies to the legislative emergency model. "(In this connection, a constitution that contains provisions regarding the power of an emergency state of a dualistic element, the existence of two different norm systems, which are separate from one another. A normative system that regulates normal rights and procedures and a normative system that functions in a state of affairs This is true, in the executive function as well as in the model of the legislative function).

However, because PERPU No. 1 of 2020 does not mention Article 12 of the 1945 Constitution at all in its 'consideration', so it can be ascertained that this PERPU is substantially the same as its legal status as Law No. 24 of 2007 concerning Disaster Management, and with Law no. 6 of 2018 concerning Health Quarantine. All three are laws that are enforced under normal circumstances. Thus, the implementation of these three laws must not violate other laws, violate human rights, let alone violate the 1945 Constitution. If all three violate the 1945 Constitution, then as long as someone submits a petition for review of their constitutionality, the Constitutional Court can at any time cancel or declare these three laws are invalid because they are proven to have violated the 1945 Constitution.

The stipulation of PERPU No. 1 of 2020 the enactment of various provisions in 11 laws and amending the material of 1 law, namely the APBN Law described above. However, apart from matters that are official or amended by this PERPU, the other provisions of the Law are still and must not be violated. Such is the law that PERPU has not changed or enacted, means that it is still what it is, so that it cannot be violated in the implementation of PERPU No. 1 of 2020. Of course there are many examples that can be referred to as examples. For example, the prohibition of carrying out Friday prayers in mosques, or later for tarawikh prayers in the holy month of Ramadan. With all the dignity of intent and content for the nation and humanity, the Police can act to protect the people and gather in mosques which under ordinary

circumstances is a real human right. Is it with PERPU No. 1 of 2020, can such violations of human rights be justified? The answer is not clear, because PERPU No. 1 of 2020 is only to overcome conditions in the economic and financial sector. The contents of the PERPU are only financial policies and financial system stability for handling the Covid-19 pandemic and / or in the context of facing threats that threaten the national economy and / or financial system stability. because the purpose of PERPU No. 1 of 2020 is only to overcome conditions in the economic and financial sector. The contents of the PERPU are only financial policies and financial system stability for handling the Covid-19 pandemic and / or in the context of facing threats that threaten the national economy and / or financial system stability. because the purpose of PERPU No. 1 of 2020 is only to overcome conditions in the economic and financial sector. The contents of the PERPU are only financial policies and financial system stability for handling the Covid-19 pandemic and / or in the context of facing threats that threaten the national economy and / or financial system stability.

Likewise with Law no. 6 of 2018 concerning Health Quarantine. In the preamble, this Law also does not mention Article 12 of the 1945 Constitution concerning the state of danger, but only Article 5 paragraph (1), Article 20, Article 28 H paragraph (1), Article 34 paragraph (3) of the Constitution of the Republic of Indonesia 1945. Part Five of this Law regulates Large-Scale Social Restrictions (PSBB), namely in Article 59 which stipulates:

- (1) Large-Scale Social Restrictions are part of the Public Health Emergency response;
- (2) Large-Scale Social Restrictions are aimed at preventing the spread of an ongoing Public Health Emergency between people in a certain area;
- (3) Large-scale social restrictions, the people referred to in paragraph (1) include at least:
 - a. school and work vacations;
 - b. religious event; and / or
 - c. activities in public places or facilities.
- (4) The Organization of Large-Scale Social Restrictions in coordination and cooperation with various parties related to the provisions of laws and regulations.

Article 59 paragraph (3), especially in the letter 'b', for example, by closing the mosque on Friday, can be said to be a real violator of human rights which can only be done by the state officially declared as in a state of civil emergency. What happens if the provisions of Article 59 paragraph (3) with clear evidence from the facts on the ground that mosques are forced to close for weeks or even months, for whatever reason, can still violate the principle of religious freedom guaranteed in the Constitution 1945. If the law is tested before the Constitutional Court, then the panel of judges must tolerate it not on the basis of consideration of the enactment of Article 12 of the 1945 Constitution? If other articles are used, the provisions of Article 59 of Law no. 6 of 2018 is contrary to the 1945 Constitution.

Especially regarding PERPU No. 1 of 2020, it can be said, the status is somewhat different regarding Law no. 6 of 2018 and Law no. 24 of 2007 which has officially become a law. PERPU, according to Article 22 paragraph (2) of the 1945 Constitution, to become law still has to obtain approval from the DPR. If it does not get approval, according to Article 22 paragraph (3) of the 1945 Constitution, the PERPU must be revoked. The problem is, if the PERPU later gets approval from the DPR, the material provisions in it will apply forever, even though, its contents are limited to and in the context of dealing with the threat of the Covid-19

outbreak. If the state of the Covid-19 epidemic crisis has ended and the situation returns to normal, then of course, the existence of PERPU No.

From the meaning and understanding and understanding in terms of the policy material outlined, led to PERPU No. 1 of 2020 is very different from other PERPUs that have been established. The existing PERPU criterion is PERPU which is really stipulated as a law which is within the stipulated time and it is impossible for refugees to be approved and approved together in a hearing at the DPR. This means that the substance of the PERPU is essentially a law, but due to time constraints it cannot be regulated according to the usual statutory order procedures, so it must be stipulated by PERPU. However, PERPU No. 1 of 2020, the contents of the policy material set forth in it are truly temporary during a crisis situation due to the Covid-19 epidemic. In fact, PERPU No. 1 of 2020 is also set to overcome a crisis situation related to the threat of the Covid-19 outbreak. Specifically, the aims and answers in the title of this PERPU, namely: regarding "state financial policies and financial stability for handling the 2019 coronavirus pandemic (Covid-19) and / or in order to face threats that threaten the national economy and / or stop the financial system".

Therefore, after later in the next trial period, the President will convey PERPU No. 1/2020 DPR for the purpose of obtaining approval, there must be different considerations from the DPR or the President regarding this PERPU when compared to other PERPUs which are term in nature. length of statute in general. First, the President must deliberately explain that this PERPU is temporary to overcome the Covid-19 pandemic outbreak, which is likely to end the threat of the Covid-19 outbreak, so the reason for the existence of PERPU No. 1 Year 2020 will automatically disappear. Second, the DPR itself must also accept the submission of PERPU No. 1 of 2020 with a flexible attitude in accordance with the aims and objectives of the stipulation of PERPU No. 1 of 2020. Both the Government and the DPR must assess the development of the situation to what extent the threat of the Covid-19 outbreak can be said to have ended or not. If it is still not over, the health emergency can be extended in accordance with the authorities determined based on the provisions of Article 8 letter d PERPU No. 1 of 2020 which states, "the determination of the time period for force majeure due to the 2019 Corona Virus Disease pandemic (COVID-19) is regulated as referred to in letters a, b, and c refers to the determination of the Government through the Head of the National Disaster Management Agency".

Because the rights are indeed temporary, the Government may not file the PERPU at all to get the DPR's approval. This is because the provisions of Article 22 paragraph (2) of the 1945 Constitution which states "this Government Regulation must be approved by the DPR in the following proceedings". This means that PERPU must be submitted to the DPR with the intention of obtaining approval to become the law it should be. However, if the situation returns to normal and the PERPU is no longer needed, then there is no need to get DPR approval either. In the absence of DPR approval, PERPU must be revoked by itself. To revoke it, of course it is sufficient to do it unilaterally by the President himself,

In my opinion, the provisions regarding the revocation of PERPU which are required by this bill, in my opinion, are a fatal mistake. But because it has been regulated in the Law on Prevailing Laws, we can understand it in two categories, namely (i) PERPU with long-term objectives as ordinary laws, and (ii) PERPU with short-term goals to overcome the situation. in an emergency, such as PERPU No. 1 of 2020. For the time being, the first category PERPU can be revoked by the procedure stipulated by the Law concerning Prevailing Laws, however, for the second category PERPU, such as PERPU No. 1 of 2020, it is not enough that it is not enough for the DPR, so that by not getting the approval of the DPR, the PERPU is no longer right in time,

Even if PERPU No. 1 of 2020 is submitted to the DPR, the DPR must understand that the purpose of this PERPU is only temporarily approved to become a permanent law. Even though the purpose and contents are only temporary. Because of that, the DPR did not actually enforce this PERPU so that in time it had to be revoked. It's just that, the problem is, because the state of emergency as a threat to the Covid-19 outbreak cannot be determined how long it will take, so the next session of the DPR as referred to in Article 22 paragraph (2) of the 1945 Constitution is uncertain.

If we follow the provisions of Article 22 paragraph (2), the PERPU will take effect without the approval of the DPR, which will take no longer than the next session, which is 3-5 months after the issuance of PERPU No. 1 Year 2020, on March 31, 2020.²³ If the national disaster of the Covid-19 outbreak lasts more than 5 months ahead, then there is no other way for the President, except to comply with the provisions of Article 22 paragraph (2) of the 1945 Constitution, namely having to submit the PERPU to the DPR for approval or disapproval in the trial the following. If the discussion in the DPR regarding PERPU No.1 / 2020 occurs, then there are several scenarios that need to be tried, namely:

- 1) PERPU No. 1 of 2020 is declared rejected, so according to Article 22 paragraph (3) of the 1945 Constitution, the PERPU must be revoked;
- 2) PERPU No. 1 Year is declared 2020 for a while until the Covid-19 disaster ends, which time is submitted to be determined by the President cq the Head of BNPB as Chair of the Covid-19 Handling Task Force;
- 3) PERPU No. 1 of 2020 is declared rejected and must be revoked by the President;
- 4) PERPU No. 1 of 2020 is declared rejected and must be repealed by the Bill on the Revocation of PERPU.

Another option is that the discussion and decision making in the DPR regarding PERPU No. 1 Year 2020 should be postponed until the Covid-19 business or at least until the estimate of the end of the Covid-19 crisis can be known with certainty. We must focus on resolving the danger of Covid-19 which threatens the safety of all citizens. "Salus populi, suprema lex esto", salvation is the highest law, and the people must take precedence over everything. PERPU No. 1 of 2020 is actually needed to deal with and overcome the Covid-19 emergency for a while, so it should not be declared rejected, because it is needed for the safety of the people. However, the DPR should not declare the PERPU, because by acceptance it means that PERPU will become a permanent law.

As stated above, PERPU No. 1/2020 cannot be categorized as a PERPU for and in an emergency situation because it does not comply with the provisions of Article 12 of the 1945 Constitution. The provisions of Article 12 state, "The President declares a state of danger. The conditions and consequences of a state of danger are stipulated by law". From Article 12 it can be seen that:

- 1) The conditions and legal consequences of such a state of danger shall be determined by law. With a statement that the statement of the state of danger is stipulated by law in

²³According to the provisions of Article 22 paragraph (2) of the 1945 Constitution, people are repeated by Article 52 paragraph (1) of Law no. 12 of 2011, PERPU must obtain the approval of the DPR-RI at the latest in the following trials. In the Elucidation of Article 52 Paragraph (1), it is emphasized that "What is meant by" the following trial "is the period of the first session after the Government Regulation in Lieu of a Law is enacted."

accordance with the specific policy policies that are put in place to solve the problem and return to its original state; and

2) The terms and legal consequences of the circumstances are further stipulated in and the law includes. Until now, the law that is still in effect on this is Law no. 23 of 1959 concerning the State of Danger. However, many of the contents of this Law are no longer in accordance with the times. Including the new provisions of the 1945 Constitution after the First, Second, Third and Fourth Amendments in 1999-2002.

PERPU No. 1 of 2020 is in no way related to and not the implementation of Article 12 of the 1945 Constitution quoted above. Therefore, this PERPU in terms of its form is an ordinary law that cannot conflict with the 1945 Constitution, and may not suspend or override the enactment of other statutory provisions and let alone the provisions of the 1945 Constitution. However, in terms of content, PERPU No. 1 Year 2020 is only sustainable for a while as long as the crisis situation due to Covid-19 has not ended. PERPU is not appropriate to represent the provisions of the various laws in force. Because of that, PERPU No. 1 of 2020 also cannot conflict with the 1945 Constitution or other laws that do exist to be based on the 1945 Constitution. In short, PERPU No. 1 In 2020, it is necessary to practice only until the Covid-19 crisis is resolved. After that, it must be ensured that this PERPU will actually be revoked on time.

In addition, PERPU No. 1 of 2020, it is also not appropriate for treatment as a special PERPU to enforce emergencies and be specifically applied for and in the context of emergencies due to Covid-19. Because in terms of substance, this PERPU only regulates "State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic", and / or (ii) in the context of Facing Threats that Endanger the National Economy and / or Stability. Financial System "only. This PERPU does not regulate all government actions that must be taken during the Covid-19 emergency. The substance really comes from the interests of economic and financial policy makers only. The ministry of ministries in the coordination ranks of the Coordinating Ministry for Political, Legal and Security Affairs and the Coordinating Ministry for Human Development and Culture have no idea whatsoever to formulate new policies during the Covid-19 crisis. So the threat of Covid-19 is the task of all state ministries.

PERPU No. 1 of 2020 is very inadequate as a legal instrument that guides and guides the implementation of government tasks in facing the threat of the Covid-19 outbreak. The content is too narrow with regard only to financial policies, the economy only. Therefore, its enforcement cannot be used as a basis for government actions in other fields which must still comply with and carry out all regulations that are in a proper state during normal circumstances. In fact, the situation that arises due to the threat of Covid-19 is out of the ordinary and must admit to having crashed, bypassed, and breached many provisions of the statutory regulations, which if they do not enter into force,

First, PERPU No. 1 of 2020 there is no law in general, starting with formulating general provisions containing definitions of meaning. PERPU No. 1/2020 by no means limits the meaning of very abstract concepts, such as financial policies, financial system stability, threats that threaten the national economy and / or financial system stability, etc. Therefore, in its implementation, the interpretation of the aforementioned terms will greatly depend on the implementing officials to narrow down or expand the meaning.

Second, PERPU No. 1 of 2020 directly and contains new policies in 29 articles which are divided into 5 chapters, namely (I) Scope, (II) State Financial Policy, (iii) Financial System

Stability Policy, (IV) Sanctions, and (VI) Closing. In Chapter I, Article 1, it is clearly stipulated that the scope of this regulation by PERPU only serves:

- (1) In order to meet the needs of state governance, a State Revenue and Expenditure Budget (APBN) is prepared, which consists of the state revenue budget, state expenditure budget, and budget financing;
- (2) To implement the State Revenue and Expenditure Budget (APBN) as referred to in paragraph (1), Law Number 20 Year 2019 concerning the State Revenue and Expenditure Budget for Fiscal Year 2020 has been enacted;
- (3) To implement the State Revenue and Expenditure Budget (APBN) as referred to in paragraph (1) and paragraph (2) in the framework of:
 - a. handling of the Corona Virus Disease 2019 (COVID-19) pandemic and / or
 - b. Threats that threaten the national economy and / or financial system stability need a second state policy and a system stability policy.
- (4) State financial policies as referred to in paragraph (3) include state revenue policies including policies in the field of taxation, policies on state spending policies in the field of regional finance, and policies for financing;
- (5) The financial system financial policy as referred to in paragraph (3) includes policies for crisis management, financial institutions experiencing financial crises and financial system stability.

Third, in Chapter II on State Finance Policy, policies that change various provisions in the Law on State Finance and other related Laws are regulated, which are properly implemented and will conflict with many other laws and also with the 1945 Constitution. PERPU only watches with the State Finance Law, the Taxation Law, the State Treasury Law, the Bank Indonesia Law, the Deposit Insurance Corporation Law, the Law on Fiscal Balance between the Central and Local Government, and the Law on Financial System Crisis Prevention and Handling, as well as the Law on Revenue and the Dutch Budget. State Year 2020. Because it is related to the Covid-19 crisis throughout the country, this PERPU also cares for the material of the Law on Health, as well as with the Law on Regional Government only. For example, This PERPU does not participate in the enforcement of several articles in the Law on Human Rights, the Law on the National Education System, the Law on Trade, the Law on Cooperatives, and so on, which in practice all have been affected by the growing threat of the Covid-19 virus pandemic. PERPU No. 1 of 2020 only focuses on financial sector policies. It is very clear that only officials from the financial sector took the initiative to issue PERPU. 1 of 2020 only focuses on financial sector policies. It is very clear that only officials from the financial sector took the initiative to issue PERPU. 1 of 2020 only focuses on financial sector policies.

In one sense, this is a compliment to officials in the financial sector who have their hearts and minds to initiate special policies in the context of handling the Covid-19 outbreak. This is at the same time an embarrassing mockery for officials in other sectors, how come they are not at all moved to formulate specific policies in their respective fields. Even though it is clear that the impact of the Covid-19 pandemic is the safety of the Indonesian people, except and certainly will have an impact on all sectors of government and national development. Where do law graduates sit in government, how can they enjoy their positions without feeling of responsibility to contribute to handling the threat of Covid-19. But on the other hand, What is even more important is that the policies contained in this PERPU are very limited only with regard to financial sector policies. Of course, in practice services and action steps taken in the field are very limited, because they cannot be a guide and reference in all interrelated sectors.

If officials in the financial sector receive immunity according to the provisions of Article 27, does it mean that officials in other fields, who have also made breakthroughs by bypassing the law, will be left to be accountable for themselves due to their work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19. because it cannot become a guide and reference in all interrelated sectors. If officials in the financial sector receive immunity according to the provisions of Article 27, does it mean that officials in other fields, who have also made breakthroughs by bypassing the law, will be left to account for themselves for their work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19. because it cannot become a guide and reference in all interrelated sectors. If officials in the financial sector receive immunity according to the provisions of Article 27, does it mean that officials in other fields, who have also made breakthroughs by bypassing the law, someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they have also made breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19. they also have to make breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19. they also have to make breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also have to make breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also have to make breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also have to make breakthroughs that violate the problems related to Covid-19. they also have to make breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they have also made breakthroughs that violate the problems related to Covid-19. they also have to make breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they have also made breakthroughs that violate the problems related to Covid-19. they also have to make breakthroughs that violate the problems related to Covid-19. someday he will be left to account for himself due to his work in the realm of criminal law, without protection. In fact, they also had to make breakthroughs that violated the problems related to Covid-19.

Therefore, it can be said that this PERPU has not yet resolved the problem of the need for special policies that have been implemented to deal with the Covid-19 problem. In fact, if the new policies in this PERPU later turn out to be applied permanently, for example by obtaining the approval of the DPR according to the applicable provisions, it can be hoped that this PERPU will cause more complications related to the legal system and the Indonesian economic constitution. . This is because this PERPU has put aside so many provisions of the Law which have been standardized but are permanently amended by PERPU, all of which are only temporary. For this reason, the Government and the DPR must respond to this PERPU appropriately, not to be struggled or idealized to obtain the approval of the DPR as PERPU in general. PERPU No. 1 of 2020 is a different PERPU, which is only temporary, so that in time after its function to deal with the Covid-19 crisis is declared complete, the DPR must refuse to

reject this PERPU, and on that basis PERPU is revoked and does not become a permanent law.

4 Conclusion

Thus, in order to face the threat of the dangers of Covid-19, the Government should have issued (i) a Presidential Decree which states the enactment of the Covid-19 Danger State; (ii) PERPU concerning State of Danger as the elaboration of Article 12 of the 1945 Constitution which is intended to amend or replace Law no. 23 of 1959; (iii) PERPU concerning Covid-19 Hazard Management in 2020 which contains special policies that diverge temporarily from various provisions of the Law which wish to overcome emergencies until normal conditions are restored;

PERPU No. 1 of 2020 is very inadequate as a legal instrument that guides and guides the implementation of government tasks in facing the threat of the Covid-19 outbreak. The content is too narrow with regard only to financial policies, the economy only. Therefore, its enforcement cannot be used as a basis for government actions in other fields which must still comply with and carry out all regulations that are in a proper state during normal circumstances. In fact, the situation that arises due to the threat of Covid-19 is out of the ordinary and must admit to having crashed, bypassed, and breached many provisions of the statutory regulations, which if they do not enter into force,

4.2 Recommendation

Based on the description above, it can be seen that PERPU No. 1 of 2020 has many problems that can cause various legal complications in its implementation and application. Among those that have been stated above as remedial solutions, there are several alternative solutions that can be achieved to overcome this PERPU Covid-19 legal problem.

First, from the President's side, the following things can be done:

- 1) PERPU No. 1 of 2020 can improve the conditions in Article 12 of the 1945 Constitution in the consideration given that it was preceded by an official stipulation by the President declaring that the country was in a state of emergency Covid-19. However, the disadvantage is that it can be faulted too late, and creates uncertainty;
- 2) The President deliberately did not send or submit the PERPU to the DPR to ask for approval, so that the discussion in the DPR to accept or reject can state until there is certainty when Covid-19 will end. However, the weakness is that this could violate Article 22 paragraph (2) of the 1945 Constitution which states, "This government regulation must be approved by the DPR in the following trial". Therefore, PERPU must be submitted to the DPR at the latest before the following session period.

Second, from the DPR side after receiving the PERPU submission from the President, several alternative actions can be taken as follows:

- 1) The decision to postpone the decision to determine or reject PERPU until the right time when the threat of Covid-19 can be predicted with certainty when it will end. But the weakness is because according to Article 22 paragraph (2) of the 1945 Constitution, which is repeated by Article 52 paragraph (1) of Law no. 12 of 2011, PERPU must obtain the approval of the DPR-RI at the latest in the following trials. If it is not approved, it

means that PERLU is rejected and according to Article 22 paragraph (3) of the 1945 Constitution, PERPU must be revoked.

- 2) Declaring the prohibition or not applying the PERPU into law, and in accordance with the provisions of Law no. 12 of 2011, the revocation is carried out by means of a law which also regulates the time for the end of the Covid-19 crisis and the legal consequences of the revocation of the PERPU. The weakness is political, that is, can the Government together with the coalition political parties state firmly in public reject PERPU No. 1 of 2020, so that PERPU must be revoked.

Third, from the perspective of the Constitutional Court, which must face the examination of applications from various circles of society who think that PERPU No. 1/2020 contradicts the 1945 Constitution. The alternatives are:

- 1) The Court rejected the examiner's request by confirming the constitutionality of PERPU No. 1 of 2020 with notes (i) on your own to deal with the emergency threat of the Covid-19 pandemic outbreak (Conditionally Constitutional); and (ii) After the end of the threat of epidemic, PERPU must be revoked.
- 2) The Court granted the petition by stating PERPU No. 1 of 2020 contradicts the 1945 Constitution with conditions (Conditionally Unconstitutional), for example, (i) it is still ongoing until the end of the Covid-19 pandemic, (ii) all legal consequences that have arisen during the enactment of PERPU No. 1 of 2020 remains valid and precise until the PERPU is declared no longer based on the Constitutional Court decision.

Fourth, what is important is that in principle there is a need for the same perception among all policy makers regarding the Covid-19 problem and how to overcome it. On the one hand, PERPU No. 1 of 2020 is very much needed to overcome various problems during the Covid-19 crisis and return the situation to normal, but other parties have weaknesses that must be overcome so that they do not cause troublesome legal consequences in the future.

And lastly, it is hoped that the threat of the dangers of Covid-19 can unite all of the nation's children, namely the common interest for common safety and even for the safety of the state and nation from the threat of the dangers of Covid-19. Stop using Covid-19 for your own political gain and politics that will be enjoyed by other parties who are not liked. Stop looking at Covid-19 from a political perspective, branding for yourself or other parties. Stop cursing, blaming, memorizing and being hostile to other parties and / or territories over yourself, worshiping one's own idol, glorifying one's own group, all of which are narrow and mediocre political motives. The Covid-19 threat is a threat to safety for all of us and even for all of humanity. Let us unite to face and overcome it, regardless of political attitudes and political polarization in society. "Salus poluli suprema les esto", people's safety is the highest law. "Legem non alphabetical necessity". The importance of salvation has no law, but the interest itself is the law.

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The Concept of Military Law Development in Indonesia

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Abstract. Military law in force in Indonesia today is a legacy from the Dutch East Indies Colonial Government in the form of *Wetboek van Militair Strafrech* and *Wet op de Krigstucht* which currently causes many problems among Soldiers because of the structure, substance and culture of the law based on the law the colonial law system. The concept of military law development in Indonesia is carried out by building structures, culture and substance. The development of law structure refers to institutions that form and implement law (law enforcement), the development of law culture refers to assessing and expectations of the military community and the development of the substance of military law is carried out by establishing military law norms, both disciplinary norms law, criminal law, procedural law, military criminal law, military administrative law and military civil law.

Keyword: Military law, development, soldiers.

1 Introduction

Military law grows and develops along with the development of military society which is very closely related to war. War refers to a condition which is no longer controlled by law but rather the use of gun violence carried out by the army. The war is always associated with destruction, murder, plunder or acts of violence to win the war. In World War II, Adolf Hitler stated that "the victor shall not be asked later on whether we told the truth or not. In starting and making war, not the right is what matters, but victory." [1]. The victor of the war will not be asked whether he will tell the truth or not. In war, it is not a right which is important, but victory is.

Military law was issued for the need of the military community to regulate its members to be obedient to every leader's orders. Each member of the military is required to always be disciplined in carrying out training, discipline in obeying the rules issued by the leadership including being disciplined when carrying out war orders so that strict norms are needed to foster soldiers' obedience to the law.

Initially, military law did not have its own place in public and private law. However, bearing in mind that the importance of legal issues that apply specifically to members of the military who have a very heavy duty, i.e. securing the country's sovereignty, maintaining territorial integrity, and protecting the entire nation and all of Indonesia's people, military law needs to be issued. Military life which is very hard and full of discipline requires special and specific rules so that the law is also adjusted to the duties carried out by members of the military. Therefore, special and specific laws are needed in the fields of disciplinary, criminal,

criminal procedure, constitutional law, administrative law or law military administration, including military civil law.

The embryo of military law that grew and developed in Indonesia today originated from the Swiss Military Law which was created in 1393 under the name *Kriegsordnung*, known as *Sempacherbrief*. In 1532, Emperor Charles V of Germany issued a *Kriegsartikel* which was named the *Constitutio Criminalist* of Carolina used as a model of military law by European countries. In 1536, Hertog Karel van Gelre issued *Articulbrief*, and in 1621, King Gustav Adolf of Sweden issued a *Criegartikel* which was valid for all infantry, cavalry, and artillery troops. The Swedish king realized that victory on the battlefield was not only determined by the strength of weapons, military tactics, but was also determined by the discipline of the troops supported by adequate legal rules.

Towards the end of the XVII century, Napoleon succeeded in codifying military law under the name *Code Penal Militair* and succeeded in building a strong army with morale and high discipline. In 1799, the Dutch succeeded in compiling the *Crimineel Wetboek voor de Militair van Staat* (Book of Military Criminal Law) which modeled on the *Penal Code Penal Militair* of Napoleon. In 1815, the *Crimineel Wetboek voor het Krijgsvolk te Lande* (the Criminal Code for the Army) was issued, and in 1903, the concept of *Wetboek van Militair Strafrecht* was created by Prof. van der Hoeve. In 1923, *Wetboek van Militair Strafrech* (Military Criminal Code/KUHPM) was enacted in force for the Dutch Army and Navy and *Wet op de Krigstucht* (Military Disciplinary Code/KUHDM) was also enacted. In 1934, KUHPM and KUHDM were promulgated by *Staatblad* 1934 No. 167 and 168 which came into force on October 1, 1934 by Decree of the Governor General on March 25, 1934 *Staatblad* 1934 No. 337.

After Indonesian independence, *Wetboek van Militair Strafrecht* (KUHPM) was ratified by the Law No. 39/1947 and *Wet op de Krigstucht* (KUHDM) was ratified by the Law No. 40/1947 that was valid for the entire Indonesian Military. Whereas the Army court was formed by Law No. 7 of 1946, the Military Criminal Procedure Code was established by Law No. 8 of 1946 and the Army Court was formed by Law No. 31 of 1947 and the Military Imprisonment was formed by Law No. 47 of 1947. In 1997, 2 (two) Military Laws were successfully amended, namely Military Discipline Law with Law No. 26/1997 and Military Courts Law with Law No. 31/1997 which is still in force. In 2014, the Military Disciplinary Law was amended by the Law No. 25/2014.

Based on the history of the formation and enactment, the military law in Indonesia is very ancient and is a product of the Dutch Colonial Government which is still valid until now. As a result, a lot of rules are not in accordance with the lives of Armed Force soldiers. There are few legal experts (legal scholars) interested in studying military law because it has no economic value and it must be a member of the military to understand military law. The development of military law is now a necessity that is arguably very urgent, many violations committed by Armed Force Soldiers because the military legal system is inadequate to resolve legal problems that occur within the Armed Forces. Therefore, the research problems that can be formulated are: do military laws need to be developed and updated adjusting to the needs and development of Indonesian military society? What efforts can be made to develop military law to suit the personality and needs of the Indonesian military community? These problems are discussed in the discussion section of this paper.

Based on the aforementioned background, military law which grew and developed in Indonesia today is a legal product of the Dutch Colonial Government. Therefore, it is no longer relevant for Armed Force Soldiers because it contains many colonialism values that are no longer in accordance with the dignity of Armed Force soldiers. In solving the aforementioned

problems, 3 (three) legal theories are used in this study, namely legal system theory, legal objective theory, and legal development theory.

1.1 Legal System Theory

The legal system theory was put forward by Lawrence M. Friedman, who said that the success or failure of law enforcement depends very much on three legal systems including the legal structure, the substance of the law, and legal culture. The legal structure concerns law enforcement officers, the substance of the law includes the set of laws, and the legal culture is a living law adopted by a community [2].

The development of military law is carried out, starting from reforming the legal system including the structure of military law enforcement institutions, which include: Superiors who have the right to punish (Ankum), Officer Submitting Case (Papera), Military Police (Pom) as investigators, Military Oditur, Military Judges, and Military Society Organization (Lemasmil). The substance of military law includes the rules of military law, the norms and patterns of actual behavior of military law instruments. The substance of military law concerns the applicable laws and regulations and has binding power so that it becomes a guideline for military law enforcement officials including: KUHPM, Military Discipline Law, Military criminal procedural law (Military Court), military administrative law, and military civil law. Meanwhile, the legal culture is the attitude and behavior of the military community (law enforcement habits) in enforcing the law for soldiers. It needs availability of law in the form of rules/norms/regulations, and guarantees for the realization of the rules into legal practice [3]. Therefore, the development of military law in Indonesia begins with the structuring of the legal system.

1.2 Legal Purpose Theory

Gustav Radbruch states there are three (3) basic values to create harmonization of the implementation of legal objectives to protect the community both actively and passively and to create a condition of society that takes place appropriately, and to strive for prevention of arbitrary efforts of law enforcement in order to realize order, peace and justice so that people's prosperity can be achieved. The first basic value is justice as one of the purposes of the law. Gustav Radbruch stated "recht ist wille zur gerechtigkeit" (law is the will for justice). The second basic value is the benefit of the law. Utilists believe that the purpose of law is merely to provide maximum benefit or happiness for as many citizens as possible. The third basic values is normative legal certainty that regulations are made and enacted to regulate clearly and logically so that they do not clash or cause norm conflicts [4].

1.3 Development Law Theory

Kusumaatmadja's Theory of Development Law was first coined by the assumption that law cannot play a role in changing society and there has been a change in the nature of people's thinking towards modern law. Kusumaatmadja stated that law is a tool to maintain order in society. Another goal of law is the attainment of justice of different content and size, according to the development of society. In order to gain the order situation, legal certainty must be sought in the community. According to Mochtar Kusumaatmadja, law is expected to function as a means of community renewal or a means of development (law as a tool of social engineering) [5]. The Theory of Development Law created by Mochtar Kusumaatmadja shows

that there are 2 (two) dimensions as its core, namely first, order in the context of renewal or development which is seen as something absolutely absolute, and secondly, law in the sense of rules or regulations can function as a tool the regulator or means of development desired for renewal.

2 Method

Research is an activity to analyze and construct law methodologically, systematically and consistently [6] to search for and find legal principles in order to answer legal issues according to the prescriptive character of legal science [7]. The method chosen to analyze the problem of the conception of the development of military law in Indonesia is normative juridical which examines the norms of military law both legislation on military discipline law, military criminal law, military criminal procedural law, military constitutional law, military administrative law military, and military civil law with a statutory approach and a conceptual approach.

3 Result and Discussion

Military law has the meaning implied in the two words that make it up, namely the words military and law. Law means a series of rules, regulations, orders, both written and unwritten that determine or regulate the legal relations between members of the community [8]. The word military comes from the word "miles" which means a "warrior" i.e. someone who is ready to fight. Thus the military means the people assigned to war. Military Law embraces both a penal code for the maintenance of disclosure of the army and administrative laws which provide the maintenance of the army.

Military law is the law regarding military and army life. Therefore, military law consists of norms derived from various fields of law such as civil law, criminal law, state administrative law, international law in which the objects are military lives. In addition, military law is a special part of various fields of law that only applies to the military and the army [9].

3.1. The Scope of Military Law

Military law in force in Indonesia at the moment is largely derived from legislation legacy from the Dutch East Indies Colonial Government which was much influenced by Continental European Military Law. The results of the study of the legislation products show that Military Law in Indonesia covers military disciplinary law, military penitentiary law, military state administration law, military administrative law and armed dispute law/humanitarian law which specifically regulates the life of the Indonesian military. The norms that specifically regulate the rules that apply to the military are compiled into a single unit so that they are easy to learn. The laws and regulations relating to each of these legal fields are no longer valid, some are out of date, but most still apply, of course, after changes and additions are made according to the nature of independence.

In the military (Armed Forces) environment, it can be said that military law has not been popular in the community, which means that it has not been fully recognized by the military community. In military education, the cadets are only taught at glance about Military Discipline Law, Military Criminal Law and the Law of Armed Disputes. Special experience in the field of military law can only be obtained through bachelor degree (S-1) education at the Military Law College (STHM). In addition, if someone is interested in military law, he/she

will write a final project, thesis, or dissertation with the object of research related to military law.

3.2. History of the Development of Military Law in Indonesia

The history of military law in Indonesia was influenced by the arrival of the Dutch in the archipelago which can be divided into 4 (four) periods, namely the era of Verenigde Oost-Indische Compagnie (VOC), the era of the beginning of the Dutch Government, the period of the Japanese Government, and the Period of Indonesian Independence [10].

- i. **Military Law of the VOC Period**
In trade competition, the VOC engaged in battles with the Spaniards and Portuguese so that the Dutch Government granted freedom to the VOC to arm themselves and gave them the right to build fortresses on the archipelago's mainland. Therefore, the VOC had the right to hold government apparatus and make the necessary regulations. The Dutch government allowed the VOC to have its own army and enforced Dutch military law (*articulbrieven*) for VOC troops in the archipelago. The VOC army was unable to control the vast archipelago territory, so in 1799, the VOC government was taken over by the Dutch Government.
- ii. **Military Law in the Beginning of the Dutch East Indies Government**
In 1803, the Dutch Government was invaded by France under Napoleon's control and appointed Lodewijk Napoleon as king of the Netherlands. To prevent the Dutch colony from falling into French hands, in 1816, the British invaded the archipelago led by Lord Minto and assisted by Thomas Stanford Raffles who was later appointed as Governor-General in the former Dutch colony. Raffles allowed the indigenous people to live under their customary law, while the British army was under British Military Law. In 1816, the former Dutch colony controlled by the British was handed back to the Dutch Government along with the Dutch occupation forces sent directly from the Netherlands to the Archipelago. They brought military law in the form of *Criminee Wetboek voor de Landmacht* (Book of the Criminal Code of the Army), *Rechtspleging bij de Landmacht* (Judicial Army), and *Reglement van Krijgstucht* (Military Disciplinary Regulations). On January 1, 1923, *Wetboek van Militair Strafrecht* (KUHPM) and *Wetboek op de Krijgstucht* (KUHDM) applied in the Netherlands. While, on October 1, 1934, KUPM and KUHDM were enforced in the Dutch East Indies by Decree of the General Governor dated on March 25, 1934 *statsblad* 1934, Number 337. Thus, since 1934, military law in force in the Dutch East Indies included the KUHPM (*Wetboek van Militair Strafrecht*), the KUHDM (*Wetboek op de Krijgstucht*), the Army Court (*Rechtspleging bij de Landmacht*), Law on the Supreme Military Court in the Indies (*Provisionele Instructie voor*), the *Miltaire Gerechtshof van Nederland*, and the provisions on the rule of Military Justice in the Dutch East Indies (*Bepalingen Betreffende de Rechtsmacht van de militaire Rechter in Nederlands Indie*).
- iii. **Military Law during the Japanese occupation**
On December 8, 1941, the Pacific War broke out between Japan and the United States and Britain. In a short time, Japan succeeded in occupying the Philippines, Formosa (Taiwan), Vietnam, Malaysia, Singapore, and the Dutch East Indies. In March 1942, the Government of the Dutch East Indies was taken over by the Japanese Military by bringing its own military laws that apply to *Heihio*, *Gyugun*, and *Peta*.

iv. Military Law after Indonesia's Independence

After the Proclamation of Independence on August 17, 1945, the Government of Indonesia issued Government Regulation No. 2/1945 that all existing regulations remained in effect as long as a replacement had not been held. At that time, all regulations (military law) issued by the Dutch East Indies Government were applied to the Indonesian military. In 1946, the Government of Indonesia issued the Law No. 7/1946 on Army Courts, given the number of violations committed by members of the army. In 1947, the Law No. 39/1947 on the Army Criminal Code was issued. During 1945-1949, the Indonesian Government succeeded issued the Law No. 7/1946 on Army Courts, Law No. 8/1946 on Criminal Procedure Regulations at Army Courts, Law No. 31/1947 on Army Courts, Law No. 47/1947 on Army Imprisonment, Law Number 39/1947 on the Army Criminal Code, Law Number 490 of 1947 on KUHDT, and Government Regulation No. 24/1948 on Regulation of Army Discipline.

3.3. Expected Conception of Military Law

Indonesian Military Law is a sub-system of national law as a system. This means that the struggle of the soldiers who have sacrificed their lives to defend and preserve the Pancasila and the 1945 Constitution will not be betrayed. They have taken a rest in peace, because "knowing" that the struggle is still continuing. Apart from that, in the context of the development of military law in Indonesia, there are three main military principles that must be followed, namely:

3.3.1 Principles of the implementation of national security and defense. The principles of national defense and security include (1) the principle of universality to implement national defense and security; (2) the principle of populism, i.e. the participation of all citizens in the defense and security; (3) the principle of territoriality, i.e. every inch of archipelago is the foundation of resistance which is, if necessary, in the form of continuous resistance of guerrilla; (4) the principle of not recognizing surrender in maintaining sovereignty and maintaining the territorial integrity of the Unitary State of the Republic of Indonesia (NKRI); (5) the principle of prioritizing love for the motherland rather than peace; (6) principle of active defensive-offensive or active defensive; and (7) principle of esprit de corps, (although it must be based on that in the international political arena, there are no permanent friends or opponents).

3.3.2 Principles in the field of military organization, including: (1) the principle of single command; (2) the principle of homogeneous assignment; (3) the principle of delegation of authority; (4) the principle of spanned and spent of control; (5) the principle of the chain of command; (6) the principle of flexibility; (7) the principle of mobility; (8) the principle of simplicity; and (9) the principle of self-provisioning (self sufficiency).

3.3.3 Principles in the field of Armed Disputes, including: (1) the principle of reciprocity; (2) the principle of reprisal; (3) the principle of proportionality (balance); (4) the principle of equal rights and degrees, does not interfere in the affairs of other people's lands and upholds human dignity.

In the event of an incompatibility between general law and military law, it is seen from its urgency, especially for the country's existence, that Indonesian military law takes

precedence. For this development, it is very important to pay attention to the history of the TNI which grew and developed through a process that is very unique to Indonesia. Guiding the good things from history does not necessarily have to be regarded as something that likes to go back to a time of emergency/war/danger. It could be also considered something that likes to inflame an emergency situation. Weaknesses and strengths obtained from the history of military law in Indonesia can be used as a mirror so that this nation does not fall into the same mistakes. Therefore, this nation can move faster because it utilizes things that are beneficial to the growth and development of the Indonesian nation. Douglas Mac Arthur states "if there is one thing I have learned during my long years of experience, it is that if we would correctly solve the problem of the present and chart a safe course into the future. We must study and weigh and understand the manifold lessons of which history is the great - indeed the only-competent teacher. For as cicero put it eighty years before the birth of Christ. Not to know what happened before one was born is always to be a child"[11].

3.4 Development of a Military Law system.

The development of military law is an effort to form a new law in order to renew positive laws about military life. Updating means replacing the old military law with the new law. Reform of military law is in the same sense as the development of military law based on and sourced from the Pancasila and the 1945 Constitution. As a nation that has been independent since 17 August 1945 (more than 75 years), it should have its own national law products to meet the needs of the military community. The current military legal system is still limited to ideals. There is no certainty when there is a change in a better direction to be used as a guide for the military community (TNI) towards a better direction for the sake of order for members of the TNI.

One thing that needs attention in the development of military law must be based on the foundations and ideals contained in the military's moral consciousness and ideals. Military law as an embodiment of military life values is expected to be present to protect every member of the military. The development of military law is directed at the realization of a national-scale military law system that serves the interests of the TNI by adjusting overall legal material that originates from the Pancasila and the 1945 Constitution. The development of military law is expected to be able to change all kinds of laws on Dutch colonial products to be replaced with national law products.

The development of military law is expected to be a change and renewal of the legal system which includes changes in the structure, culture, and substance of military law itself. The construction of a military legal structure can begin with the establishment of adequate legal institutions to enforce the law by updating the Ankum, Papera, Pom, Military Oditur, Military Judges and Lemasmil systems. In law enforcement, law enforcers should be more humanistic and protective and provide legal awareness to soldiers who violate them, so they are reluctant to repeat violations of the law. This is in accordance with the principles of law enforcement in Indonesia, which are legal guidance and awareness, instead of deterrence. Thus, the development of Indonesian military law began with the improvement of the character of law enforcers. Culturally, the military community (members of the TNI) expects to get legal protection for their attitudes and behavior, so that justice and benefits can be created in the formation of the substance of military law.

The development of military law can be seen from the renewal of legal culture which refers to the values and hopes or dreams of the Indonesian military community (TNI). In the meantime, military justice is very easy to dismiss military members, without considering the

interests of military organizations, military interests, and the interests of the nation and state. Recruiting a citizen into a TNI soldier is very expensive, if many soldiers are fired, there will be a lot of loss to the nation and state. Culturally, members of the military are always educated and taught to be accustomed to acting hard, decisive, and highly disciplined.

The development of the substance of military law is carried out through the reform mechanism of military legislation such as the reform of the KUHPM, the renewal of the Law on Military Justice, the reform of military administrative law, and the issuance of military civil law. At present, Law Number 31/1997 on Military Courts is still mixed with Military Administrative Courts, so that it has been enacted since the Law No. 23/1997 on Military Administrative Courts. This greatly interferes the sense of justice of the military community whose rights to seek justice in the field of military administrative law could not be channeled. Thus, substantially, there needs to be an update of all types of legislation governing military life that needs to be updated. Therefore, there is no arbitrariness in the actions taken by the unit commander against members. The process of issuing laws and regulations can be realized by means and methods that are definite and standard that bind all institutions authorized to make military laws and regulations and improve coordination of the process of issuing laws and regulations of military legislation. There is a need to update Law No. 34/2004 on the Indonesian National Army, because the administrative law is mixed with the Criminal Law so that it does not provide legal certainty.

3.5 Development of Military Law in accordance with legal objectives.

Gustav Radbruch stated that the purposes of law are justice, certainty, and expediency. At the beginning, Gustav Radbruch placed legal certainty in the main position, but after he saw the fact that in Germany under Nazi rule legalized the practice of inhuman warfare during World War II, Radbruch refined his theory by placing justice first and foremost most important than the certainty and usefulness of the law.

In the development of military law, the value of benefits is placed first by considering the interests of military organizations, military interests, the principle of unity of command, chain of command. Sentencing of violating soldiers considers the benefits of the aspects of law enforcement. Unlawful enforcement and enforcement will weaken the principle of unity of command and chain of command.

The purpose of expediency law is stated by Jeremy Bentham, John Stuart Mill, and Rudolf von Jhering. According to Bentham, the purpose of law is to provide maximum benefit and happiness to as many citizens as possible. The concept of military law development places expediency as the primary objective of law. The main measure of the aim of the law is as much happiness as possible for as many soldiers. Judgment of good-bad and fair-unfair of military law depends very much on its ability to give happiness to as many soldiers as possible. Benefit is defined as happiness. The purpose of the law according to Bentham is to provide a guarantee of happiness to each individual (the greatest happiness of the greatest number). The principle of expediency should be applied qualitatively because the quality of pleasure is always the same for every soldier. To realize the happiness of soldiers, each formation of military legal regulations, although achieving 4 (four) objectives, namely first, to provide subsistence; second, to provide abundant food; third, provide protection; and fourth, achieving equality.

Military regulations (military law) that can bring happiness to most military societies are seen as good legislation. The existence of the state in establishing military law is merely a tool to achieve ultimate benefits, i.e. the happiness of the majority of TNI soldiers. Thus, the development of military law that is expected by TNI soldiers is a rule that can provide

happiness and improve the welfare of soldiers. It is because the daily life of TNI soldiers is hard, highly disciplined. If they are not given prosperity and happiness balanced with their lives, there will be many violations because TNI soldiers feel get unfair treatment from the state.

4. Conclusion

All in all, Military Law in force in Indonesia is largely a legacy of the Dutch Colonial Government; thus, it must be renewed according to the needs of the Indonesian Military community to avoid many violations committed by TNI Soldiers. The development of military law that is suitable for TNI soldiers to minimize the occurrence of law violations committed by TNI soldiers, so that military units become orderly, organized, and highly disciplined who are ready to carry out tasks in the field of national defense and security. Every TNI soldier must obey the rules of military law and carry out his duties and obligations according to the Oath of Warriors and guided by the Sapta Marga and the Eight Mandatory Forces of the TNI. The concept of the development of Indonesian military law is carried out through the renewal of the principles of the national defense and security, the principle of military organization, and the principle of armed disputes. The development of military law is expected to include reform of the military law system which includes reform of the structure, culture and substance of military law by sharpening the legal objectives of justice, expediency and legal certainty. The purpose of the development of military law is more emphasis on the usefulness towards justice through legal certainty.

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Redesigning Legal Environment Through Environment Education Relating to The Right to Get Fresh Water

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Abstract. Everything in the world needs water. The fulfilment of water is one of the human rights guaranteed by the state in the constitution. The state has to manage it with all benefits. Indonesia becomes a target from another country for importing waste is hazardous to water. There is no implementation of regulation and the sanctions for water polluters are too light. This paper to examine the legislation for redesigning the legal environment and the right to get fresh water for all benefits. This research finding are: (1) harmonize the legal environment through education can develop an awareness, and (2) make the implementation of regulation are an essential role based on the community participation and local wisdom in redesigning the legal environment to get fresh water for the maximum people's prosperity. It can also preserve the environment, especially fresh water.

Keywords: Legal environment, Environment education, The right to get fresh water.

1 Introduction

Everyone needs water as one of the body's nutrients, that the balance through thirst [1], so they can't live without it. Water is a common heritage of all humankind which used on to the current generation, and then use it sustainably to future generations. The human body consists mostly of fluid, so compliance of water as a life necessity and very important [2]. Getting fresh water becomes a problem by imports of plastic waste in several regions in Indonesia, such as Gresik, East Java, which are plastic chips mixed with paper that cannot be recycled. Based on the facts found by Ecological Observations and Conservation of Wetlands (ECOTON) in one paper company that investigated 11.11 percent of important materials containing plastics which reached 60 percent [3]. Valuable violations of waste often occur. Waste is imported from abroad contains plastic, metal, household waste, or other associated materials [4].

Based on Central Statistics, an increase in Indonesia's plastic waste imports by 283.152 tons in 2018. The highest peak in the last ten years, while Indonesia's plastic waste imports in 2013 were around 124.433 tons. Waste from developed countries flooded Southeast Asian countries, including Indonesia. Imports of plastic waste into Malaysia tripled in 2016 to 870.000 tons last year. The increase in the number of waste imports in 2018 will reach almost 50 percent in a year in Indonesia. Malaysia has re-exported 3000 tons of plastic waste to the country of origin of the waste. Philippines since 2013 has sent 200 containers of trash back, and Indonesia has decided to export five containers of waste from East Java to the country of origin. The rules

on imported waste are Act Number 18 the Year 2008 on Waste Management and Trade's Ministry Regulation Number 92 the Year 2019 on Trade Minister's Regulation Amendments Number 84 Year 2019 on the Hazardous Import and Toxic Wastes as Industrial Raw Material's Provision. The two rules are already strong enough to restrain the waste import, but it is just being monitored so as not to pollute the environment. The rules in the form of a prohibition to put waste into the territory of Indonesia, mixing waste with hazardous and toxic waste, and managing waste cause pollution and/or environmental damage as mandated by act because of water pollution is unfinished [5].

Indonesia is one of the center world's marine ecosystems. Coral species, seagrass beds, and mangrove forests stay in the waters. Various species of fisheries will be disturbed by the presence of plastic waste. Many plastic waste in 2010 from worldwide were wasted and polluted the sea. Indonesia has a coastal population of 187.2 million which annually produces 3.22 million tons of plastic waste that appropriately organized and the oceans contaminate by the plastic waste. Based on Indonesia's land and sea pollution due to plastic waste, if import waste does not immediately stop and plastic waste cannot take care precisely, it will further damage fresh water. Local communities become the origin of development and implementation programs that tackle issues of climate change and sustainability. Elaborating environmental awareness is important during childhood and formal education in the school. Partnerships between communities and schools have the potential for acquiring more transformative change, through more authentic learning experiences for the local surroundings [6]. Importing plastic waste and being able to collect waste that can be organized properly will increase fresh water will transfer everyone's right to get fresh water can protect human health, especially for the future. Redesigning the legal environment through environmental education and the right to get fresh water for all benefits as a crucial result in the future. The increasing amount of waste can damage fresh water, but the regulations do not support the community in the use of fresh water for public purposes equally.

2 Method

This paper uses Ramsey and Rickson's perspective that knowledge enhancement through education is encouraging environmental quality. Regulating and implementing the environment education based on local wisdom and the right to get fresh water for all benefits as a state of duty. The aim of the research is redesigning the legal environment through harmonize the regulation with a combination environment of formal education, local wisdom, and evaluate the right to get fresh water. This research uses the regulation about environmental protection and management, water resources, health, and education and make comparison with Malaysia in sanction for water polluter as redesign legal environment.

3 Result and Discussion

Pollution in water is the presence of objects that cause the water cannot be used abnormally for specific purposes. For example, drinking water (piped water, decent water), swimming/recreation (swimming pool, seawater on the beach), bathing (water plumbing, propitious water), aquatic animal life (river water, lake water), irrigation and industrial uses containing certain foreign substances over the limit [7]. Water pollution is vulnerable that cause

environmental harm. Moreover, pollution in childhood can have an impact continuously, include cancer [8]. The right to get fresh water is a primary human need for health and prosperity that must be protected by the state.

3.1 Redesigning Legal Environment through Environment Education

The importance of environmental education can be explored through local wisdom, just as Malaysia has managed peat resources sustainably through compaction and water management. Decent communication will build community awareness and correct erroneous assumptions about peatlands and peat fires. Peat can be managed well in Malaysia, so it is difficult to burn, namely, Sarawak is the largest peat area with 1.6 million hectares of peatland or 13 percent of the land area can be protected from fire because it has good compaction technology and water management starting from small farmers to large corporations. Awareness of technology is important. It should be communicated by academics to stakeholders through the socialization of scientific studies to manage peat so that the issue of peat fires not will happen in Central Kalimantan. Good water management can maintain peatland moisture and maintain existing water reserves. Indonesia has 15 million hectares of peat, 4 million are used for production, 4 million hectares are degraded, and 2 million hectares in the form of shrubs and the remainder is forest. Peat areas are still forested should be left, but degraded peat or scrub can be conserved as suitable as agricultural land or production forest [9].

When the management of water resources is associated with local wisdom, then the management must concentrate to the noble values that apply in the way of life of the community (Article 2 letter f of Act Number 17 Year 2019 on Water Resources) to among others protect and manage the sustainable in environment. Article 2 letter f Act Number 17 Year 2019 states *"Water Resources Management is carried out based on the principle: f. local culture;"*. Love the environment can create and preserve the existence of water is fit for human consumption through environmental education by making the best use of water. Utilization of the environment around humans based on local wisdom properly and sustainably can preserve the existence of water. It can be utilized as well as possible in human life.

The aim of water resources regulation aims to provide protection and guarantee the fulfilment of people's rights to water, the sustainability of the water and the resources to provide fair benefits for the community, the water preservation and the function to support sustainable development, ensure the creation of legal certainty for the community participation in supervising the use of water resources, from planning, implementing, and evaluating utilization, ensuring the protection and empowerment community, including indigenous peoples in efforts to conserve water resources, utilize water resources, and control the destructive of water. The role of indigenous peoples is very important to be involved in the management of water resources for sustainability. The government must also concern about that for sustainability based on harmonizing regulation through Article 6 paragraph (1) letter f Act Number 1 the Year 1967 on Outside Investment that states *"Closed Business Fields for foreign investment in full control are the fields that are important to the country and control the livelihoods of the people as follows: f. drinking water;"* and Article 5 Water Resources Act that *"Water Resources are controlled by the state and used for the greatest prosperity of the people."* Water resources management has endeavoured for steady development as a conscious and planned effort to ensure environmental integrity and the security, proficiency, prosperity, and the life's grade of present and future (Article 1 Number 3 Act Number 32 the Year 2009 on the Environmental Shelter and Supervision). The provisions are aimed at legal certainty and protection for everyone to get a good environment.

The education about environment as a right for everyone (Article 65 paragraph (2) Act Number 32 the Year 2009) that *"Everyone has the right to achieve environmental education, access to information, access to participation, and access to justice in fulfilling the right to the environment."* Education about environmental is part of the effort to secure and manage nature as the duties and Government's authorities (Article 63 paragraph (1) letter w Act Number 32 Year 2009 reads *"In environmental protection and management, the Government has the duty and authority of : w. provide education, training, coaching, and appreciation;"*. The right to environmental education for Indonesian that creates an obligation for the Government to carry out such education. The sanctions are not regulated in Act Number 32 Year 2009. Environmental care that stems from a love for the surrounding must be sharpened early on through education.

The Environmental Act has educational arrangements, but there is only an education system that introduces students to the new curriculum. Society is not easy to have awareness about the environment. The desire to secure the environment will be minimal when the effort is not carried out early. One person starts from small things by preserving mangroves on the coast of Indonesia. One example, the famous coast of Indonesia is mangrove forest in Indramayu, West Java, namely Karangsong. There were already groups that had environmental concerns there, even though they had not yet brought maximum impact. Mangroves have an important role in community life around the coast. Therefore, its sustainability must be maintained so that children and grandchildren can feel the benefits. It is one of the efforts to create a generation of environmental awareness will be the perpetrator and guardian of sustainable development in the future. The most effective character building is the formal education system at elementary school-age children.

The teacher is also involved in forming education. The curriculum is expected to produce young people to have more love and commitment to preserving the environment, especially mangroves. Development agencies will be formed with environmental insight in the future. The environment love makes the legislators and organizers in creating the Environmental Act truly love the environment. Preserving plants that become local wisdom. For example, Japan maintain healthy oceans to improve the capability to cope with climate change in the island. They supporting for coastal protection by utilizing ecosystems like coral reefs and mangroves and contributing to the water stock's development sector [10]. Whereas in Indonesia, tall buildings in urban areas and more buildings with glass, for example, Jakarta, no longer pay attention to the negative impacts or effects of greenhouses that reduce ozone (CFC). Policymakers and licensors will be wiser to love the environment for taking and issuing policies carefully that concern the lives of many people.

Mangrove's education can have good character and knowledge about the environment for children. If there is love and ownership, it can raise a good skill in preserve mangrove forests. Practically, Mangrove-related education has been started since 2016 [11]. A nation is strong, rich, and culturally diverse like China when they can preserve traditions based on history and cultural interactions between art, literature, beliefs, and religion as national consciousness that makes flora and animal survival. Inheritance of tradition from adults to children fosters morals into everyday life including respect for the environment. It is an important component of environmental education for young people [12].

The rights are used for protection the environment are continually evolving. A "right" to the "environment," the adjectival objective "fresh" or "healthful" or "quality" differs from state to state. For example, Hawai'i's and Montana's constitutions aim to afford a "fresh and healthful environment," Illinois' "a right to a healthful environment," Massachusetts' a "right to fresh air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and

esthetic qualities of their environment,” and Pennsylvania’s “a right to fresh air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” Some of these provisions may overlap with nuisance laws or other codes, such as city and local ordinances that limit noise or protect property owners’ access to light and air or access to public amenities such as beaches, but the constitutional provisions tend to be much broader in scope and richer in values, that the codes tend toward more precise standard-setting [13].

Education has the prior aim that is shaping human behavior. Societies with the world establish educational systems to develop citizens who will behave in many ways. In education, some of the desired behaviors are sharply defined, like skills to mathematics and reading. Their research about the effectiveness of environmental education for promoting responsible citizen behavior. Based on Tbilisi conference declaration about environmental education that: awareness and sensitivity to the total environment allied problems; sensitivity gains a variety of experience acquire a basic understanding the environment and the problems; attitudes acquire a set of values and feelings of concern for the environment and motivation for actively participate in environmental improvement and protection; skills know and solve environmental problems; and participation is an opportunity to be actively involved at all levels in working toward environmental problem’s resolution. If environmental problems become an integral part of instruction designed to change behavior, instruction must go beyond an “awareness” or “knowledge” of issues. Students promote a sense of “ownership” and “empowerment” are fully invested in an environmental sense and become responsible.

Awareness comes from sense or feeling, but knowledge comes from study or education or a way that get from studying. It can say that awareness and knowledge are two things that are different, but connecting each other. The human can get knowledge from education, and then they get awareness about something from education. In line with Ramsey and Rickson, knowledge enhancement through education directs to pleasant demeanors, that advances environmental quality [14].

The rules of environmental law and the national education system have been harmonized about the education about environmental in the curriculum (formal education), but sanctions for violations or disobedience to the rules of organizing education to the government do not yet exist or are uncompleted norms. Schools that have been conducting environmental education based on local wisdom, not the government. The absence of sanctions for government obligations also makes this norm ineffective or futile. The government through the community can empower or develop the community to form a social environment that loves its environment based on local wisdom. Previously when the parties that would carry out activities or businesses that could cause pollution and environmental damage, it was these social institutions or communities that had advanced first with the assistance and coordination of the local government to secure environment based on a love for the environment. Environmental education can not be effective also appears from the absence of regulations under the Act, so that the provisions are broken off related to the organizers of education, facilities and infrastructure, curriculum types and curriculum objectives, teachers and their roles, etc., the need for further regulation on environmental education through a joint regulation.

Ethics are formed from the social environment of the community as a guide for the community and the government to act on the environment. The presence of ethics builds awareness of a fresh and healthy environment that produces quality water for human life. Ethics so that it can be lived and implemented in people's lives requires law as a way to secure the environment. Society and government through the law together to fight for the environment, when education and the environment whose implementation cannot be forced through legal instruments [15]. The rule of law is important to have strict sanctions so that their implementation is effective.

No matter how severe the sanction of fines as the last legal remedy to expose violators as a substitute for environmental damage, if not accompanied by awareness to love the environment from the community and the government through environmental education, the existence of environmental laws is in vain. This situation automatically makes the community more and more already getting quality water to meet the needs of people's lives that have an impact on violations of the rights of the community and its future generations for a better life.

Uncompleted norm because there is no further regulation of the provisions of environmental education, for example compiling regulations with the Environment Minister with the Education and Culture Minister (the organizers, who are educated, the form of education (curriculum), the authorities to teach, etc.) which aims to build a sense of love for the environment for its survival. The sanctions is also a paradigm for redesigning environmental education settings based on local wisdom. This is important to be carried out together with the strengthening of social institutions by emphasizing sanctions for the presence of the environmental destroyer to restore environmental damage.

Executing environmental strategies and programs in Malaysia that use the five-year plans within the legal and institutional framework. The results of Agenda 21 and sustainable development were incorporated and integrated into the national planning process. Criminal sanctions for environmental offenses in Malaysia under statute law are in the form of fines and jail sentences for serious cases. The death penalty may be inflicted in very serious cases. For example, under the Act 2006 about Water Industry Services, the commission of the offense of contamination of water, a person who is found guilty of contaminating any watercourse with any substance to cause death. The death or imprisonment may extend to twenty years as punishment, and the punishment is not death, he shall also be liable to whipping (Section 121 Act 2006, Water Industry Services).

Basic principles of environmental law in Malaysia, there is no specific provision in the Federal Constitution which speaks about the recognition or protection of the public's right to a healthful environment. Consequently, Malaysia's approach to environmental management through policy and legal measures has not evolved from a Constitutional mandate to afford the public a right to get fresh air, water, and environment. According to Act 127, 1974 (Environmental Quality), penalties provided include a fine, or imprisonment, or a combination. For more serious offenses, the court may even impose the death sentence on the accused person. In Malaysia, the death penalty is the most severe punishment that can be imposed on a person and this penalty can be found under section 121 of the Water Industry Services Act 2006 for the offense of contamination of water. Under section 121 (2), a guilty person of an offense under subsection (1), on conviction, death is the result of the act, shall be punished with death or imprisonment for a term may extend to twenty years. If the punishment is not death, he shall also be knouting.

Modern environmental legislation in Malaysia represents the government's policy in using criminal sanction as a deterrence measure in criminal related offenses. The death penalty, the longer period of imprisonment, the introduction of whipping, and the imposition of higher amounts as penalties for environmental offenses, reveal that harsh punishments in result to decrease of crimes against the environment, regardless of the actual effectiveness of this policy in securing the environment [16]. In contradiction about the sanction for the water polluters, Indonesia has "*the polluter must be pay*" principle in legal environment (Article 87 paragraph (1) Act Number 32 Year 2009). Sanctions for environmental pollutants are too light that a maximum sentence of 15 years imprisonment and a maximum fine of 15 billion rupiah (Article 98 paragraph (3) Act Number 32 Year 2009), when the actions result in serious injury or death to others or the same sanctions when people enter hazardous and toxic material waste to

Indonesia's territory (Article 106 paragraph (3) Act Number 32 Year 2009). Sanctions that are not proportional to the impact of pollution are not under the soul and spirit of the formation of environmental law, namely the state through the government must protect and manage the environment for sustainable implementation so that it remains a source and support of life for the people of Indonesia and other living things (General Explanation Act Number 32 Year 2009). Considering that water is the most important and sustainable necessity of human life and living things cannot live without water, sanctions for water pollutants should be very severe. Imposing sanctions that are not proportional to the effects of water pollution caused by environmental pollutants will cause environmental laws to be ineffective and futile. The imposition of very severe sanctions for water pollutants as acts that violate human rights to good and healthy environmental rights in Article 28H paragraph (1) of the 1945 Constitution and have enormous impacts and losses to prevent water pollution, deterrent, and protect human rights. Therefore, designing of legal environment changes immediately to the more severe sanctions in the form of capital punishment or life imprisonment and the imposition of fines according to the calculation of the worst impacts due to pollution in legal environment.

Regulation on the precise role of government to environmental management policy. The reconstruction of systems of environmental governance to ensure sustainable development is a serious challenge [17]. Environmental education through redesign of the rule-based on local wisdom must be carried out on an ongoing basis so that the implementation is effective on the environment. Affection environment to formal education on local wisdom for generations, but there is no sanction becomes a problem. The important role of community institutions based on local wisdom who destroy the environment must participate directly in restoration, and not based on sanctions and fines. The strengthening and preservation of local culture to produce fresh water in areas are very useful for the consumption, swimming pool, industry, tourist arena, and finally to Bali's economy. For example, Subak namely irrigating rice fields in social, technological, and religious at Hindu society [18] can be developed to obtain fresh water by removing waste that can damage the natural beauty, ecosystem, and the health of vicinity, accompanied by environmental education giving rise taste and attitude to not have the heart and love the surrounding environment.

According to Hans Kelsen, the characteristic of positive law is a coercive order, which is an order that forces it as one form of sanctions including seizure by force out of will affected by everything possessed by humans such as life, freedom, or property. Sanctions in the form of punishment and reward. Pospisil stated that the inclusion of sanctions was needed in statutory regulation. The purpose of sanctions so that the law toothed. When the rule of law in the form of an order (obligation) or prohibition will be an empty order or guarantee and tends not to be obeyed if there is no sanction attached. The rule of law (legal norms) containing the contents (gebod) [19] is an order to carry out something through the words "mandatory" or "must".

Related to the provision that every education in Indonesia must have an environmental education, but the regulations under it do not emphasize the involvement of local wisdom to include local communities and the noble heritage of their ancestors as a basis for environmental preservation. Local wisdom has also been regulated in Article 36 paragraph (3) Act Number 20 Year 2003 on National Education System stating *"The curriculum is prepared by the level of education within the edging of the Unitary State of the Republic of Indonesia by taking into account: d. diversity of regional and environmental potential."* An environment that best knows the situation is the people themselves. The requirement of regulations harmonization so the implementation is effective and its sanctions. In the absence of sanctions for one's obligations, include the sanctions are too light is cause the law will be useless and ineffective.

3.2. The Right to Get Fresh Water for All Benefits

Healthy water is water that can be consumed, as regulated in Article 1 Number 5 Water Resources Act, that drinking water is water that is processed or not to health requisited and can be taken immediately. Article 162 Act Number 36 Year 2009 on Health that *"Environmental health efforts are aimed at realizing a healthy environmental quality, be it physical, chemical, biological, or social which enables everyone to achieve the highest degree of health."* Water that is healthy and does not have bad risks to health includes contaminated liquid waste, solid waste, waste gas, waste that is not processed under government requirements, disease-carrying animals, hazardous chemicals, ionizing and non-ionizing radiation, water polluted (Article 163 paragraph (3) Act Number 36 the Year 2009).

Malgosia Fitzmaurice thinks based on Jonna Razzaque's experiment that the humans are consumed only 10 percent of annual world water stock and only 15 percent have a water's galore. World Resources Institute (WRI) also says that the world face called "water stress". It means that many people will drink water that does not have access a well sanitation in resulting sanity matters [20]. Nowadays, in Indonesia importing waste will certainly affect water quality which will have an impact on the health of the surrounding community.

United Nations Development Programme (UNDP) Human Development Report in 2006, which states that rule is critical to the progressive realization of the human right to water and shelter of public interest in provision's water. Based on that, water privatization in constitution for the greatest people's prosperity. When the country can not produce fresh water, it can manage third parties with competition for prosperity, suitability or appropriateness and efficiency.

The right to water is known in international law and regional human rights systems as a fully independent human right. It is a derivative right or in a fragmented fashion in several treaties. For example, Article 36 the Constitution of Fiji (2013) requires the state to 'take reasonable standart within its available resources to gain the progressive realization of the right of every one to be free from hunger to have adequate food of acceptable quality and to fresh and safe water in adequate quantities'. Then, the right to access to water in India has been read into the right to life. Article 28H the 1945 Constitution provides that every one has the right to live in physical and spiritual prosperity, to enjoy a home and a well environment.

Based on the 1945 Constitution, everyone has the right to a good and healthy environment is regulated in Act Number 36 Year 2009 on Health. It is a basis for government to realize the rights of Indonesian citizens will be elaborated by the regulations below. For example, Article 6 Water Resources Act states *"The state guarantees the people's right to use water fulfill the minimum daily basic needs for a healthy and fresh life with sufficient quantity, good quality, safe, sustainable, and affordable."* Environmental conditions are important to know the implementation is easy and can develop the right environment paradigm for the future. The management of water resources must be related to constitution. It is managed by the state and used to the greatest people's welfare. It can not be owned and/or controlled by individuals, community groups, or business entities (Article 7 Water Resources Act).

The United Nations members were adopted the Sustainable Development Goals (SDGs), so water becomes one of the main agendas in 2015. The aim of water to "ensure availability and sustainable management of water and sanitation for all." Target 6.1 of Goal 6 estimates that "by 2030, achieve universal and equitable access to safe and affordable drinking water for all." [21].

The 1945 Constitution of Indonesia has amended four times in 1999, 2000, 2001, and 2002 [22]. The right to fresh water as part of the constitutional rights that guaranteed by Article 33

paragraph (3) states "*The earth and water and the natural resources are controlled by the state and are used for the greatest prosperity of the people.*", namely water is controlled by the state and used for the people's maximum prosperity. Article 28H paragraph (1) in the Indonesia's highest law is the basis for securing the constitutional rights to obtain a good environment through the acquisition of the right to fresh water, without the presence of hazardous and toxic waste that can damage water quality.

One of the most important and fundamental elements in human living is water, so the control over the lives of many people is carried out by the state is the meaning of "*earth and water and the wealth of natures are controlled by the state and used for the greatest prosperity people*". For the preservation and sustainability of availability will be water, there are five very strict limits for the utilization of water, namely: (1) should not interfere, override, and negate the people's right to water; (2) the state must fulfill the people's right to water which has the right to access water as a human right; (3) fulfillment of human rights to environmental sustainability; (4) state supervision and control over water is absolute; (5) the main priority of exploitation of water is given to State-Owned Enterprises or Regional-Owned Enterprises [23]. The right to get water, including the right to obtain fresh water, must be respected, protected and fulfilled by the state as one of the living rights that must be preserved and not only related to the current needs of life but also the future related to human existence. The Constitutional Court of Indonesia in its decision also recognizes the customary rights of indigenous and tribal peoples who still live on the water resources under Article 18B paragraph (2) the 1945 Constitution [24]. The use of water as all benefit must be limited, namely meeting daily basic needs, smallholder agriculture, and non-business activities for the maximum prosperity of all people in all regions of Indonesia evenly and controlled by the state, so the right to use in water must involve community participation in the management of water resources.

Local wisdom is a legacy of noble values for generations. It preserves the environment creates education for future generations which is only regulated in Act Number 17 the Year 2019. There are obligations in legal environmental to maintain the preservation of environmental functions and control pollution and/or environmental damage, including the acquisition of fresh water, must be accompanied by the acquisition of the right of the public on environmental education is formally based on local wisdom to create a love for the environment and access to water use fresh evenly and "*controlled by the state*" with the participation of the public the widest on access to water. Management fresh water by the state is a benefit for the greatest community prosperity. Harmonizing Act Number 32 Year 2009, Act Number 36 Year 2009, Act Number 17 Year 2019, and Act Number 20 Year 2003) is very important with environmental education and local wisdom. The need for implementation of Act Number 17 Year 2019 in the form of Government Regulations as committed to water resources in Article 78 Act Number 17 Year 2019 and make the local of regulations that harmonize environmental education and the curriculum by local wisdom. The right to formal environmental education is one of the community engagements by students to maintain the existence of water as part of the environment and their continued survival.

4 Conclusion

The right to get fresh water is the main need for human health and welfare, so the state must provide the fulfillment of these rights. The state manages the water and used it for the greatest prosperity of the people so the water resources cannot be owned and/or controlled by individuals, community groups, or business entity. The water is used for as all benefit, but it

must be limited (daily basic needs, smallholder agriculture, and non-business activities) for the maximum prosperity of people in all regions of Indonesia evenly and controlled by the state. The right to use water must involve community participation in the management of water resources for the future related to human existence. Any heavy rights and obligations will not present a deterrent or fear of polluters, if the sanctions are too light. In Malaysia, some severe sanctions for violators of environmental act and the provisions are adhered to by its people. When every community and government through its apparatus has a love for the environment through environmental education it will cause compassion and internalization for the environment for the future. Regulation is not being accompanied by sanctions will be in ineffective and futile. The designing of legal environment changes immediately to the more severe sanction (death penalty, life imprisonment, etc.) and the imposition of fines according to the calculation of the worst impacts due to pollution. The harmonization of regulation by combining environmental education and local wisdom is important. The need for implementation of Act (Government Regulations) and make the local regulations that harmonize environmental education and the curriculum by local wisdom.

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